

**BEFORE THE ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF:

PacifiCorp

)
) **FINAL ORDER AND**
) **SETTLEMENT AGREEMENT**
)
) OAH Case No.: 2019-ABC-02999
) DEQ Case No. WQ/I-NWR-2019-037

SETTLEMENT AGREEMENT

The Oregon Department of Environmental Quality (“DEQ” or the “Department”) and PacifiCorp (“PacifiCorp”) (collectively, “Parties”) do hereby stipulate and agree as follows. The Department incorporates the Parties’ stipulations and agreements into the accompanying Final Order, pursuant to ORS 183.417(3).

A. Background

1. DEQ issued a Clean Water Act Section 401 Water Quality Certification (“401 WQC”) to PacifiCorp, pertaining to its Prospect 3 Hydroelectric Facility (FERC Project No. P-2337) (“Project”), on February 7, 2019.
2. On February 21, 2019, PacifiCorp filed its request for hearing regarding certain conditions of the 401 WQC pursuant to OAR 340-048-0045(2), and DEQ referred the matter to the Office of Administrative Hearings on July 30, 2019. PacifiCorp filed an amended request for hearing on December 12, 2019.
3. On September 27, 2019, the Federal Energy Regulatory Commission (“FERC”) issued a new license for the Project pursuant to the Federal Power Act (“License”). The License incorporated the conditions of the 401 WQC, including the conditions that are the subject of PacifiCorp’s request for hearing. PacifiCorp on October 25, 2019 filed a request for rehearing with FERC, requesting that FERC reserve its authority to modify the License after the resolution of PacifiCorp’s request for hearing on the 401 WQC. On November 25, 2019, FERC granted the request for rehearing for the limited purpose of further consideration.
4. The Project is located in the Rogue Basin, on the South Fork of the Rogue River near the community of Prospect in northeastern Jackson County, Oregon. The Project diversion dam is located at river mile 10.5 on the South Fork Rogue River in the approximately 1,616 square-mile Upper Rouge River sub-basin.

B. Consent

1. Each Party to this Settlement Agreement certifies that it has read the entire Settlement Agreement, and understands and agrees with the contents thereof.
2. Each Party to this Settlement Agreement understands and agrees that this Settlement Agreement and all documents incorporated by reference set forth the entire agreement of the parties.
3. Each Party to this Settlement Agreement understands and agrees that this Settlement Agreement and the resulting non-appealable Final Order that is consistent with the Settlement Agreement constitute the complete and final resolution of the issues in the above-captioned Matter.
4. The Parties agree to jointly and immediately request a stay of the contested case proceeding.
5. Effective upon the signing of this Settlement Agreement by the Parties, PacifiCorp waives its right to request reconsideration, petition for judicial review, or appeal the Final Order to the extent the Final Certification Decision, as defined in section C.9, is consistent with the Settlement Agreement. PacifiCorp reserves its right to request reconsideration, petition for judicial review, or appeal the Final Order if the Final Certification Decision is inconsistent with the Settlement Agreement or the Final Order (or Final Certification Decision incorporated therein) is revised pursuant to an appeal or other challenge by a third party.

C. Terms of the Agreement

The Parties to this Settlement Agreement wish to resolve their dispute in a manner that avoids further litigation on this matter. Therefore, in consideration of the promises and mutual covenants contained herein the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the following terms, as well as those in Section B:

1. PacifiCorp agrees to provide, no later than December 31, 2020, \$187,770 to WaterWatch of Oregon to fund implementation of or otherwise support the removal of three small, privately-owned diversion dams on Slate Creek and its tributary, Welter Creek ("Harboldt Dam Removal Project"). This amount will be provided through \$177,770 in direct funding and \$10,000 of in-kind labor to implement removal of or otherwise prepare, submit, and manage any necessary in-water permit applications required to implement the project. PacifiCorp will undertake follow-up monitoring to confirm that the dams have been removed and to provide a final report to DEQ, copying the Oregon Department of Fish and Wildlife (ODFW), at the completion of that project.
2. PacifiCorp agrees to replace the two existing round, corrugated metal pipe culverts on Big Ben Creek below Forest Road 37 (T34S, R4E, S2, NESW) with a new culvert designed to U.S. Forest Service aquatic organism passage stream-simulation standards to restore upstream fish passage; provided further that PacifiCorp (a) agrees to replace the culverts by December 31, 2021, including timely obtaining all needed permits and approvals to carry out that work, subject to factors outside PacifiCorp's reasonable control; and (b) undertakes follow-up monitoring to

confirm that the new culvert has been installed as designed to restore upstream fish passage and to provide a final report to the Department, copying the ODFW, at the completion of that project. PacifiCorp shall not own and shall not be responsible for maintaining the culvert.

3. PacifiCorp agrees to replace the existing round, 67' X 10', corrugated metal pipe culvert on Imnaha Creek below Forest Road 3775 (T33S, R4E, S17, NENW) with a new culvert designed to U.S. Forest Service aquatic organism passage stream-simulation standards to restore upstream fish passage; provided further that PacifiCorp (a) agrees to replace the culvert by December 31, 2021, including timely obtaining all needed permits and approvals to carry out that work, subject to factors outside PacifiCorp's reasonable control; and (b) undertakes follow-up monitoring to confirm that the new culvert has been installed as designed to restore upstream fish passage and to provide a final report to the Department, copying the ODFW, at the completion of that project. PacifiCorp shall not own and shall not be responsible for maintaining the culvert.

4. PacifiCorp agrees to construct and install a self-cleaning, rotary drum screen that meets the 2011 National Marine Fisheries Service fish screening criteria to prevent fish entrainment in an irrigation ditch that diverts flows from Mill Creek into the North Fork Rogue River; provided further that PacifiCorp (a) agrees to construct and install the fish screen by December 31, 2021, including timely obtaining all needed permits and approvals to carry out that work, subject to factors outside PacifiCorp's reasonable control; and (b) undertakes follow-up monitoring to confirm that the fish screen has been installed as designed to prevent fish entrainment and to provide a final report to the Department, copying the ODFW, at the completion of that project. PacifiCorp shall not own and shall not be responsible for maintaining the screen.

5. If the actions specified in sections C.1 through C.4 cannot be implemented due to the refusal of the property owner to give permission or due to other factors beyond PacifiCorp's reasonable control, the Parties agree to confer in good faith to reach agreement on replacement projects that will be of equal or greater environmental value and of equal or less cost to implement. PacifiCorp agrees to implement such mutually agreed-upon replacement project(s).

6. DEQ has evaluated the actions specified in sections C.1 through C. 4. DEQ agrees to remove existing certification conditions IV.i and IV.j, which would require modifications to the Project's existing fish ladder at the South Fork Diversion Dam, and to revise the second sentence of existing certification condition IV.e. to read: "The minimum flow released to the South Fork Rogue River shall be equal to or greater than 30 cubic feet per second from March 1 through July 31 and equal to or greater than 20 cubic feet per second from August 1 through February 28 as measured at the United States Geological Survey gage at RM 10.25." Notwithstanding section C.14, PacifiCorp may present evidence of the actions specified in sections C.1 through C.4 in any future proceeding for the sole and limited purpose of establishing beneficial change in habitat conditions due to such actions.

7. The Parties agree that DEQ will issue a revised certification decision to make the changes specified in section C.6. PacifiCorp will implement the requirements of sections C.1 through C.4 in accordance with this Settlement Agreement, but those requirements shall not be included in the revised certification.

8. The Parties understand and agree that, if DEQ does not issue a revised certification decision by February 7, 2020 that is consistent with this Settlement Agreement, PacifiCorp may terminate this Settlement Agreement and DEQ will not issue the Final Order incorporating the Settlement Agreement.

9. The Parties agree that upon DEQ's issuance of a revised certification decision consistent with this Settlement Agreement ("Final Certification Decision"), DEQ shall issue the Final Order.

10. Within 7 days of DEQ's issuance of a Final Certification Decision that is consistent with this Settlement Agreement, PacifiCorp shall submit a request to FERC to modify the License to conform to DEQ's Final Certification Decision; provided further that DEQ will file a supporting comment in the FERC docket to the same effect.

11. DEQ shall withdraw this matter from the Office of Administrative Hearings upon the issuance of a Final Certification Decision that is consistent with this Settlement Agreement.

12. If FERC does not issue a modified license to make all changes set forth in section C.6, PacifiCorp shall have no obligation to undertake the actions set forth in sections C.1. through C.4; provided however that PacifiCorp will comply with all certifications conditions included in the License unless and until amended by FERC, and if FERC modifies its license to partially include changes set forth in section C.6, then the Parties shall confer in good faith to reach agreement on PacifiCorp's obligation to undertake actions set forth in sections C.1 through C.4 that were not included in the modified license to maintain the Parties' bargained-for benefits of this Settlement Agreement. Provided further that if FERC issues a modified license that makes all changes set forth in section C.6 and the Final Order (or Final Certification Decision incorporated therein) is subject to an appeal or other challenge by a third party, then PacifiCorp, following the conclusion of all administrative appeal(s) or judicial review, if any, shall submit a request to FERC to modify its license to conform to final conditions determined by such process, if any, but only to the extent that the final conditions reinstate the conditions of the 401 WQC issued on February 7, 2019. If these conditions are reinstated, in whole or in part, then PacifiCorp's obligations will be as provided in the first sentence of this section.

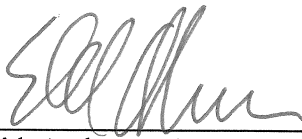
13. Each Party to this Settlement Agreement represents, warrants, and agrees that the person who executes this Settlement Agreement on its behalf has the full right and authority to enter into this Settlement Agreement on behalf of that Party and bind that Party to the terms of this Settlement Agreement.

14. The Parties agree that nothing in this Settlement Agreement establishes factual, legal, or policy precedent. Without limiting the generality of the foregoing, this Settlement Agreement establishes no principle or precedent with regard to any issue addressed herein or otherwise limits any Party's participating in any other pending or future licensing proceeding; provided further that this Settlement Agreement shall not be offered in evidence or cited as precedent by any Party to this Settlement Agreement in any judicial litigation, arbitration, or other adjudicative proceeding, except in a proceeding to establish the existence of or to enforce or implement this Settlement Agreement. This section shall survive any termination of this Settlement Agreement.

15. This Settlement Agreement is binding upon, and inures to the benefit of, the parties and their respective successors and assigns.

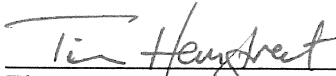
16. This Settlement Agreement may be signed in counterparts. Facsimile or scanned signatures on this Settlement Agreement shall be treated the same as original signatures.

17. This Settlement Agreement is effective on the date of the final signature.



Keith Andersen, Oregon Department of Environmental Quality

12/31/2019
Date



Tim Hemstreet, Managing Director, PacifiCorp

Dec. 30, 2019
Date

FINAL ORDER

The Environmental Quality Commission hereby issues this Final Order incorporating by reference in their entirety its Final Certification Decision for the Prospect 3 Project and the Settlement Agreement attached hereto. Pursuant to ORS 183.417, this Final Order is not subject to appeal.

Keith Andersen

On behalf of the Oregon Department of Environmental Quality
On behalf of the EQC pursuant to OAR 340-011-0505

Date