

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southern California Edison Company

Project No. 382-034

ORDER ON REHEARING AND CLARIFICATION

(Issued October 19, 2006)

1. The Kern River Watermaster, the North Kern Water Storage District, the Buena Vista Water Storage District, the Kern Delta Water District, the Kern County Water Agency, and the City of Bakersfield, California (collectively, Kern Water Users), and the U.S. Forest Service (Forest Service) have filed timely requests for rehearing of the Commission's May 17, 2006 order which issued a new license to Southern California Edison Company (SCE) for the continued operation and maintenance of the Borel Hydroelectric Project.¹ The project is located on the North Fork of the Kern River and the main stem of the Kern River in Kern County, California, and has an authorized capacity of 12 megawatts.

2. On rehearing, the Kern Water Users argue that the Boating Flow Augmentation measures detailed in the license fail to adequately protect their water rights. The Forest Service argues that the license order failed to include, as mandatory conditions, a number of the conditions submitted by the Forest Service under section 4(e) of the Federal Power Act (FPA). For the reasons discussed below, we are granting rehearing in certain respects, amending and clarifying the license order in certain respects, and denying rehearing on other issues.

¹ 115 FERC ¶ 62,187 (2006).

Background

3. The Borel Project occupies approximately 159 acres of Sequoia National Forest lands. The project includes: a diversion dam with an intake structure on the North Fork of the Kern River; an 11.2-mile-long canal (Borel canal) with a second intake structure about four miles below the diversion dam; and four penstocks leading to the powerhouse. Water is discharged from the powerhouse into the Kern River.

4. The Borel Project was originally licensed in 1925, but project operations changed in 1950 when the Army Corps of Engineers (Corps), constructed the two-part Isabella Dam (Main dam and Auxiliary dam) between the project's headworks and powerhouse. The two Corps dams created Lake Isabella, thus inundating the upper 4.2 miles of the Borel canal. When Lake Isabella impounds more than 110,000 acre-feet of water, the Corps releases water from the lake into SCE's intake structure at the Corps' Auxiliary dam. The water is carried through the lower seven miles of the Borel canal and then to the project's powerhouse. In dry years, when Lake Isabella levels are lower than 110,000 acre-feet, the diversion structure and upper portion of the Borel canal are exposed, and SCE uses them to divert water from the river through the entire 11.2 miles of canal.

5. In addition to releasing water through its Auxiliary dam to the Borel Project, the Corps releases water from the Main dam into the lower Kern River or from the Main dam through the Isabella Partners Hydroelectric Project No. 8377 (Isabella Project), which is located at the Main dam.² The Corps makes these releases as determined by the Kern River Watermaster. A more detailed project description appears in the license order.

Discussion

A. The Forest Service's proposed 4(e) conditions

6. In addition to authorizing the Commission to issue licenses for hydroelectric projects on specified federal lands and waters, section 4(e) of the FPA provides that such licenses "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."³ As noted earlier, the Borel Project occupies 159 acres of Sequoia National Forest lands.

² See *Central Hydroelectric Corp.*, 43 FERC ¶ 62,240 (1988). The Isabella Project's tailrace discharges at the base of the Main dam.

³ 16 U.S.C. § 797(e) (2000).

7. When reviewing the Forest Service's proposed section 4(e) conditions for inclusion in the license order, the Commission followed its established practice of restricting the applicability of section 4(e) to national forest lands within the project boundary. The Commission then considered a number of the rejected section 4(e) conditions as recommendations, and included some of them in the license under the comprehensive development standard of section 10(a)(1) of the FPA.⁴

8. The May 17, 2006 Order determined that a number of the conditions relating to the project would be included in the license, but under the authority of section 10(a)(1) rather than section 4(e) of the FPA, based on the conclusion that these conditions would require action on lands outside the project boundary or not on national forest land.⁵ Forest Service conditions 17 and 18, relating to instream flow measurement and fish monitoring, were included as Articles 401 and 405, respectively, and a slightly modified version of condition 26, relating to boating flow augmentation, was included as Article 403 of the May 17, 2006 Order. The order declined to include condition 23, which requires the licensee to be responsible for installation, removal, and maintenance of a Bailey bridge at Lake Isabella.⁶

9. In its request for rehearing, the Forest Service argues that the Commission erred by failing to include conditions 17, 18, 23, and 26, as mandatory conditions under FPA section 4(e).

10. On August 22, 2006, the U.S. Court of Appeals for the D.C. Circuit issued a decision in *City of Tacoma v. FERC*.⁷ There, the court determined that with regard to

⁴ 16 U.S.C. § 803(a)(1) (2000).

⁵ 115 FERC ¶ 62, 187 at P 45-57 (2006).

⁶ A Bailey bridge is a portable bridge that can be stored and then moved into place when necessary. When Lake levels are drawn down and the upper portion of the Boral canal is exposed, the Bailey bridge is needed to provide access across the Borel canal to the opposite shore. The license order concluded that, given the licensee's lack of control over lake levels, the infrequency of such draw downs, and the costs associated with the bridge, inclusion of this condition in the license was not warranted. *Id.* at P 58-60. In any event, based on the additional materials submitted by the Forest Service with its request for rehearing, it appears that the Bailey bridge is in fact located on national forest land.

⁷ *City of Tacoma v. FERC* (*Cushman* decision), 2006 U.S. App. LEXIS 21400 (D.C. Cir. 2006).

conditions submitted under section 4(e), “so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation.”⁸ Further, the court stated that the FPA gives the Commission no discretion to reject section 4(e) conditions.⁹

11. In light of the change in analysis, we will amend the May 17, 2006 Order to include conditions 17, 18, 23, and 26 as mandatory conditions under FPA section 4(e).¹⁰

B. Boating Flow Augmentation Flows

12. Forest Service condition 26 provides details for a boating flow augmentation release schedule. Condition 26 augments flows in the bypassed reach of the Kern River below the Corps’ Main dam through a ramping schedule for daily boating releases for whitewater boating during summer months.

13. The Kern Water Users object to the boating flow augmentation measures detailed in condition 26. They argue that a daily ramping schedule fails to adequately protect their downstream water rights.¹¹ The Kern Water Users explain that the Corps stores and

⁸ *Id* at 26.

⁹ *Id*.

¹⁰ To eliminate redundancies, we will delete the requirements of license Articles 401 (Minimum Stream Flows), 403 (Boating Flow Augmentation), 404 (Instream Flow Measurement Plan), and 405 (Fish Monitoring Plan), leaving the corresponding Forest Service conditions in the Appendix A attached to the license order. However, to ensure that the instream flow measurement and fish monitoring plans are filed with the Commission, for its approval, we are adding a new Article 401 that so provides. In addition, Article 401 enumerates the circumstances and requirements, in addition to those in Forest Service condition 17(b), for temporarily modifying required minimum flows.

¹¹ The Kern Water Users also assert that their water rights are protected by sections 10(c) and 27 of the FPA. Section 10(c) of the FPA provides:

Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefore. 16 U.S.C. § 803(c).

(continued)

regulates the Kern River water to which they are entitled in the manner directed by the Watermaster, who is appointed by the Kern Water Users for purposes of directing the storage, release, and delivery schedule of water to Kern Water Users. These users divert water from the Kern River at a series of intake facilities beginning about 50 miles downstream of Isabella Reservoir. The water is used primarily for irrigation of crops, but also for groundwater recharge benefiting agricultural, municipal, and domestic uses.

14. The Kern Water Users further explain that it is critical that water which the Watermaster schedules and directs for release from Isabella Reservoir arrives at each of the points of diversion of the Kern Water Users at the specified times, and in quantities and flow rates, that are consistent with those water rights, schedules, and directions. They contend that it is also critical that releases made from conservation storage for boating flow augmentation not interfere with such operations so as to cause any “wasted” water, in the form of unusable surges at the points of measurement and diversion.¹²

15. As discussed above, under the *Cushman* decision, the Commission has no discretion with regard to whether condition 26 is included in the license. However, the Commission believes that the terms of condition 26 will adequately protect the interests of downstream water users. The condition explicitly recognizes that SCE cannot augment boating flows without the cooperation of the Corps and downstream water rights holders. In other words, any boating flow augmentation plan must, in the end, be

Section 27 provides that nothing in Part 1 of the FPA “shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.” 16 U.S.C. § 821. Section 10(c) has been interpreted to require compensation for the taking of state-created property rights. *Public Utility District No. 1 of Pend Oreille County v. City of Seattle (Pend Oreille)*, 382 F.2d 666, 670 (9th Cir. 1967) (citing *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483 (1930)). Section 27 in turn serves to bring water rights within the scope of section 10(c). *Pend Oreille*, 382 F.2d at 670.

¹² The Kern Water Users contend that, because it takes flows about twice as long to travel through the bypassed reach than through the canal, the boating flow releases will cause an interruption in flows below the powerhouse for several hours downstream while the natural channel receives releases that otherwise would have been routed through the Borel canal. They further contend that a few hours after the release begins, there will be a “doubling up” of downstream flows as water released back into the canal reaches the powerhouse at the same time as the flows released earlier into the natural river.

acceptable to the Corps and the Watermaster.¹³ This should ensure that boating augmentation flows will not interfere with downstream water rights.¹⁴ Moreover, if the licensee, Corps, and Kern Water Users reach an agreement for flows different from those described in condition 26, the Forest Service has reserved the right to modify condition 26 accordingly.¹⁵ We therefore deny rehearing on this issue.¹⁶

The Commission orders:

(A) The June 16, 2006 requests for rehearing filed by the Forest Service and the Kern River Water Users are granted to the extent set forth in this order, and denied in all other respects.

(B) Ordering paragraph (D) of the May 17, 2006 license order is revised by deleting the phrase “to the extent that those conditions apply to reservation lands or waters within the project boundary.”

¹³ In addition, license Article 402, which requires SCE to file a plan for augmentation of flows that has been prepared in consultation with the Kern Water Users among others, specifies that the plan shall include measures to minimize the disruption of flow to downstream water users and water rights holders. We are making several minor clarifying changes to Article 402, and in addition we are including a requirement that the Watermaster be a party to the Memorandum of Agreement required by that article.

¹⁴ In the unlikely event that the final boating flow augmentation plan conflicts with the Kern Water Users’ exercise of their water rights, Kern Water Users are correct that they would be entitled to compensation for any loss of their water rights. *See* n.12, *supra*.

¹⁵ 115 FERC ¶ 62,187 (2006), Appendix A, Condition No. 26-Boating Flows.

¹⁶ We reject as unreasonable the Kern Water Users’ request that SCE be required to compensate the Watermaster and the Corps for any expenses necessary to design and implement the boating releases. We also deny the Kern Water Users’ request that they be deemed interested parties to any compliance proceeding without the need to move for intervention. Such an action would be tantamount to a grant of automatic intervention. The Commission’s regulations do not provide for automatic intervention, nor do we think it would be appropriate. *See Virginia Electric Power Company*, 113 FERC ¶ 61,154 at 61,606 n. 9 (2005). However, the Watermaster, as an entity to be consulted on the Boating Flow Plan, may file for intervention and seek rehearing of any order issued on the plan. *See, e.g., Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 at 61,099 (1987).

(C) The first sentence of Article 301 is revised by changing “Article 401” to “condition 17 of the attached Appendix A.”

(D) Articles 401 (Minimum Stream Flows), 403 (Boating Flow Augmentation), 404 (Instream Flow Measurement Plan), and 405 (Fish Monitoring Plan) are deleted from the May 17, 2006 license order.

(E) A new Article 401 is added to the license, to read as follows:

Article 401. Commission Approval and Notification.

(a) Requirement to File Plans for Commission Approval

Two conditions of this license included in the U. S. Forest Service’s (Forest Service’s) final section 4(e) conditions (Appendix A) require the licensee to prepare plans for approval by the Forest Service before filing with the Commission, and then to implement the measures in the plans without prior Commission approval. Each plan shall be submitted to the Commission for prior approval. The plans are listed below.

Forest Service condition no.	Plan name	Due date
17(a)	Instream Flow Management Plan	Within one year of license issuance
18	Fish Monitoring Plan	Within one year of license issuance

The Commission reserves the right to make changes to the plans. Upon Commission approval, the plans become requirements of the license, and the licensee shall implement the plans, including any changes required by the Commission.

Condition 18 requires the licensee to prepare a Fish Monitoring Plan in consultation with resource agencies. The licensee shall submit to the Commission documentation of its consultation, copies of comments and recommendations made in connection with the plan, and a description of how the plan accommodates the comments and recommendations. If the licensee does not adopt a

recommendation, the filing shall include the licensee's reasons, based on project-specific information.

(b) Requirement to Consult with Agencies and Notify Commission of Planned and Unplanned Deviations from License Requirements

Forest Service condition 17(b) in Appendix A provides for temporary modification of stream flows for maintenance activities, operational emergencies beyond the control of the licensee, and public safety. When flows are so modified, the condition requires notification to the Forest Service. In addition to the notification requirements of condition 17(b), the licensee shall notify the Commission, the U.S. Fish and Wildlife Service (FWS), and the California Department of Fish and Game (Cal Fish and Game). Such notification shall be made prior to implementing the flow modifications, if possible, or in the event of an emergency, as soon as possible, but no later than 10 days after each such incident.

In addition to the circumstances in condition 17(b) that allow for deviation from the flow requirements of the license, flows may be temporarily modified for short periods upon agreement of the licensee, the Forest Service, FWS, and Cal Fish and Game. If the flow is so modified, the licensee shall notify the Commission, Forest Service, FWS, and Cal Fish and Game as soon as possible, but no later than 10 days after each such incident ends.

(F) Article 402 is revised to read as follows:

Article 402. Boating Flow Augmentation Plan. Within six months of license issuance, the licensee shall file, for Commission approval, a plan for augmenting flows for boating, as required by condition 26 (Boating Flows) of the attached Appendix A. The plan shall be prepared after consultation with the U.S. Forest Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, California State Water Resources Control Board, the Kern River Watermaster (Watermaster), the U.S. Army Corps of Engineers (Corps), and Isabella Partners.

The plan shall detail coordination procedures among the Corps, the Watermaster, and the licensee for the timing of water releases into the Borel canal and project bypassed reach to ensure the timely delivery of water to downstream users and water rights holders during periods of boating flow augmentation, as required by condition 26. The plan shall include, at a minimum, procedures for providing the boating flow augmentation,

including the timing, duration, ramping rate, rate of the releases from both the Main dam and Auxiliary dam, and measures to minimize the disruption of flow to downstream water users and water rights holders.

The plan shall also include a Memorandum of Agreement (MOA) entered into by the licensee, the Watermaster, and the Corps. The MOA shall signify the Corps' willingness to release the boating flows into the bypassed reach, and shall specify any restrictions needed to protect the authorized purposes of the Corps project, including navigation, irrigation, recreation, water quality, and flood control. The Regional Engineer shall be invited to attend meetings regarding the agreement. The MOA shall be subject to revision by mutual consent of the Corps, the Watermaster, and the licensee as experience is gained by the actual project operation. Should these entities fail to reach an agreement the matter will be referred to the Director, Office of Energy Projects, for resolution. The licensee shall file with the Commission copies of the plan and signed MOA, and any revisions thereto, and provide copies to the Director, Office of Energy Projects, and the Regional Engineer.

The licensee shall include with the boating flow augmentation plan documentation of consultation with the specified entities, including copies of comments and recommendations on the draft plan, and specific descriptions of how the entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for comments and recommendations, before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The boating flow augmentation plan shall not be implemented until the licensee is notified that the plan is approved. Upon approval, the licensee shall implement the plan according to the approved schedule, including any changes required by the Commission.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.