

131 FERC ¶ 61,250
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Southern California Edison Company

Project No. 382-085

ORDER DENYING REHEARING AND REQUEST TO CONVENE A JOINT
AGENCY CONFERENCE

(Issued June 17, 2010)

1. On April 19, 2010, American Whitewater, California Sportfishing Protection Alliance, Trout Unlimited, Friends of the River, and the Sierra Club (collectively, American Whitewater) jointly filed a request for rehearing of the Commission's March 18, 2010 order¹ amending Southern California Edison Company's (SCE) license for the 12-megawatt Borel Hydroelectric Project No. 382. The order deleted the requirement to augment flows in the project's bypassed reach for whitewater boating and replaced it with a requirement to provide funds to the U.S. Forest Service (Forest Service) for the improvement of a boat takeout downstream of the project.² American Whitewater also requests that the Commission convene a multi-agency coordination conference to

¹ *Southern California Edison Co.*, 130 FERC ¶ 61,192 (2010) (March 18 Order).

² Included in American Whitewater's rehearing request is a copy of its request to the Forest Service for reconsideration of condition 26 (which the Forest Service submitted under section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (2006)) and a request to the California State Water Resources Control Board (State Board) for reconsideration of the Board's decision to not require water quality certification under the Clean Water Act section 401(a)(1), 33 U.S.C. § 1341 (2006), for the proposed amendment. As these requests are to the Forest Service and the State Board, we do not address them.

resolve the issues involved on rehearing.³ For the reasons discussed below, we are denying the requests for rehearing and conference.

Background

2. The project is located on the North Fork and the main stem of the Kern River in Kern County, California, within the Sequoia National Forest (managed by the Forest Service), and it uses the U.S. Army Corps of Engineers' (Corps) Isabella Dam. Isabella Dam, which creates Lake Isabella, is a two-part dam. It includes a Main Dam, which releases flows downstream into the Kern River, and an Auxiliary Dam, which releases water into the Borel Project's canal leading to the project's powerhouse.⁴

3. 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. The Corps releases water from Lake Isabella as determined by the Kern River Watermaster (Watermaster), who represents downstream water rights holders and, as explained in more detail below, has the authority to request irrigation releases from the Corps.⁵

4. In 2006, the Commission staff issued SCE a new license for the Borel Project.⁶ As pertinent to this proceeding,⁷ the license required that SCE, with the agreement of the Corps and the Watermaster, forego some of the flows for its project and instead make

³ See 18 C.F.R. § 385.601 (2009) (regulation regarding procedures for conferences).

⁴ From the powerhouse, water is returned to the Kern River about 1.8 miles downstream of Isabella Dam.

⁵ The Watermaster represents 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 (Kern Water Users), which collectively hold virtually all of the consumptive water rights on the Kern River. The rights are used primarily for irrigation of crops, as well as groundwater recharge benefiting agricultural, municipal and domestic uses. The Watermaster acts as agent for the Kern Water Users for purposes of controlling the storage and delivery of water to the respective public water users.

⁶ *Southern California Edison Co.*, 115 FERC ¶ 62,187 (2006) (2006 License Order).

⁷ Our March 18 Order contains a detailed background of this proceeding. March 18 Order, 130 FERC ¶ 61,192 at P 2-10.

them available for the Corps to release from the Main Dam to augment flows in the bypassed reach so that total flows in the reach would be 400, 500, or 800 cubic feet per second (cfs) to provide an opportunity for whitewater boating during the summer months. These augmented-flow requirements were submitted by the Forest Service under section 4(e) of the Federal Power Act (FPA).⁸ Forest Service condition 26 established the schedule for, and provided details of, the required boating flow augmentation releases. However, condition 26 also stated:

The Forest Service acknowledges that SCE has limited authority over releases from Isabella Reservoir. SCE cannot independently augment flows in the diverted reach without the cooperation of the Army Corps of Engineers and the downstream water rights holders. The Forest Service expects SCE to enter into an Agreement with the Corps and water rights holders to obtain the needed releases. The Forest Service also reserves the right to revise this condition if flow release agreements reached between SCE, COE, and water rights holders require changes to the schedule described in this condition.⁹

5. In light of SCE's inability to independently augment flows in the diverted reach without the cooperation of the Corps, Article 402 of the license required SCE to develop a flow augmentation plan detailing coordination procedures among the Corps, the Watermaster, and SCE for the timing of water releases into the Borel Canal and the bypassed reach to ensure the timely delivery of water to downstream users and water rights holders during periods of boating flow augmentation. Article 402 also required SCE to enter into a Memorandum of Agreement (MOA) with the Watermaster and the

⁸ 16 U.S.C. § 797(e) (2006). Section 4(e) requires that the Commission include in any license for a project located within a federal reservation (e.g., the Sequoia National Forest) all conditions that the Secretary of the department under whose supervision the reservation falls (in this case the U.S. Department of Agriculture, through the Forest Service) shall deem necessary for the adequate protection and utilization of the reservation. The Forest Service's section 4(e) conditions are set forth in Appendix A of the 2006 License Order, 115 FERC ¶ 62,187 at 64,846-54.

⁹ 2006 License Order, 115 FERC ¶ 62,187 at 64,854. *See also* Forest Service Condition 13 (*id.* at 64,848), which reserves the Forest Service's authority to modify its section 4(e) conditions "to resolve any conflict between [the section] 4(e) conditions and . . . settlement agreements for Isabella flow releases between licensee, Corps of Engineers, and water rights holders."

Corps, signifying the Corps' willingness to release the boating flows into the bypassed reach, and specifying any restrictions needed to protect the authorized purposes of the Corps project, including navigation, irrigation, recreation, water quality, and flood control.¹⁰

6. In its January 16, 2009 amendment application, SCE stated that it had engaged in consultation with agencies, as required by Article 402 and condition 26, and had unsuccessfully attempted to obtain the agreement of the Corps and Watermaster to allow it to provide augmented flows from the Corps' Main Dam. SCE explained that, as a result, the consultation discussions shifted to providing structural improvements elsewhere in lieu of augmented flows. SCE proposed, with the agreement of the consulted entities, to provide funds to the Forest Service for the improvements of the Forest Service's Democrat Dam Boating Take-out facility, located about ten miles downstream of the project's powerhouse. Included in the amendment request was a letter from the Forest Service revising condition 26 to delete the flow augmentation requirements and instead require SCE to fund improvements to the Forest Service's take-out facility. The Commission approved the amendment request in its March 18 Order.

Discussion

A. The Amendment Request Substantially Complies with the Commission's License Amendment Regulations.

7. On rehearing,¹¹ American Whitewater reiterates contentions, first made in response to the filing of SCE's amendment request, regarding the sufficiency of SCE's amendment application. Specifically, it argues that the application fails to comply with section 4.201(a)(4) of the Commission's regulations regarding the content of license amendment requests, because it does not state, in the form and manner specified by the regulations, the reasons why the proposed changes to Article 402 are "necessary rather than more convenient or economical."¹²

8. We reject this argument. American Whitewater gives too strict a reading to our regulations, which simply state that an applicant must show "why the proposed changes are necessary."¹³ We do not require, as a condition for all license amendments, that they

¹⁰ March 18 Order, 130 FERC ¶ 62,187 at 64,835.

¹¹ Request for Rehearing at 15-19.

¹² Request for Rehearing at 16.

¹³ 18 C.F.R. § 4.201(a)(4) (2009).

be necessary in the literal sense advocated by American Whitewater (e.g., absolutely required, compulsory, inevitable), nor do we require a showing that a proposed amendment not be “convenient or economical.”¹⁴ The purpose of this provision is that we be able to understand the reason for an amendment request. Although SCE’s application may not have contained a section entitled “Initial Statement” that included a statement as to the purpose of the amendment, the application (and supplements thereto) contained ample evidence that SCE was seeking the amendment, because the Corps and Watermaster had declined to agree to augmented flows, the Forest Service had altered one of its mandatory conditions, and consultation between the SCE and the agencies had yielded a new recreation measure, which required our approval before being implemented.

9. American Whitewater next argues¹⁵ that SCE’s application fails to comply with section 4.201(a)(5)(i) of the regulations because it does not identify or cite to the “statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to . . . the appropriation, diversion, and use of water for power purposes”¹⁶ While American Whitewater contends that the proposed amendment will impact the timing and volume of SCE’s diversion and use of water for power purposes by rerouting water intended for the purpose of enhancing whitewater recreation back through SCE’s powerhouse, it does not cite to any state statutes or regulations that it believes apply to SCE’s amendment request.

10. In issuing the license, the flow regime and the possible changes to it for whitewater boating were both analyzed. The augmentation flows have not been and are not being released as part of project operations. The license conditioned their release on SCE’s obtaining the Watermaster’s and the Corps’ agreement to their release (which, as noted, could not be obtained), and in so conditioning the augmentation flow requirements, the license contemplated that the flows might never be released.¹⁷ The amendment request does not propose any change to project operations, rather it seeks to retain the status quo. Thus, we do not see, nor does American Whitewater explain, what state statutory or regulatory requirements “with respect to . . . the appropriation,

¹⁴ Indeed, the fact that a proposed action was convenient or economical could be sufficient to support an amendment application.

¹⁵ Request for Rehearing at 18-19.

¹⁶ Section 4.201(a)(5)(i), 18 C.F.R. § 4.201(a)(5)(i) (2009).

¹⁷ See March 18 Order, 130 FERC ¶ 61,192 at n.23.

diversion, and use of water for power purposes” could affect the licensee’s proposal to delete the flow augmentation requirement.

11. For the above reasons, we deny rehearing on this issue.¹⁸ In any event, even if there were modest gaps in the application such as those alleged by American Whitewater, our staff could have requested additional information from SCE, rather than rejecting the application .

B. The License As Amended Is Best Adapted to a Comprehensive Plan of Development under FPA Section 10(a)(1).

12. On rehearing, American Whitewater argues¹⁹ that the Borel license, as amended by our March 18 Order, is not best adapted to a comprehensive plan of development, as required by section 10(a)(1) of the FPA. American Whitewater contends that our findings are fatally flawed because they focus on potential obstacles to implementing the flow augmentation requirement and fail to address whether an obligation to provide recreational boating in the bypassed reach is necessary to ensure the license is best suited to a comprehensive plan of development for the Kern River. We disagree.

13. Section 10(a)(1) of the FPA²⁰ requires that projects licensed by the Commission be best adapted to the comprehensive development of the waterway, taking into account all beneficial uses of the waterway (e.g., waterpower development; protection, mitigation, and enhancement of fish and wildlife; irrigation; flood control; water supply; and recreation). In deciding under what conditions to issue a license, our task is to fashion license conditions that will achieve what in our judgment is an optimal balance between and among the various developmental and environmental public interest uses of the

¹⁸ The section of American Whitewater’s rehearing request that addresses the sufficiency of SCE’s amendment application also contains unrelated arguments attacking the Commission’s March 18 Order. These arguments are deemed waived because they were not included in American Whitewater’s statement of issues in its rehearing request. *See* 18 C.F.R. § 385.713(c)(2) (2009). The arguments are in any event without merit. For example, American Whitewater argues that, rather than deleting the flow requirement, we should have postponed it for eight to twelve years until after the Corps has completed its remediation of Isabella Dam. However, as discussed in this order, the Corps’ position on the matter was not the only factor on which we based our decision.

¹⁹ Request for Rehearing at 19–25.

²⁰ 16 U.S.C. § 803(a)(1) (2006).

affected waterway. The Commission's obligation under section 10(a)(1) continues throughout the term of the license.²¹

14. The 2006 License Order for the Borel Project (as amended by the 2006 order on rehearing of the license) balanced the various competing uses of the waterway when it required the licensee to make flows available to the Corps in the summer months to augment flows in the bypassed reach for whitewater boating, but only on condition that the authorized purposes of the Corps project (including navigation, irrigation, recreation, water quality, and flood control) would be protected and any adverse effect on downstream water rights holders would be minimized. To ensure that this would be the case, the license required SCE to obtain the agreement of both the Corps and the Watermaster as a condition of the releases.²² The license thus reflected a balancing of these competing uses and a determination to subordinate whitewater boating flows to irrigation and other downstream water uses by water districts and municipal water agencies.²³ Our March 18 Order deleting the boating flow requirement simply recognized the balancing reflected in the 2006 License Order. The time for raising any objections to that determination was on rehearing of the 2006 license and rehearing orders.

²¹ See, e.g., *S.D. Warren Company*, 68 FERC ¶ 61,213, at 62,022 (1994).

²² See *Southern California Edison Co.*, 117 FERC ¶ 61,067 at P 15(Order on Rehearing), which states:

[T]he 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 acceptable to the Corps and the Watermaster. This should ensure that boating augmentation flows will not interfere with downstream water rights.

²³ See n.5, *supra*. As explained in more detail elsewhere in this order, the Watermaster releases water to downstream water rights holders, which use the water primarily for irrigation of crops, as well as groundwater recharge benefiting agricultural, municipal and domestic uses.

15. American Whitewater further argues²⁴ that our comprehensive development findings are arbitrary and capricious because they are not supported by substantial evidence, as required by section 313(b) of the FPA.²⁵

16. This argument is without merit. There is ample evidence in the record to support our March 18 Order. Citing seismic and seepage concerns at Isabella Dam, the Corps explained that it has initiated a “geotechnical investigation to further assess the risk and identify potential solutions”²⁶ The Corps stated that the exploration and remediation program would take from eight to twelve years. The Corps asked that, since this work is sensitive to lake levels, “any requirement to alter releases for Isabella Dam solely for rafting concerns” be postponed until the remediation is complete.²⁷

17. Furthermore, the Watermaster, whose agreement to release the augmentation flows is also required, continued to object to the release of such flows, as it had throughout the relicensing proceeding. The Watermaster explained that the Kern Water Users (which it represents) “have continuously opposed any plan as part of the Borel relicensing process . . . that causes disruptions in the Kern River Water Right holders regulated flow downstream.”²⁸

18. As the Watermaster has explained,²⁹ the Kern Water Users collectively hold virtually all of the consumptive water rights on the Kern River, with priority dates ranging from 1870 to 1891. They also have rights under a 1964 contract with the United States to the entire 535,000 acre-feet of conservation storage space existing in Isabella Reservoir. The Watermaster, as agent for the Water Users, controls the storage and delivery of water to the respective public water agencies holding legal right to use Kern River water. It schedules releases from Lake Isabella for delivery to the Water Users, which divert water from the lower Kern River at points beginning approximately 50 river miles below the Lake Isabella Main Dam, and also oversees the allocation and division of

²⁴ Request for Rehearing at 25-35.

²⁵ 16 U.S.C. § 313(b) (2006).

²⁶ Corps’ January 11, 2007 letter, contained in SCE’s January 16, 2009 amendment request.

²⁷ *Id.*

²⁸ November 7, 2008 letter from Kern River Watermaster, included in SCE’s January 16, 2009 amendment request.

²⁹ Watermaster’s March 5, 2009 motion to intervene and comments.

water among the Water Users pursuant to long-standing contractual formulas. As noted previously, the Water Users make beneficial use of the water primarily for irrigation of crops, as well as groundwater recharge benefiting agricultural, municipal, and domestic uses. Moreover, because the Kern River has been declared by the State Water Resources Control Board to be a fully appropriated stream system,³⁰ it is critical that water that the Watermaster schedules and directs for release from Isabella Reservoir arrives at each of the points of diversion of the Water Users at the specified times, and in quantities and flow rates, that are consistent with their water rights and schedules.

19. In response to the public notice of the amendment application, the Watermaster stated:³¹

[It has] consistently objected to any scheme of boating flow releases from Isabella Reservoir into the bypassed reach of the Kern River on a daily or other short-term ramping schedule. Hourly fluctuations in the point of release from the power canal to the river channel, then back to the power canal several hours later, would have a seriously disruptive effect on water deliveries at the Kern Water Users' downstream diversion points.

The Watermaster further explained:³²

This is because releases do not travel at the same rate of speed through the Borel power canal as they do through the natural stream channel. It takes roughly twice as long (± 4 hours) for water to travel the seven miles of river channel between the dam and the Borel power plant as it takes the same volume of water to reach the power plant via the Borel Canal (± 2 hours). A daily ramping schedule [required to implement the augmentation flow requirement] would therefore cause both interruptions and "doubling up" of scheduled water deliveries at the water users' diversions.

20. Given the Corps' refusal to release whitewater flows for at least an estimated eight to twelve years and the Watermaster's ongoing steadfast refusal to agree to such flows because of its concern that they could adversely affect downstream water rights holders, our determination in the March 18 Order to delete the requirement was reasonable.

³⁰ See Decision-1196 (1964); WR 89-25 (1989); WR 91-07 (1991); WR 94-01 (1991); and WR 98-08 (1998).

³¹ Watermaster's March 5, 2009 Filing at 3.

³² *Id.* at n.5.

While delaying the requirement for many years might have taken care of the Corps' concerns, there is no indication that such a delay would have brought about an agreement by the Watermaster to release the flows. For the above reasons, we deny rehearing on this issue.³³ Of course, if in the future SCE, the Corps and the Watermaster can reach an agreement to augment flows for whitewater boating, SCE may at that time seek an amendment of its license or American Whitewater can ask us to re-examine the issue.³⁴

C. Issuance of the March 18 Order Did Not Violate the National Environmental Policy Act of 1969 (NEPA).³⁵

21. American Whitewater contends that the March 18 Order violates NEPA because it did not consider the environmental impact of deleting the augmentation-flow requirement, including an analysis of a full range of possible flows, as well as consideration of the cumulative impact on recreation in the project area of deleting the flow requirement. However, as noted above, the Borel license required the agreement of the Corps and the Watermaster as a condition of releasing the augmentation flows, and it also clearly contemplated the possibility that the flows would not be released if agreement could not be obtained. Thus, our deletion of the requirement was not a new action that had not previously been considered, but rather was the result contemplated in the event that agreement could not be reached. Nor did it have any environmental

³³ American Whitewater also argues that the deletion of the flow-augmentation requirement is inconsistent with another requirement of the license (Forest Service condition 17) to make flows ranging from 20 to 60 cfs (depending on the time of year) available to the Corps for release from the Main Dam for the fishery resource (fishery flows). We disagree. Like the whitewater flows, the release of the fishery flows required the agreement of the Corps and the Watermaster, which these entities gave in 2006. *See* September 15, 2006 filing of SCE. Presumably, the volume of the releases (20 to 60 cfs) is small enough that the releases would not adversely affect the stability of the Main Dam. Certainly, the Corps has never suggested that the fishery releases, unlike the whitewater releases, are a matter of concern. The augmented-flow requirements, on the other hand, would result in a total release from the Main Dam of 400, 500, or 800 cfs (depending on certain variables). Of course, the Corps has the authority (and has exercised it from time to time) to suspend the fishery flows, if warranted. *See, e.g.*, November 13, 2008 letter to SCE from Commission staff (finding that the Corps' reduction of the required flows was not a violation of SCE's license).

³⁴ In the relicensing proceeding, SCE was the entity that proposed the flow-augmentation requirement.

³⁵ 42 U.S.C. § 4321, *et seq.* (2006).

consequences other than those that were recognized and analyzed in the 2006 license order. Moreover, the decision in the 2006 license order to not require SCE to devise an alternative in the event agreement could not be reached reflected a decision that no alternative recreation enhancement would be needed if augmenting the whitewater flows failed.³⁶ Thus, there was no obligation to consider alternative measures. Had American Whitewater disagreed with this decision, it should have challenged the 2006 License Order.

D. A Multi-Agency Coordination Conference is not Required.

22. American Whitewater requests that we vacate our March 18 Order, remand the matter to Commission staff for further consideration, and direct staff to convene a public conference that includes Commission staff, the Forest Service, California State Water Resources Control Board, and other parties in order to resolve the issues raised on rehearing. However, we affirm our March 18 Order and deny rehearing in all respects, and we thus find that no purpose would be served by a public conference.

The Commission orders:

(A) The request for rehearing, filed in this proceeding on April 19, 2010, by American Whitewater, California Sportfishing Protection Alliance, Trout Unlimited, Friends of the River, and the Sierra Club is denied.

³⁶ American Whitewater reiterates arguments (Rehearing, 36-43) addressed and rejected in our March 18 Order (130 FERC ¶ 61,192 P 18 and 25-26), that we erred in failing to require water quality certification for the proposed amendment under section 401 of the Clean Water Act and that under standard license Article 5 of SCE's license, which requires SCE to obtain and retain all rights in project property necessary to fulfill license requirements, SCE must acquire rights from downstream water rights holders as may be necessary to ensure the release of the augmentation flows. However, American Whitewater has not posited any arguments on rehearing that require analysis in addition to that which is included in the March 18 Order.

(B) The request by American Whitewater, California Sportfishing Protection Alliance, Trout Unlimited, Friends of the River, and the Sierra Club to convene a conference pursuant to 18 C.F.R. § 385.601 (2009) is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.