

140 FERC ¶ 61,208
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

California Department of Water Resources and
the City of Los Angeles

Project No. 2426-217

ORDER DENYING MOTIONS TO INTERVENE AND REJECTING REQUEST FOR
REHEARING

(Issued September 20, 2012)

1. California Trout, Inc. and Friends of the River (Cal Trout) have filed a motion to intervene and a request for rehearing of a February 10, 2012 Commission staff order¹ granting a request by licensee California Department of Water Resources (California DWR) to amend fishery requirements regarding the South SWP Hydroelectric Project No. 2426 (the California Aqueduct Project). As discussed below, we deny the motion, as well as previous motions to intervene, reject the request for rehearing, and, in any event, find that the substantive arguments in the request for rehearing are without merit.

Background

2. The California Aqueduct is an approximately 475-mile-long facility that transports water for hydroelectric power and consumptive purposes from the delta of the Sacramento and San Joaquin Rivers, about 30 miles northeast of San Francisco, to the outskirts of Los Angeles. The aqueduct, which passes through San Bernardino, Los Angeles, San Luis Obispo, Ventura, and Kern counties, California, and the Angeles and Los Padres National Forests, is divided into seven major divisions, of which only the West Branch Division is relevant here.

3. The West Branch Division, located in Kern and Los Angeles Counties, includes the 1250-megawatt Castaic pumped storage project. The licensees constructed the Pyramid Dam, which impounds Piru Creek to create the Pyramid Lake Reservoir, the project's upper reservoir. Castaic Lake is the lower reservoir.

¹ *California Department of Water Resources and the City of Los Angeles*, 138 FERC ¶ 62,105 (2012) (February 2012 Order).

4. In 1978, the Commission issued an original license authorizing California DWR and the City of Los Angeles Department of Water and Power to construct, operate, and maintain the project.² Because Pyramid Dam would impound the flow of Piru Creek, Article 52 of the license required the licensees to release minimum instream flows of 5 cubic feet per second (cfs) below the dam between November 1 and March 31 and 10 cfs between April 1 and October 31, for the protection of fishery resources. Further, the licensees were to work with state and federal resource agencies to evaluate the adequacy of the flows and to recommend any revisions to them.³ License Article 51 required the licensees to prepare and file a revised Fish and Wildlife Resources Management Plan (Exhibit S).

5. The Commission subsequently approved a revised minimum flow schedule and Exhibit S.⁴ Among other things, the new Exhibit S included a fishery enhancement plan for Piru Creek that would establish a year-round trout fishery between Pyramid Dam and the downstream Frenchman's Flat area.⁵

6. On December 16, 1994, the U.S. Fish and Wildlife Service (FWS) listed the arroyo toad (*Bufo californicus*), which inhabits Piru Creek, as an endangered species. Some time thereafter, FWS expressed concern about the effects of the flow regime required by the project license on the toad. The additional flows provided under the license – while perhaps good for fish – have resulted in the unauthorized take of arroyo toad and the deterioration of its habitat.⁶ After consultation with FWS and other interested resource agencies and parties to address concerns regarding the arroyo toad and the recreational fishery, the licensee filed for a temporary waiver of the minimum flow requirements in Article 52 of the license on February 10, 2005, and subsequently filed for

² *Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power*, 2 FERC ¶ 61,258 (1978). The license will expire in 2022. The Commission licensed only facilities constructed for power purposes and not “hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power.” *Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power*, 51 FPC 529, 533 (1974).

³ *Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power*, 2 FERC at 61,610.

⁴ *Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power*, 21 FERC ¶ 62,215 (1982).

⁵ *Id.* at 63,358.

⁶ *See California Department of Water Resources and City of Los Angeles Department of Water and Power*, 129 FERC ¶ 62,073, at P 33 (2009) (October 2009 Order).

a license amendment on March 17, 2005, to implement a new operating schedule to avoid an incidental take of the arroyo toad. The licensee proposed to (1) revise the minimum flow schedule in Article 52, and (2) modify the trout fishery requirements in Exhibit S, which, in part, required 4,000 pounds of catchable trout to be stocked annually in Piru Creek.⁷

7. The licensee proposed to revise Article 52 to provide for flow releases from Pyramid Dam into Piru Creek that simulate the natural hydrology of the creek to the extent operationally feasible and consistent with safety considerations. As a result, greater volumes of water would pass through middle Piru Creek (i.e., the 18-mile-long flows between Pyramid Lake and Lake Piru) during the rainy season (November through April). During the dry season (May through October), the volume and rate of flows into middle Piru Creek would typically diminish incrementally in response to progressively smaller volumes of natural surface water flows entering Pyramid Lake. During very dry years, it is possible that there may be periods where no surface water would flow into middle Piru Creek.⁸

8. To address the potential effects of the changed flow regime, the licensee proposed, in part, to change the then-existing fish stocking practices. Historically, the California Department of Fish and Game (California Fish and Game) stocked 3,000 pounds of catchable rainbow trout in the Frenchman's Flat area between November and May, which California Fish and Game believes to be the creek's carrying capacity in this area. California Fish and Game also annually stocked up to 1,000 pounds of additional catchable rainbow trout between Frenchman's Flat and Pyramid Dam.⁹ In its proposal, the licensee would stock some or all of the additional 1,000 pounds of trout allotted to Piru Creek each year as determined appropriate by California Fish and Game.¹⁰

9. The Commission issued public notice of the licensee's filings, establishing a July 8, 2005 deadline for filing comments and motions to intervene in the proceeding.¹¹

⁷ See October 2009 Order, 129 FERC ¶ 62,073 at P 2. At various times during the post-license proceedings, California DWR and the City of Los Angeles have filed applications and other documents jointly and California DWR has filed alone. For ease of reference, this order will refer to both licensees as "licensee."

⁸ *Id.* PP 5-6.

⁹ *Id.* P 7.

¹⁰ *Id.*

¹¹ See June 8, 2005 Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene and Protests.

10. On November 21, 2008, Cal Trout filed comments on the final environmental analysis (EA) prepared by Commission staff for the application. Cal Trout asserted that the EA failed to address adequately its concern that during extremely dry years, portions of Piru Creek may be dry and this would adversely affect California red-legged frogs and steelhead trout.¹² Cal Trout further stated that the EA did not consider reasonable alternatives that would also protect native rainbow trout, and that Commission staff should have prepared an Environmental Impact Statement instead of an EA.¹³ FWS filed comments concurring with the EA's determination that the proposed flows would not adversely affect the California red-legged frog and should improve the habitat for this species.¹⁴ The National Marine Fisheries Service (NMFS) recommended maintaining the catch-and-release fishery without hatchery stocking in the area between Pyramid Dam and the concrete weir to prevent possible genetic introgression of wild (*Oncorhynchus mykiss*) and hatchery-reared rainbow trout until NMFS and California Fish and Game make a definitive determination regarding future fish stocking practices in the area.¹⁵

11. In approving the proposed amendment, Commission staff determined that the institution of more diversified flows, rather than continuous flows, would benefit native fish populations and reduce populations of non-native, aquatic predators, such as bullfrogs. Therefore, the proposed flows would be beneficial for native rainbow trout, as well as the arroyo toad and the red-legged frog.¹⁶ In addition, Commission staff determined that the proposed action would have no effect on steelhead trout, since their migration into the project reach is blocked by the downstream Santa Felicia dam.¹⁷ Commission staff also concluded that an EIS for the amendment was unnecessary, given that Cal Trout failed to provide adequate evidence that the amendment would have a significant effect on the quality of the human environment.¹⁸

12. Commission staff recognized that, to comply with a state court order issued in 2007, California Fish and Game was preparing an environmental analysis to determine whether its fish stocking program may harm native trout and amphibians. Piru Creek was

¹² See Comments of Cal Trout filed November 21, 2008.

¹³ *Id.*

¹⁴ October 2009 Order, 129 FERC ¶ 62,073 at P 40.

¹⁵ *Id.* P 27.

¹⁶ *Id.* PP 41, 56.

¹⁷ *Id.* P 42.

¹⁸ *Id.* P 44.

listed by California Fish and Game as a stream where fish will not be stocked until the program evaluation is complete.¹⁹ Commission staff concluded that, until the genetic origin of native rainbow trout in the project area was resolved, it was appropriate to implement NMFS's temporary no-stocking recommendation.²⁰ Because there was uncertainty as to how the trout fishery would be maintained in Piru Creek, Commission staff eliminated the minimum flow requirements in Exhibit S to the license, but required the licensee to file a plan and schedule to temporarily address the trout fishery in Piru Creek until NMFS and California Fish and Game make a final fish stocking determination.²¹

13. Ordering Paragraph (D) of the October 2009 Order required that the licensee file a plan and schedule for providing catchable rainbow trout at Frenchman's Flat and between Frenchman's Flat and Pyramid Dam while California Fish and Game and NMFS make a definitive determination regarding future stocking practices in the area. Ordering Paragraph (D) further required that the plan be prepared in consultation with California Fish and Game and NMFS.²²

14. Pursuant to Ordering Paragraph (D), California DWR filed a trout stocking plan on July 6, 2010. In its filing, the licensee stated that California Fish and Game was still in the process of evaluating whether trout stocking would be permitted in Piru Creek, which was anticipated to take several months to complete. Therefore, the licensee proposed to: maintain contact with California Fish and Game to monitor the status of the pre-stocking evaluation; provide semi-annual reports to the Commission on the status of the pre-stocking evaluation; and provide stocking allocation information, location information, and a schedule to the Commission once the pre-evaluation was completed.²³

15. Cal Trout filed comments on California DWR's July 2010 trout stocking plan and a motion to intervene on July 19, 2010. Cal Trout asserted that the Commission should reject the plan because it failed to satisfy Ordering Paragraph (D) of the October 2009 Order. In addition, Cal Trout argued that it should be allowed to intervene in the post-licensing proceedings because the licensee's plan, if approved, would constitute a material change in the terms of the license.²⁴

¹⁹ *Id.* P 46.

²⁰ *Id.* P 47.

²¹ *Id.* P 48.

²² *Id.* at ordering para. (D).

²³ *See* Catchable Trout Proposal filed July 6, 2010.

²⁴ *See* Cal Trout Comments filed July 19, 2010.

16. On June 21, 2011, Commission staff issued a letter to the licensee, concluding that the proposed plan did not meet the requirements of Ordering Paragraph (D). The letter explained that Ordering Paragraph (D) requires that a plan to provide trout in Piru Creek is to be implemented during the interim period while California Fish and Game evaluates whether it will permit fish stocking in the creek.²⁵ Staff directed the licensee to revise the plan and re-consult with the resource agencies in developing a plan to temporarily address the trout fishery in Piru Creek pending a decision by the agencies regarding future fish stocking practices in the area.²⁶ In addition, staff requested that the licensee provide updates regarding the status of the stocking evaluation for Piru Creek and documentation of any final determinations.²⁷ Staff further stated that, if during re-development of the plan, the licensee determined that it would not be feasible to fulfill the requirements of Ordering Paragraph (D), it could file a request to amend or otherwise delete these requirements, along with adequate justification and documentation of consultation with the resource agencies.²⁸

17. On August 26, 2011, the licensee responded to Commission staff's June 21, 2011 letter. California DWR explained that during consultation meetings with California Fish and Game and FWS on August 4, 2011, and with NMFS on August 16, 2011, the agencies had stated that, before a final determination is made regarding future fish stocking in Piru Creek, they intended to enter into formal Section 7 consultation under the Endangered Species Act, which the agencies expected to take at least a year.²⁹ The agencies also informed the licensee that until a final determination is made regarding trout stocking in the project area, they were not in a position to either participate in or condone a trout stocking program in Piru Creek.³⁰ Therefore, the agencies agreed that the licensee could not develop or implement a trout stocking plan for Piru Creek until the Section 7 consultation was completed and that Ordering Paragraph (D) of the October 2009 Order must be either amended or deleted. The agencies favored amending the paragraph, as opposed to deleting it, to accurately reflect the process that must occur before trout stocking at Piru Creek could be re-initiated.³¹ The licensee stated that it intended to complete consultation with the resource agencies and requested an extension

²⁵ See June 21, 2011 Letter from Commission staff to California DWR.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See August 26, 2011 Letter from California DWR to the Commission.

³⁰ *Id.*

³¹ *Id.*

to October 15, 2011 to file an application to amend Ordering Paragraph (D) and documentation of consultation.³²

18. On October 11, 2011, the licensee filed an application to amend Ordering Paragraph (D) of the October 2009 Order. The application repeated the facts as outlined in the August 26, 2011 letter concerning the Section 7 consultation process and proposed an amendment which would require the licensee to file a trout stocking plan after the resource agencies make a final determination allowing future stocking practices in the project area. In addition, the licensee stated that its proposed amendment would not conflict with the recent revision to its water quality certification, but would instead be in accordance with the statement therein that expanding fish planting in Piru Creek as mitigation for the modification of instream flow requirements is infeasible until the stocking program has been reevaluated.³³ By letter dated September 9, 2011, California Fish and Game concurred with the proposed amendment; no formal concurrence was received from FWS or NMFS.³⁴

19. On February 10, 2012, Commission staff issued an order granting the application (February 2012 Order). The order found that the licensee's request to amend the previous license amendment, which was filed to accommodate an ongoing stocking evaluation that must be completed before California Fish and Game can conduct required rainbow trout stocking in Piru Creek, was reasonable and would allow the licensee flexibility in implementing the required stocking plan. In addition, the order revised the proposed amendment to include a requirement that the licensee file periodic reports with the Commission every six months regarding the progress of the fish stocking evaluation.

20. Cal Trout filed a request for rehearing and motion to intervene on March 8, 2012, in which it argues that Commission staff's order was arbitrary and capricious. Cal Trout asserts that staff misinterpreted the requirement in Ordering Paragraph (D) of the October 2009 Order to mandate fish stocking in Piru Creek, rather than other methods to ensure adequate rainbow trout in the area.³⁵ Cal Trout argues that Ordering Paragraph (D) requires the licensees to file a plan for providing catchable rainbow trout without engaging in fish stocking in order to foster survival of native rainbow trout until California Fish and Game makes a final determination regarding whether stocking will be allowed in Piru Creek.³⁶ Cal Trout further claims that

³² *Id.*

³³ *See* Application at 3.

³⁴ *See* October 11, 2011 Application Transmittal Letter.

³⁵ *See* Rehearing Request at 5.

³⁶ *Id.*

modification of in-stream flows and temperatures that will ensure a catchable native rainbow trout population in Piru Creek, at least until such time that the stocking program has been finally decided, is the “obvious solution” and that the licensee has made no showing that such an adjustment would be infeasible.³⁷ Cal Trout requests that the Commission require the licensee to immediately consult with the resource agencies regarding a plan to provide catchable rainbow trout unless and until California Fish and Game and NMFS approve a fish stocking plan and that such plan include modification of the project’s flow regime to accommodate both native rainbow trout and the arroyo toad.³⁸ In the alternative, if the Commission grants the application, Cal Trout argues that the agency must prepare a supplemental environmental analysis which evaluates the impacts to native rainbow trout in the absence of mitigation and whether alternative mitigation measures exist to alleviate such impacts.³⁹

21. In addition, Cal Trout maintains that it should be allowed to intervene in the post-licensing proceedings because the amendment constitutes a material change in the terms of the license.⁴⁰ In the alternative, Cal Trout requests that the Commission exercise its discretion to allow intervention because it is in the public interest, given the impact on native rainbow trout.⁴¹

22. On March 23, 2012, the licensee filed an answer to Cal Trout’s motion to intervene. The licensee maintains that the amendment only defers its existing obligation to file a trout stocking plan until circumstances beyond its control allow it to comply with Ordering Paragraph (D). Therefore, the amendment is not a material change in the plan of project development or in the terms or conditions of the license and Cal Trout should not be allowed to intervene.⁴² The licensee further characterizes Cal Trout’s claim that resumption of the previous flow regime is appropriate as an impermissible collateral attack on the 2009 license amendment.⁴³ The licensee argues that, since Cal Trout is not

³⁷ *Id.* at 5-6.

³⁸ *Id.* at 8.

³⁹ *Id.*

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

⁴² See Answer of the California Department of Water Resources Opposing California Trout and Friends of the River’s Motion for Post-Licensing Intervention, filed March 23, 2012.

⁴³ *Id.* at 5.

a party to the proceeding and its rehearing request is an impermissible collateral attack on the October 2009 Order, the Commission should deny the request.⁴⁴

Discussion

A. Motions to Intervene and Request for Rehearing

23. Cal Trout requests that it be allowed to intervene in the post-licensing proceedings involving the amendment to Ordering Paragraph (D) of the October 2009 Order. It also has filed motions to intervene earlier in the proceeding. The Commission denies these requests for the reasons discussed below.

24. After a license has been issued, opportunities for public participation in compliance matters are limited. This is because many post-license proceedings simply involve a licensee implementing the requirements that have been established by the project license. It would be unnecessary and inefficient to permit entities to relitigate matters that were resolved in licensing proceedings. Instead, the Commission's longstanding policy and practice has been to provide public notice and allow an opportunity for intervention and rehearing with respect to only certain types of post-licensing compliance filings. Thus, the Commission has explained that it is required to give public notice, and entertain interventions in, post-license proceedings only where the licensee's filings entail material changes in the plan of project development or in the terms and conditions of the license, or could adversely affect the rights of property holders in a manner not contemplated by the license.⁴⁵ The Commission will, however, entertain timely interventions (within 30 days of an order) by agencies and other entities regarding post-licensing matters on which they are required to be consulted.⁴⁶

25. Each post-licensing proceeding is a separate matter, requiring, if appropriate, a separate intervention.⁴⁷ The Commission does not allow entities to file one motion to

⁴⁴ *Id.* at 6.

⁴⁵ *See New York State Electric and Gas Corp.*, 138 FERC ¶ 61,190, at P 18 (2012). *See also Appalachian Power Co.*, 137 FERC ¶ 61,065, *reh'g denied*, 137 FERC ¶ 61,208 (2011); *Kings River Conservation District*, 36 FERC ¶ 61,365 (1986).

⁴⁶ *See New York State Electric and Gas Corp.*, 138 FERC ¶ 61,190, at P 19. *See also Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 (1987).

⁴⁷ *See, e.g., Eugene Water and Electric Board*, 133 FERC ¶ 61,052, at P 12 (2010).

intervene in all post-license matters.⁴⁸ Thus, to the extent that Cal Trout is seeking to intervene in all matters regarding the Piru Creek fishery, the motion is denied. Moreover, as noted above, Article 51 of the license for the California Aqueduct Project requires the licensees to consult with FWS and California Fish and Game regarding its fishery plan. Article 52 requires consultation with those agencies, along with the U.S. Forest Service, with respect to minimum flows in Piru Creek. Cal Trout is not an entity to be consulted, and thus has no right to intervene in proceedings regarding these matters.

26. We now address Cal Trout's individual motions.

27. The Commission provided an opportunity for intervention with respect to the licensee's 2005 proposal to alter project operations to protect the arroyo toad, setting a July 8, 2005 deadline for motions to intervene.⁴⁹

28. Cal Trout did not file its original motion to intervene by the deadline, but rather waited until March 4, 2010, in conjunction with its comments on, and opposition to, DWR's request for a 90-day extension to file a catchable rainbow trout plan. By that time, Commission staff had long since approved the 2005 filings in the October 2009 Order, and the order had become final. Thus, to the extent that Cal Trout was seeking to intervene in the proceeding on the 2005 filings, that proceeding had ended, so the motion to intervene was moot.⁵⁰ If, however, Cal Trout's motion was an attempt to intervene in the only matter then pending -- the licensee's request for a 90-day extension to file its fish-stocking plan -- then, even setting aside the fact that Cal Trout was not an entity to be consulted under the relevant license articles, the motion did not lie, since the Commission does not consider requests for extensions to be proceedings in which it will accept intervention.⁵¹ In any case, when the fish-stocking plan was filed in July 2010, the first motion to intervene became moot.

⁴⁸ See, e.g., *City of Tacoma, Wash.*, 89 FERC ¶ 61,058, *reh'g denied*, 89 FERC ¶ 61,275 (1999) (denying petition by Tribe to intervene in all post-license proceedings regarding project).

⁴⁹ See June 8, 2005 Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene and Protests.

⁵⁰ Moreover, Cal Trout did not in any of its motion seek late intervention or make any attempt to show good cause for its late motions, as is required by our regulations. See 18 C.F.R. § 385.214(b)(3) and (d) (2012).

⁵¹ See, e.g., *Cent. Me. Power Co.*, 53 FERC ¶ 61,089, at 61,250 (1990); *City of Tacoma, Wash.*, 89 FERC 61,800.

29. Cal Trout filed a pleading “renewing” its previous motion to intervene on July 19, 2010, in connection with its comments on the licensee’s fish-stocking plan, asserting that the licensee’s proposal, if approved, “will work a material change in the terms of DWR’s license, because it will render Ordering Paragraph D completely meaningless and deprive the public of recreational fishing opportunities at Piru Creek.”⁵²

30. As discussed previously, Cal Trout is not an entity required to be consulted by license Articles 51 and 52. Moreover, as discussed in detail below, the proposed fish-stocking plan did not materially change the conditions of the license, but rather was an attempt to implement the requirements of the October 2009 Order. Accordingly, Cal Trout had no right to intervene with respect to the fish-stocking plan.⁵³ In any event, when Commission staff rejected the proposed plan by letter dated June 21, 2011, the renewed motion to intervene became moot at that point.

31. Cal Trout did not file comments or a motion to intervene in response to the licensee’s October 12, 2011 trout stocking plan.

32. Cal Trout’s most recent motion to intervene was filed in conjunction with its request for rehearing of the February 2012 Order. Cal Trout asserts that the licensee’s October 12, 2011 catchable rainbow trout plan and the approved amendment to Ordering Paragraph (D) of the October 2009 Order constitute a material change to the project justifying the need for post-licensing intervention. Cal Trout argues that the amendment renders Ordering Paragraph (D) completely meaningless and will deprive the public of recreational fishing opportunities.⁵⁴

33. Cal Trout does not argue that it has been given a consulting role in this matter, nor does it argue that the February 2012 Order affects the rights of any property owners. Instead, Cal Trout asserts that the February 2012 Order constitutes a material change to the project that justifies post-licensing intervention. Cal Trout maintains that the February 2012 Order effectively eliminates the requirement to provide catchable rainbow trout in Piru Creek to mitigate for the project’s impacts on recreational fishing during the timeframe while California Fish and Game and NMFS make a definitive determination regarding future stocking practices in the project area.⁵⁵ While the February 2012 Order

⁵² See Cal Trout July 19, 2010 Comments at 3.

⁵³ It did have the right to file comments, and those comments were fully considered by staff in acting on the proposed plan.

⁵⁴ See March 8, 2012 Request for Rehearing of Commission Order Amending October 28, 2009 Order Amending Article 52 and Exhibit S (issued February 10, 2012); Motion to Intervene.

⁵⁵ Rehearing Request at 3-4.

revised the licensee's obligation to implement the required trout stocking plan, it does not constitute a material change to the project that justifies post-licensing intervention.

34. The February 2012 Order granted the licensee's proposed amendment to a previous license amendment, in order to accommodate an ongoing stocking evaluation by resource agencies that must be completed before the licensee can conduct required rainbow trout stocking in Piru Creek. As stated in the order, the proposal "would essentially defer the development of a fish stocking plan until a Section 7 consultation process is completed, and the FWS and NMFS authorize fish stocking in Piru Creek."⁵⁶ Allowing the licensee to defer its existing obligation to develop a fish stocking plan – a delay consistent with the clearly expressed desires of the resource agencies – does not eliminate that obligation and, thus, does not entail a material change in project development or terms and conditions of a license.⁵⁷ If, at some point in the future, the licensee and the resource agencies determine that fish stocking is no longer desirable, the licensee would have to file an application to amend its license to that effect. Such a proceeding would require public notice and the opportunity to comment, of which Cal Trout could avail itself. We also agree with the licensee that Cal Trout's request for rehearing is an improper collateral attack on the October 2009 Order, which established the process that led to February 2012 Order.

35. Under section 313(a) of the Federal Power Act,⁵⁸ an entity must be a party to a proceeding in order to file a request for rehearing.⁵⁹ Given our denial of its motion to intervene, Cal Trout is not a party to this proceeding. Therefore, the request for rehearing is rejected. In any event, as explained below, Cal Trout's rehearing request is substantively without merit.

⁵⁶ February 2012 Order, 138 FERC ¶ 62,105, at P 7.

⁵⁷ See, e.g., *City of Columbia*, 105 FERC ¶ 61,175, at 61,921 (2003). ("The timing of a compliance filing is an administrative matter between the licensee and the Commission, and does not alter the substantive obligations of the licensee. It therefore does not give rise to an opportunity for intervention and rehearing."); *City of Tacoma Wash.*, 89 FERC 61,800 (extension of time for post-licensing compliance filing does not give rise to an opportunity to file a motion to intervene or request for rehearing.). In addition, given that the February 2012 Order does not entail a material change, Cal Trout has not demonstrated that intervention and rehearing are in the public interest at this stage of the post-license proceedings.

⁵⁸ 16 U.S.C. § 8251 (a) (2006).

⁵⁹ See *Alabama Power Company*, 140 FERC ¶ 61,124 (2012); *Appalachian Power Company*, 134 FERC ¶ 61,113, at P 17 (2011).

B. The Merits of the Rehearing Request

36. Cal Trout argues that the February 2012 Order fails to provide a valid reason for amending Ordering Paragraph (D) of the October 2009 Order. We disagree.

37. As discussed above, Ordering Paragraph (D) of the October 2009 Order required the licensee to “file a plan and schedule for providing catchable rainbow trout at Frenchman’s Flat and between Frenchman’s Flat and Pyramid Dam while the [California Fish and Game] and [NMFS] make a definitive determination regarding future stocking practices in the project area.” Ordering Paragraph (D) further required the licensee to prepare the plan in consultation with California Fish and Game and NMFS.⁶⁰ The basis for Ordering Paragraph (D) was the uncertainty as to how the trout fishery would be maintained in Piru Creek. To address this uncertainty, Commission staff stated that it would amend Exhibit S to the license to eliminate its minimum flow requirements and require the licensee to file a plan and schedule to “temporarily address” the trout fishery in Piru Creek until NMFS and California Fish and Game make a final determination regarding future fish stocking practices in the project area.⁶¹

38. In the February 2012 Order, Commission staff stated that the plan for providing catchable rainbow trout was required as a measure to mitigate for the loss of trout habitat resulting from the implementation of a modified flow regime to benefit the federally endangered arroyo toad.⁶² Commission staff found that the licensee’s proposal to amend Ordering Paragraph (D), which was developed in consultation with California Fish and Game, FWS and NMFS, would essentially defer the development of a fish stocking plan until a Section 7 consultation process is completed, and the FWS and NMFS authorize fish stocking in Piru Creek.⁶³ Commission staff concluded that the request was reasonable and allows the licensee flexibility in implementing the required stocking plan.⁶⁴ Contrary to Cal Trout’s argument, Commission staff’s interpretation of Ordering Paragraph (D) to require a fish stocking plan was reasonable and the order provided valid reasons for approving the proposed license amendment.

⁶⁰ See October 2009 Order, 129 FERC ¶ 62,073 at Ordering Paragraph (D).

⁶¹ *Id.* at PP 46-48.

⁶² See February 2012 Order, 138 FERC ¶ 612,105 at P 2.

⁶³ *Id.* P 7.

⁶⁴ *Id.*

39. Cal Trout's argument that Commission staff's decision was arbitrary and capricious is based on an unreasonable interpretation of the Commission's orders and unsupported factual assertions. For example, Cal Trout states that "[p]aragraph D . . . plainly requires DWR to file a plan for providing catchable rainbow trout *without* engaging in fish stocking."⁶⁵ Contrary to Cal Trout's statement, Ordering Paragraph (D) requires California DWR to file a plan for providing catchable rainbow trout while California Fish and Game and NMFS make a determination regarding future stocking practices in the area; it does not state that the plan must use methods other than fish stocking to ensure adequate rainbow trout in the area. Moreover, Cal Trout's assertion that the "obvious solution" is to maintain in-stream flows and temperatures that will ensure a sufficient catchable native rainbow trout population in Piru Creek is ill-conceived.⁶⁶ Cal Trout's solution necessarily would require the resumption of minimum in-stream flow requirements and would directly conflict with the license amendment eliminating the prior flow requirements to benefit the federally endangered arroyo toad.⁶⁷ To the extent Cal Trout is attempting to persuade the Commission to re-impose minimum in-stream flow requirements, its argument constitutes an improper collateral attack on the October 2009 Order.

40. Cal Trout also asserts that the February 2012 Order is contrary to Commission staff's June 21, 2011 letter denying the trout stocking plan filed by California DWR on July 6, 2010.⁶⁸ We disagree.

41. In its initial trout stocking plan, California DWR proposed that, during the period while California Fish and Game completed its pre-stocking evaluation, California DWR would monitor the status of the evaluation, provide updates to the Commission every 6 months, and upon completion of the pre-stocking evaluation, provide a stocking schedule

⁶⁵ Rehearing Request at 5 (emphasis in original).

⁶⁶ *Id.*

⁶⁷ Cal Trout also states, at 6, that "monitoring studies conducted since the October 2009 Order demonstrate that periods of higher flows can be mutually beneficial to the arroyo toad and native rainbow trout." Cal Trout does not identify these monitoring studies. The monitoring reports for the arroyo toad and other sensitive species filed since the October 2009 Order reflect observations during lower flow periods and do not reference native rainbow trout. *See* Arroyo Toad and Sensitive Species Monitoring Reports filed January 25, 2011 and November 18, 2011. In addition, the EA prepared for the October 2009 Order determined that the elimination of minimum instream flows would be beneficial for rainbow trout and other native fishes. *See, e.g.*, October 2009 Order, 129 FERC ¶ 62,073 at P 40.

⁶⁸ *Id.* at 4.

to the Commission. California DWR stated that a copy of the proposed plan was sent to California Fish and Game, FWS, and NMFS with a request for comments; however, no comments were received.⁶⁹ On June 21, 2010, Commission staff issued a letter determining that the proposed plan did not meet the requirements of Ordering Paragraph (D) of the October 2009 Order, which requires implementation of a plan to provide trout in Piru Creek during the interim period while the California Fish and Game evaluates whether it will permit fish stocking.⁷⁰ Commission staff directed California DWR to revise the plan and re-consult with the resource agencies in developing a plan to temporarily address the trout fishery in Piru Creek and to provide updates regarding the status of California Fish and Game's stocking evaluation and any final determinations.⁷¹ The June 21, 2010 letter further stated that if during re-development of the plan, California DWR determined that it would not be feasible to fulfill the requirements of Ordering Paragraph (D), California DWR may consider filing a request to amend or otherwise delete this requirement, along with adequate justification and documentation of consultation with the resource agencies.⁷²

42. Pursuant to the June 21, 2011 letter, the licensee consulted with the resource agencies and was informed that before a final determination is made with respect to whether trout stocking will resume in the project area, California Fish and Game and FWS intend to enter into a formal Section 7 consultation under the Endangered Species Act.⁷³ In addition, the agencies informed the licensee that, until a Biological Opinion is developed by FWS and a final determination is made regarding trout stocking in the area, the agencies were not in a position to either participate in or condone a trout stocking program in Piru Creek. Based on this information, California DWR determined that it could not develop or implement a trout stocking plan for Piru Creek until the Section 7 consultation is completed.⁷⁴ The proposed amendment, prepared in consultation with the resource agencies, provided that a plan and schedule for providing catchable rainbow trout for Piru Creek would not be required until California Fish and Game and FWS

⁶⁹ See Letter from California DWR to the Commission, dated June 28, 2010 (filed July 6, 2010).

⁷⁰ See June 21, 2011 Letter from Commission staff to California DWR.

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ 16 U.S.C. § 1531, *et seq.*

⁷⁴ See October 11, 2011 Application for Non-Capacity Related Amendment of License to Amend Ordering Paragraph (D) at 2-3; *see also* August 26, 2011 Letter from California DWR to the Commission requesting an extension of time to file the application to amend.

conclude the Section 7 consultation process and make a definitive determination allowing future stocking practices in the area and NMFS concurs in that determination. Once a final determination is made by California Fish and Game allowing stocking in the area, the licensee would file for Commission approval a stocking plan prepared in consultation with the resource agencies and in compliance with the provisions in the Biological Opinion.⁷⁵

43. Contrary to Cal Trout's assertion, Commission staff did not reverse its position regarding Ordering Paragraph (D) in the February 2012 Order. As discussed above, the June 21, 2011 letter provided that the licensee could file a request to amend or delete the requirements in Ordering Paragraph (D), in consultation with the resource agencies, if it determined that it would not be feasible to comply with those requirements. As explained in the amendment application and the February 2012 Order, California DWR determined that it would not be feasible to develop a trout stocking plan until the ongoing stocking evaluation is completed. California DWR followed the procedure outlined in the June 21, 2011 letter and submitted an amendment to Ordering Paragraph (D) that was developed in consultation with the resource agencies.⁷⁶ In approving the proposed amendment, Commission staff's actions were consistent with its June 21, 2011 letter.

44. Finally, Cal Trout argues that the Commission violated the National Environmental Policy Act (NEPA)⁷⁷ by deleting critical mitigation without environmental review. Cal Trout claims that preparation of a supplemental EA is required by NEPA regulations that require supplemental environmental documents when an agency makes substantial changes in a proposed action that are relevant to environmental concerns.⁷⁸ We disagree.

45. As discussed above, Commission staff did not delete the requirement in the license that the licensee file a fish stocking plan to mitigate for the loss of trout habitat. Rather, the February 2012 Order revised and clarified the process for developing a fish stocking plan at the project and deferred the licensee's obligation to implement the required plan until it was feasible. This being the case, the February 2012 Order did not make a

⁷⁵ See October 11, 2011 Application at 2.

⁷⁶ In its August 26, 2011 letter, California DWR explained that the resource agencies favored amending Ordering Paragraph (D) as opposed to deleting it altogether. The agencies believed it would be better to have the ordering paragraph accurately reflect the process that must occur before trout stocking at Piru Creek is re-initiated.

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

⁷⁸ 40 C.F.R. § 1502.9(c) (2012).

material or substantial change in the license terms that would require preparation of a supplemental environmental analysis.

The Commission orders:

(A) The motion filed by California Trout, Inc. and Friends of the River on March 8, 2012, to intervene in post-license proceedings in this docket is denied and the concurrent request for rehearing is rejected.

(B) The prior motions to intervene filed by California Trout, Inc. and Friends of the River on March 4, 2010, and July 19, 2010, are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.