

129 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Dorado Irrigation District (CA)

Project No. 184-196

ORDER ON REHEARING

(Issued December 17, 2009)

1. On July 24, 2009, Commission staff issued an order¹ modifying and approving a water quality and water pollution control plan filed by El Dorado Irrigation District (El Dorado), the licensee for the El Dorado Project No. 184. The order modified and approved the licensee's proposal for summer releases and turbidity monitoring measures relating to the geomorphology sensitive site investigation and mitigation plan (geomorphology plan) approved by Commission staff on March 24, 2009. On August 21, 2009, El Dorado filed a request for rehearing of the July 24 Order, arguing that the July 24 Order exceeded the Commission's authority and should be vacated. For the reasons discussed below, the Commission grants in part the request for rehearing.

Background

2. The 21-megawatt El Dorado Project is located on the South Fork of the American River and its tributaries, in El Dorado, Amador, and Alpine Counties, California, and occupies federal lands administered by the U.S. Forest Service (Forest Service).

3. Commission staff issued a new license for the project in 2006.² The license includes a number of mandatory conditions submitted by the Forest Service under section 4(e) of the Federal Power Act³ and by the California State Water Resources

¹ 128 FERC ¶ 62,057 (2009).

² 117 FERC ¶ 62,044 (2006).

³ 16 U.S.C. § 797(e) (2006). Section 4(e) requires that Commission licenses for projects located within federal reservations (here, national forest lands) include all

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Control Board (California Water Board) in its water quality certification issued for the project under the Clean Water Act (CWA).⁴ Article 401(a) of the El Dorado Project license requires that any plans filed with either the Forest Service or the California Water Board for their approval pursuant to any mandatory conditions must also be filed with the Commission for approval.

4. One of the plans required by the mandatory conditions is a geomorphology plan,⁵ which is to include an evaluation of the effects of a controlled release over the project's Caples Auxiliary dam spillway into the downstream channel.⁶ El Dorado submitted the geomorphology plan for Commission approval in August 2008, and, on March 24, 2009, Commission staff approved the plan.⁷ The approved plan provided for a controlled release over the Caples Auxiliary dam spillway during the spring of 2009, based on water availability.

5. El Dorado did not implement the controlled release during the spring of 2009. Instead, on June 25, 2009, El Dorado notified Commission staff and the agencies that it believed that Caples reservoir had sufficient stored water to provide the controlled release during the summer.

6. In comments regarding the proposed summer release, the Forest Service explained that the resource agencies had discussed the potential effects of authorizing a summer release instead of the spring release approved in the geomorphology plan.⁸ The Forest

conditions that the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of such reservations.

⁴ Section 401(d) of the CWA, 33 U.S.C. § 1341(d) (2006), provides that a water quality certification issued by a state water quality certifying agency shall become a condition of any federal license that authorizes construction or operation of the project.

⁵ The geomorphology plan is required by Forest Service condition 37.8, and water quality certification condition no. 13. Under Article 401(a) of the license, the plan must also be filed with the Commission for approval.

⁶ The purpose of the controlled release was to inform the development of a subsequent plan to address stabilization of the spillway channel. Information in the relicensing proceeding indicated potential problems with channel stability in Caples Creek and along the Caples dam spillway channel associated with an imbalance in bedload and stream flow, and a potential impact on river processes downstream.

⁷ 126 FERC ¶ 62,226 (2009).

⁸ See email correspondence attached to request for rehearing.

Service stated that a release of 60 cubic feet per second during the summer could have potential ecological effects, and asked the licensee to postpone the release until the spring of 2010. After further consultation between El Dorado and the resource agencies, an agreement was reached for a summer spillway release if El Dorado agreed to conduct turbidity monitoring.

7. On July 20, 2009, Commission staff instructed El Dorado to submit a request to the Commission for approval of a summer release and turbidity monitoring in the form of a water quality monitoring and pollution prevention plan, along with documentation of Forest Service approval.⁹ Commission staff cited license Article 401 and Forest Service condition 30 as the authority for requiring approval of the summer release and turbidity monitoring.¹⁰ On July 21, 2009, El Dorado submitted the requested information. In the filing, El Dorado alleged that it was not required to submit the information for Commission approval, instead characterizing the submittal as “a request for acknowledgment of turbidity monitoring implementation.”

8. On July 24, 2009, Commission staff issued an order modifying and approving El Dorado’s proposal for a summer spillway release with turbidity monitoring. The order characterized El Dorado’s requested modification to the geomorphology plan as an activity that requires the licensee to file a water quality and water pollution control plan pursuant to Forest Service condition 30 and license Article 401.

9. On August 21, 2009, El Dorado filed a request for rehearing.

⁹ See request for rehearing at 3.

¹⁰ Condition 30 states, in pertinent part:

The licensee *shall discharge no waste or byproduct on or affecting National Forest System lands* if it contains any substances in concentrations that would result in violation of water quality standards set forth by the State; would impair present or future beneficial uses of water; would cause pollution, nuisance, or contamination; or would unreasonably degrade the quality of any waters in violation of any federal or state law. Prior to construction, and during operation and maintenance of the Project, the licensee shall develop a plan approved by the USFS and subject to requirements of other federal and state water quality agencies. [Emphasis added.]

Discussion

10. El Dorado asserts that the July 24 Order is arbitrary and capricious because Commission staff had already taken final action on the geomorphology plan in the March 24 Order. El Dorado argues that, when no one timely sought rehearing of the March 24 Order, it became final, and the Commission cannot now impose additional turbidity-monitoring requirements. According to El Dorado, any potential water quality impacts associated with the geomorphology plan's activities should have been addressed during the Commission's review of the geomorphology plan.

11. El Dorado's argument is without merit. El Dorado's geomorphology plan proposed, and Commission staff approved, a spillway release to be made in the spring of 2009, if sufficient water was available. The March 24 Order stated that, if test flows could not occur due to water supply limitations, El Dorado would coordinate with the resource agencies to request an extension of time from the Commission.¹¹ Once El Dorado proposed to deviate from the approved plan and to make spillway releases at a time other than that specified in the plan, that change required the prior approval of the Forest Service, the California Water Board, and the Commission. In the course of reviewing the proposed revision to the plan, the Commission had the ability to impose additional measures springing from El Dorado's proposal. Approving a summer release with sufficient turbidity monitoring requirements to address the potential water quality impacts of such a release, was clearly reasonable and within the Commission's authority. In addition, it is unclear why El Dorado, which voluntarily agreed to conduct turbidity monitoring, objects to the Commission's memorializing that agreement. We therefore deny rehearing on this issue.

12. El Dorado also argues that the July 24 Order incorrectly used Forest Service condition 30 and license Article 401 as the basis for modifying the geomorphology plan. El Dorado points out, correctly, that Article 401 is derivative and arises only when the licensee is required to file specific plans with one of the mandatory conditioning agencies. This appears correct. However, although the record shows that the Forest Service requested that El Dorado conduct turbidity monitoring, there is no indication that the agency relied on condition 30 to support the request. Thus, although, as discussed above, we have concluded that the Commission had the authority to impose the turbidity monitoring requirement, we agree with El Dorado that the citation to condition 30 as the authority for reviewing El Dorado's requested modification to the geomorphology plan was inapt.

¹¹ 126 FERC ¶ 62,226 at 64,587.

The Commission orders:

El Dorado Irrigation District's August 21, 2009 request for rehearing of Commission staff's July 24, 2009 Order is granted in part, and denied in all other respects.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.