

130 FERC ¶ 61,192
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. 382-076

ORDER APPROVING AMENDMENT OF LICENSE

(Issued March 18, 2010)

1. On January 16, 2009, as supplemented on February 20, 2009, Southern California Edison Company (SCE), licensee for the 12-megawatt (MW) Borel Hydroelectric Project No. 382, filed a request to amend its license to delete the requirement to augment flows in the project's bypassed reach for whitewater boating and replace it with a requirement to provide funds to the U.S. Forest Service for the improvement of a boat takeout downstream of the project. 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, and it uses the U.S. Army Corps of Engineers (Corps) Isabella Dam.¹ For the reasons discussed below, we grant the amendment request.

Background

2. The Borel Project occupies approximately 159 acres of Sequoia National Forest lands administered by the U.S. Forest Service (Forest Service). 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 (at Isabella Auxiliary Dam) about four miles below the diversion dam; and four penstocks leading to the powerhouse. Water is discharged from the powerhouse into the Kern River.

3. As pertinent to this proceeding, during normal water years, the Corps releases water from Lake Isabella into SCE's second 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.

¹ The Corps' two-part Isabella Dam, consisting of the Main Dam and Auxiliary Dam, creates Lake Isabella.

4. 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 (Watermaster), who represents downstream water rights holders and has the authority to request irrigation releases from the Corps.³

5. In 2006, the Commission issued SCE a new license for the continued operation of the Borel Project.⁴ The license requires that SCE, with the agreement of the Corps and the Watermaster, augment flows in the bypassed reach to provide an opportunity for whitewater boating during the summer months.⁵ SCE must augment flows to 800 cubic feet per second (cfs) on weekends and holidays from Memorial Day through Labor Day when releases from Lake Isabella to the bypassed reach are at least 400 cfs. On weekdays, from July through Labor Day, if Lake Isabella releases are less than 500 cfs, SCE must augment flows so that flows in the reach are “at least 400 cfs, and when possible, 500 cfs.”⁶ Because the Corps controls all releases from Isabella Dam, SCE makes water for these required releases available to the Corps, which releases the water from the Main Dam into the bypassed reach, either directly or through the Isabella Project.

² In 1988, Commission staff issued a license for the Isabella Project, located at the Main Dam, to use flows the Corps releases through the dam. *Central Hydroelectric Corp.*, 43 FERC ¶ 62,240 (1988). In 1991, the license was transferred to Isabella Partners. The Isabella Project's tailrace discharges at the base of the Main Dam.

³ 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.

⁴ *Southern California Edison Company*, 115 FERC ¶ 62,187 (2006).

⁵ *Id.* at 64,854. These boating flows were proposed by SCE and supported by American Whitewater and the Sierra Club.

⁶ *Id.*

6. These flow requirements were submitted by the Forest Service under section 4(e) of the Federal Power Act (FPA),⁷ which 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. Forest Service Condition 26 establishes the schedule for, and provides details of, the required boating flow augmentation releases. However, Condition 26 also states:

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.^[8]

7. To implement Condition 26, Article 402 requires 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.⁹ Article 402 also requires SCE to enter into a Memorandum of Agreement (MOA) with the Watermaster and the Corps, signifying the

⁷ 16 U.S.C. § 797(e) (2006). *See* the Forest Service's section 4(e) conditions set forth in Appendix A of the 2006 license order, 115 FERC ¶ 62,187 at 64,846-54. The license order indicated that the whitewater flow augmentation requirements were being adopted at the Commission's discretion, under the comprehensive development/public interest standard of section 10(a)(1) of the FPA, 16 U.S.C. §803(a)(1) (2006). *See* 115 FERC ¶ 62,187 at P 50-56. On rehearing of the license order, the Commission recognized that the requirement was also a mandatory condition of the license under FPA section 4(e). *See* 117 FERC ¶ 61,067, at P 10-11 (2006).

⁸ 115 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."

⁹ *See* Article 402, as modified on rehearing, 117 FERC ¶ 61,067 at 61,291.

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. If these entities cannot reach an agreement, Article 402 states that the matter shall be referred to the Commission for resolution.¹⁰

8. On January 16, 2009, as supplemented February 20, 2009, SCE filed its request to amend Article 402.¹¹ SCE stated that, as required under Condition 26 and Article 402, it had engaged in consultation with agencies, and 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, following unsuccessful attempts to obtain the agreement of the Corps and the Kern River Water Users for release of the required flows, the consulted entities considered, but failed to obtain the necessary support for, an alternative flow regime whereby flows would be augmented during a compressed recreation boating season, resulting in a ramping up of flows once at the beginning of the season and a ramping down of flows at the end of the season. As a result, discussions shifted to providing structural improvements elsewhere in lieu of augmented flows. SCE now proposes, 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.

9. Included in the amendment request is a letter from the Forest Service exercising its reserved authority to modify its section 4(e) conditions. The Forest Service is revising Condition 26 to delete the flow augmentation requirements and instead require that SCE provide funds to be used by the Forest Service to improve its Democrat Dam Boating Take-out facility.¹²

¹⁰ The plan is to be developed in consultation with the Forest Service, the U.S. Fish and Wildlife Service, California Department of Fish and Game, California State Water Resources Control Board, the Watermaster, the Corps, and the licensee for the Isabella Project No. 8377. Although not required to be consulted, American Whitewater and Sierra Club were included in the discussions.

¹¹ The Article 402 plan and MOA were due January 2007. SCE asked for, and was granted, extensions of time (the most recent extended the deadline to January 17, 2009) to file the required plan and MOA. *See* Commission staff orders issued August 22, 2006; June 19, 2007; August 30, 2007; March 11, 2008; September 23, 2008; and December 31, 2008.

¹² Improvements include construction of a new boat exit ramp for commercial boaters; construction of a new take-out ramp for private boaters; and improvements to the parking area adjacent to the take-out ramps.

10. On February 6, 2009, the Commission issued public notice of the proposed amendment, setting a March 6, 2009 deadline to file comments, protests, and motions to intervene. Timely motions to intervene were filed by the Watermaster (supporting the amendment); State Water Board; and, jointly, American Whitewater, California Sportfishing Protection Alliance, Trout Unlimited, and Friends of the River (collectively, American Whitewater) (opposing the amendment).¹³ On March 9, 2009, the Sierra Club filed a late motion to intervene, which we will grant.¹⁴ Comments opposing the amendment were filed by the Sierra Club; American Whitewater Regional Coordinator; Eugene Hacker; and Peter Wiechers (filed by American Whitewater on his behalf). On March 6, 2009, SCE filed comments in response to the arguments in opposition.

Discussion

A. Flow Augmentation Requirement

11. We first consider whether to approve deletion of the whitewater flow augmentation requirement of the license. While the Forest Service has deleted the requirement from the license conditions it submitted under FPA section 4(e), we must independently evaluate whether we should continue to require the measure under section 10(a)(1) of the FPA, which we can do, so long as doing so would not be inconsistent with any other mandatory license conditions.¹⁵ In this case, there appears to be no such inconsistency.

12. We believe that the facts in this case warrant deletion of the requirement. As noted, the Corps makes all releases from its Main and Auxiliary Dams for flood control and as determined by the Kern River Watermaster, who represents downstream water rights holders and has the authority to request irrigation releases from the Corps. SCE cannot independently release flows. It can only make available flows to the Corps for the Corps to release downstream. Flow augmentation can take place only with the agreement

¹³ All timely, unopposed motions to intervene were granted automatically, pursuant to 18 C.F.R. § 385.214(c)(1) (2009).

¹⁴ See 18 C.F.R. § 385.214(d) (2009).

¹⁵ 16 U.S.C. § 803(a)(1). That section requires that any project for which the Commission issues a license shall be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes.

of the Corps and the downstream water rights holders through the Watermaster. Indeed, the license requires that the augmented flows be released only if SCE can obtain the consent of the Corps and the Watermaster.

13. There is ample evidence in the record that neither the Corps nor the Watermaster will consent to the release of augmentation flows.

14. As the amendment request explains,¹⁶ in a series of meetings spanning 2.5 years, SCE first attempted to obtain the agreement of the Corps and Watermaster to the three-month weekday and weekend schedule for augmented flows required by the license. However, it became clear early on that the Corps and Watermaster would not agree to release the flows established in Condition 26. Nor, as noted above, could agreement be reached on an alternative flow plan.

15. The Corps has explained:

Recent explorations at Isabella Dam have identified both seismic and seepage concerns. These discoveries have resulted in Isabella Dam being elevated to the top risk category in a risk assessment of the entire nationwide portfolio of Corps dams. The Corps has initiated an aggressive geotechnical investigation to further assess the risk and identify potential solutions. We anticipate the exploration and remediation program to take from 8 to 12 years to complete. Since this work is sensitive to lake level, we request that SCE and FERC postpone any requirement to alter releases from Isabella Dam solely for rafting concerns until the remediation is complete.^[17]

SCE states that the Corps has identified a risk of liquefaction (under the dam) during an earthquake, and recent monitoring of the dam by the Corps identified an increase in subsurface leakage through the dam.¹⁸

16. Moreover, the Watermaster continues its years-long objection to any scheme of boating releases from Isabella Lake.¹⁹ The Watermaster explains that the Kern Water

¹⁶ See page 1 of the cover letter to the January 16, 2009 amendment request.

¹⁷ See January 11, 2007 letter from the Corps to SCE, included in SCE's January 16, 2009 amendment application.

¹⁸ See SCE's March 7, 2009 filing at 3.

¹⁹ Watermaster's March 5, 2010 motion to intervene. The Watermaster notes that it objected to boating flow releases in the relicensing proceeding. *Id.* at 3.

Users,²⁰ which are represented by the Watermaster, collectively hold virtually all of the consumptive water rights in the Kern River, with priority dates ranging from 1870 to 1891. The Kern Water Users also have rights under a 1964 contract with the United States to the entire 535,000 acre-feet of conservation storage space in the lake. The Watermaster acts as agent for the Kern Water Users, scheduling releases from the lake for delivery to them at various delivery points beginning about 50 miles downstream.

17. The Watermaster explains 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 their water rights, schedules, and directions.”²¹ The Watermaster states that hourly fluctuations in the point of release from the power canal to the river channel, then back to the power canal several hours later (as would be necessary to release whitewater flows) “would have a seriously disruptive effect on water deliveries at the Kern Water Users’ downstream diversion points.”²²

18. American Whitewater and the Sierra Club contend nevertheless that, because the relicense order requires the flows,²³ SCE is required to obtain all rights in project property necessary to carry out its responsibilities under the license, regardless of the Corps’ objections.²⁴ However, federal dams and reservoirs are not included in project licenses, and the Commission and its licensees have no control over the construction, operation, and maintenance of those federal facilities.²⁵ Thus, SCE cannot obtain the rights to control Corps facilities.

²⁰ See n.3, *supra*, for a list of these entities.

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ Actually, as this order explains, the requirement for augmentation flows is not an absolute one but recognizes the possibility that there can be no such flows without the Corps’ and Watermaster’s agreement.

²⁴ American Whitewater and Sierra Club cite to standard Article 5 of the license, 115 FERC at 64,842.

²⁵ See *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company*, 8 FERC ¶ 61,156, at 61,591(1979), where the Commission explained:

. . . the Commission has authority to license the construction, operation and maintenance of non-Government power houses and other project works specifically related only to the

(continued)

19. Under these circumstances, we see no reason to retain this requirement in the license. We therefore grant SCE's request to delete Article 402 from the license.²⁶

B. Funding of Forest Service Facilities

20. Neither Article 402 nor Condition 26 requires SCE to develop and implement alternative recreation measures in the event that the augmentation flows cannot be released. Nevertheless, when SCE was unable to obtain the Corps' and Watermaster's agreement to release the augmentation flows, it engaged in additional discussions with the consulted entities regarding an alternative to the flow requirement whereby SCE would provide funds to the Forest Service to improve the Forest Service's Democrat take-out facility, located on the Borel River about ten miles downstream of the project's powerhouse.

21. As noted, the Forest Service has exercised its reserved authority to revise its section 4(e) conditions to require the agreed-upon funding of improvements to the Democrat take-out facility. The revised Condition 26 is submitted pursuant to FPA section 4(e) and thus is a mandatory license requirement that the Commission must accept.²⁷ Therefore, we will include the revised condition in the license.

production and transmission of power at Government dams (since those works would utilize the water power from those dams); but not the construction, operation and maintenance of those dams

²⁶ Contrary to American Whitewater's and the Sierra Club's contentions, we find that the Corps has provided sufficient information to support its determination that providing augmented flows would impede the Corps' investigation of the seismic and seepage problems at the Corps' dam. However, regardless of the persuasiveness of the Corps' evidence, we will not second guess the Corps in this matter. Nor can we order the flows without the Corps' consent.

²⁷ We agree with American Whitewater that the funding requirement for improvements at the downstream Democrat take-out is inconsistent with the Commission's mitigation policy, as expressed in *Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 (2006), in that there does not appear to be a nexus between the Borel Project and the finding of improvements to the Democrat take-out, which is located far downstream and well outside the boundary of the Borel Project. However, as noted, the funding requirement is a mandatory requirement under section 4(e) and must therefore be included in the license.

C. Sufficiency of the Amendment Application

22. We reject American Whitewater's contention that the amendment request fails to comply with the Commission's regulations governing license amendments²⁸ because it fails to include reasons why the proposed changes to Article 402 are necessary, and fails to address state law regarding the impact to "bed and banks" of implementing the improvements to the downstream take-out, as required by our amendment regulations. The reason for the amendment is clear: the Corps and Watermaster would not agree to the releases. As for state law regarding the impact to "bed and banks" of implementing the amendment, the amendment merely requires providing funds to the Forest Service for improvements to a take-out facility and not the actual construction of the improvements themselves, which will be completed by the direction of the Forest Service.

23. American Whitewater contends that the amendment request fails to demonstrate a consensus of the consulting entities on the proposed changes, explaining that it and Sierra Club participated in the consultations but were not given adequate information showing that the proposed changes to Article 402 are needed.

24. Neither American Whitewater nor Sierra Club were required to be consulted under Article 402. Rather, SCE included them voluntarily in the consultations. They had a fair opportunity to address the issues in consultations. Moreover, Article 402 does not require the agreement of the consulting entities (much less American Whitewater and the Sierra Club), only that they be consulted.

25. American Whitewater argues that the Commission may not amend the license to delete the flow augmentation requirements and include the improvements to the downstream Democrat take-out until SCE obtains state water quality certification under the Clean Water Act (CWA) for those amendments. It contends that the proposed amendments materially change the project's impact on water quality, thus necessitating certification.

26. We reject this argument. Section 401(a)(1) of the CWA,²⁹ provides that "any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" that such discharge will comply with applicable water quality standards.³⁰ Here, neither the

²⁸ American Whitewater cites to 18 C.F.R. §§ 4.201(a)(4) and (5) (2009).

²⁹ 33 U.S.C. § 1341(a)(1).

³⁰ *Id.* § 1341(d).

proposal to delete the flow augmentation requirement (which was in any event conditioned upon obtaining the approval of the Corps and the Watermaster) nor the requirement to provide funds to the Forest Service would “result in a discharge” from the project.³¹

The Commission orders:

(A) Article 402 of the license for Project No. 382, issued May 17, 2006 (115 FERC ¶ 62,187 (2006)), as revised by the October 19, 2006 *Order on Rehearing and Clarification* (117 FERC ¶ 61,067), is deleted.

(B) Condition 26 included in Appendix A of the May 17, 2006 license order for Project No. 382, made a condition of the license by Ordering Paragraph (D) of the May 17, 2006 Order as revised by Ordering Paragraph (B) of the October 19, 2006 *Order on Rehearing and Clarification* (117 FERC ¶ 61,067), is deleted and replaced with the following:

Condition 26—Boating Enhancement

The licensee shall provide funding to the Forest Service via Collection Agreement in the amount of \$327,540 for the purpose of rehabilitating and improving public recreation facilities on National Forest Service Land located at Democrat Take-Out. Improvements to be made by Forest Service include:

1. Construction of an improved boat exit ramp for commercial boaters at Democrat Takeout.
2. Construction of a new take-out ramp for private boaters.
3. Improvements to the parking area adjacent to the take-out ramps.

³¹ As noted, the Democrat take-out itself will not be included in the Borel license, and any requirements related to the construction of improvements to the take-out are not responsibilities of the licensee, but rather of the Forest Service. Similarly, any modifications to the take-out facility, such as those proposed by Peter Wiechers and Paul Martzen, must be raised with the Forest Service.

A full description of the improvements can be found in the Plan for Recreational Boating Enhancement.

(C) Sierra Club's late motion to intervene in this proceeding, filed March 9, 2009, is granted.

(D) This order constitutes final agency action. Any party to this proceeding may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2009). The filing of a request for rehearing does not operate as a stay of the effective date of this order or of any other date specified in this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.