

134 FERC ¶ 61,195
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern California Edison Company

Project No. 1390-063

ORDER AMENDING LICENSE

(Issued March 17, 2011)

1. On August 18, 2010, Southern California Edison Company (Edison or licensee), licensee for the Lundy Hydroelectric Project No. 1390, filed an application for an amendment of the project license. The licensee proposes to install a high-density polyethylene pipeline, mainly within the existing earthen return ditch extending from the Lundy Powerhouse tailrace (near Wilson Creek) back to Mill Creek. The project is located on Mill Creek in Mono County, California, partly on land in the Inyo National Forest and on land administered by the U.S. Department of the Interior's Bureau of Land Management (BLM).

Background

2. A new license for the Lundy Project was issued on March 3, 1999.¹ The project consists of (a) 33-foot-high and 690-foot-long earth and rockfill Lundy dam, impounding Mill Creek to form the 132-acre Lundy Lake, (b) a 270-foot-long concrete intake structure, (c) a 12,000-foot-long, 48-inch-diameter pipeline, (d) a 3,000-foot-long varying-diameter penstock, (e) the Lundy powerhouse with two generating units, each with a rated capacity of 1,500 kilowatts (kW), (f) a tailrace discharging flows into Wilson Creek and bypassing approximately 7 miles of Mill Creek, (g) a water return ditch known as the Mill Creek Return Ditch extending from the powerhouse and tailrace to Mill Creek, (h) a 15-foot-long transmission line, and (i) appurtenant facilities. Historically, powerhouse flows have been directed into the return ditch only when necessary to satisfy senior water rights on Mill Creek; otherwise, most of the tailrace water has been diverted into Wilson Creek.

3. Requests were filed for rehearing of the order issuing the new license. Subsequently, Edison and several other entities reached a settlement intended to resolve

¹ *Southern California Edison Company*, 86 FERC ¶ 61,230 (1999).

outstanding issues raised in the rehearing requests, as well as contentions raised by People for Mono Basin Preservation (Mono Basin Preservation) and Mono County, California (Mono County) that the license's minimum flow schedule would interfere with water rights. Edison filed the offer of settlement with the Commission asking that it be accepted without material modification. To accomplish the purposes of the settlement, Edison proposed that the Commission amend the license to require Edison to develop an annual water management plan in consultation with water rights holders and redevelop the return ditch as a conveyance facility with a carrying capacity of no less than 40 cubic feet per second (cfs) but no more than 52 cfs.

4. The Commission issued an Order Amending License and Dismissing Requests for Rehearing on November 15, 2007.² Among other things, the Commission stated that it was appropriate for the return ditch to remain as a project work in the new license, as it was under the old license, because the return ditch is the only means of returning water to the creek from which the project diverts it. However, the Commission did not require the licensee to develop the annual water management plan or to upgrade or replace the return ditch, because it concluded that no project purpose would be served by compelling the licensee to take measures to implement a privately reached arrangement for distributing water to satisfy water rights. Rather, the Commission stated that the licensee would be free to file an application for an amendment of the license to upgrade or replace the return ditch to improve the licensee's ability to divert water for such non-project uses.³ The Commission added that any such application would have to specify the size and type of the replacement facility and would be subject to public notice and comment.

Proposed Amendment

5. The licensee's August 18, 2010 amendment request proposes to install a high-density polyethylene pipeline, 36 inches in diameter and approximately 1.37 miles long, and with a maximum capacity of 52 cfs, within the existing earthen return ditch extending from the Lundy Powerhouse tailrace (near Wilson Creek) back to Mill Creek. The return pipeline will exit the lower portion of the head works directly under the existing Wilson Creek Channel concrete liner for a short distance and then diverge to one side of the channel. Once the pipeline reaches the upstream end of the existing return ditch diversion, the pipeline will be buried within the existing alignment of the return

² *Southern California Edison Company*, 121 FERC ¶ 61,154 (2007). (November 15 Order).

³ Edison had stated that the return ditch, in its current condition, could reliably carry about 12 to 16 cfs of water. *See Southern California Edison Company*, 121 FERC ¶ 61,154 at P 89.

ditch until it reaches Mill Creek. In addition to the pipeline, a new concrete head works would be constructed at the tailrace of the Lundy Powerhouse.

6. All water flowing through the powerhouse will enter the new tailrace diversion structure through the powerhouse tailrace. The proposed tailrace diversion structure will have an approximate footprint of 20 feet by 30 feet. The structure will be divided into an upstream and a downstream compartment, with several gates controlling the water levels into each compartment. Water that is not metered into the proposed return pipeline will overflow a weir into the existing Wilson Creek channel.

7. The purpose of the proposed pipeline is to upgrade the means for returning, when necessary, a portion of the water that has been diverted from Lundy Lake through the Lundy Powerhouse back to Mill Creek below Lundy Lake. The licensee proposes that these project modifications be effected through the addition of a new license article requiring it to consult with specified entities and file a plan for engineering, permitting, constructing, and operating a modified powerhouse tailrace diversion structure and a Mill Creek return water conveyance facility.

Consultation

8. The licensee circulated a draft application for an amendment of license to resource agencies and entities that included but were not limited to the United States Forest Service (Forest Service), BLM, the U.S. Fish & Wildlife Service (FWS), California Department of Fish and Game (Cal Fish and Game), California State Water Resources Control Board (Water Board), and the California State Historic Preservation Officer. Comments were received from Mono Lake Committee, Mono Basin Preservation, the Inland Aquaculture Group, Mono County, and the Los Angeles Department of Water and Power. The licensee attached a response to these comments with the final application.

Public Notice

9. On September 28, 2010, the Commission issued a Notice of Application for Amendment of License, and Soliciting Comments, Motions to Intervene and Protests. The notice set a closing date of October 28, 2010, for any comments, motions to intervene, and protests to be filed with the Commission.

10. On October 20, 2010, Mono County filed a protest and comments, and, on October 22, 2010, a motion to intervene. Mono County asserts that the proposed amendment sets the stage for future water rights battles because the proposed pipeline's 52-cfs capacity would permit a substantial diversion of water from Wilson Creek, is inconsistent with the Commission's 2007 order because it seeks to make construction of the improved return conveyance a license requirement, and necessitates the preparation of an environmental impact statement (EIS) to assess the potential effects of substantially reduced flows in Wilson Creek on riparian habitat and the recharge of domestic wells.

Mono County adds that the environmental assessment (EA) issued by Commission staff in May 2006 for the license amendment proposed by the settlement did not contain an adequate analysis of these issues because it reflected a high degree of uncertainty regarding environmental effects, primarily due to a lack of data.

11. On October 25, 2010, Mono Basin Preservation filed a protest and comments and a motion to intervene. Mono Basin Preservation opposes the proposal because of the potential adverse impact that would occur in the north end of the Mono Basin as a result of diverting increased flows into the proposed pipeline. Mono Basin Preservation, like Mono County, argues that the May 2006 staff EA is no substitute for an EIS, and that the EA's findings were based on insufficient information. Mono Basin Preservation contends that construction of the enlarged conveyance system and its use to transport increased flows to Mill Creek are connected actions that must be evaluated in the same environmental document. Mono Basin Preservation adds that, if construction of the pipeline is allowed, it should not be made a license condition.

12. On October 28, 2010, the United States Department of the Interior, Office of Environmental Policy and Compliance, filed a pleading stating that it has no comments. Also on October 28, 2010, American Rivers, Inc., and California Trout, jointly, and Mono Lake Committee filed motions to intervene. American Rivers, Inc. and California Trout state that approval of this application will not require or result in any specific allocation of tailrace flows, and they support environmental review of the impacts of approving the proposed pipeline.

13. Cal Fish and Game, on October 28, 2010, filed a motion to intervene, as well as comments, stating that the amendment is a necessary step to implement the multi-party settlement agreement. Mono Lake Committee also filed comments on October 28, 2010, that, among other things, request that the Commission approve the application.

14. The Forest Service filed comments on October 29, 2010, urging the Commission to approve the application without considering how tailrace flows will be allocated.

15. On November 12, 2010, Edison filed a motion for leave to answer and answer to the protests of Mono County and Mono Basin Preservation, pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Commission.⁴ Rule 213 provides that an answer may not be made to a protest unless otherwise ordered by the decisional authority. As permitting Edison's answer is unnecessary to the disposition of this application, the motion is denied.

⁴ 18 C.F.R. §§ 385.212 and 385.213 (2010).

Discussion

16. In requesting authorization to install the pipeline, Edison seeks to modify an existing project work, the earthen ditch, to increase its capacity so that more water can potentially be diverted from the powerhouse to Mill Creek. This additional water diversion would be undertaken to reallocate water in accordance with the settlement agreement entered into by Edison and other entities. As noted earlier, in our November 15 Order, we stated that the distribution of water to implement this agreement would not be a project purpose, and we made it clear that any future application, such as the present one, to amend the license to upgrade or replace the return ditch for that purpose would involve the diversion of water for non-project uses.

17. As we stated in the November 15 Order, the return ditch is a licensed project work because it is the only means by which water could be returned from the powerhouse to Mill Creek, from which the project dam diverts it. Moreover, in issuing the new license, although we did not require the direction of any flows through the return ditch, we reserved authority to do so.⁵ Under the present proposal, Edison would essentially be substituting the pipeline for the ditch as a water conveyance facility, and the pipeline, once constructed, would have to be included as a project work to preserve the project's future ability to direct water into lower Mill Creek, should we determine that it is necessary for any project purpose.

18. Because the existing return ditch is sufficient to meet project purposes, and because the new facilities are not required to satisfy the terms of the project license, the standard we apply in reviewing the proposed amendment is whether it will unduly interfere with any project works or project purposes. Because the new facilities would not prevent the licensee from satisfying any flow requirements we might impose (and indeed might make it easier), we conclude that the amendment will not in any way interfere with the existing project or license requirements. Moreover, in its May 2006 EA, Commission staff considered the licensee's settlement proposal to expand or replace the return ditch, including through installation of a buried pipe. Staff analyzed the effects of constructing such an improved diversion facility and recommended measures to mitigate any possible adverse effects of that construction.⁶

19. The EA found that construction of the pipeline and conveyance facility would not affect geology and soils or recreation. The EA found that soil disturbance from construction activities could increase stream turbidity and sedimentation in either Wilson Creek or Mill Creek, which could affect aquatic resources such as spawning salmonids.

⁵ See *Southern California Edison Company*, 121 FERC ¶ 61,154 at P 90.

⁶ See *Southern California Edison Company*, 121 FERC ¶ 61,154 at P 49.

Higher turbidities and sedimentation could impair spawning success of brown trout through impaired respiration and smothering of redds, particularly if construction activities were to take place during the fall season. However, implementation of best management practices for in- or near-water work would help minimize any erosion-related effects. The EA recommended that the licensee be required to prepare an erosion control plan that specifies the measures that would be used during the above activities for the control of erosion, stream sedimentation, dust, and soil mass movement to help ensure that construction impacts to aquatic resources would be minimized.⁷

20. The EA also found that construction of the pipeline could result in a minor loss of wildlife habitat and minor disturbances to local wildlife populations.⁸ Revegetation of any disturbed areas would benefit local wildlife populations and would reduce potential erosion. The EA recommended that the licensee, before starting any land-disturbing activities, prepare a plan for revegetating disturbed areas.

21. We conclude that approval of the application, as conditioned by the above recommended measures, will be consistent with project purposes and should be granted. To implement staff's recommendation that the licensee prepare an erosion control plan, we are requiring the licensee to include its erosion control measures as part of its required design plans and specifications filing. We are also requiring the licensee, prior to construction, to file a plan for revegetating disturbed areas. The vegetation planting plan would also serve to mitigate any adverse effects that could occur to aesthetics due to land clearing and construction.⁹

22. The objections of Mono County and Mono Basin Preservation are directed not to the installation of the proposed pipeline but to its prospective use to divert flows now being directed into Wilson Creek. They express concern that allowing construction of the

⁷ EA at 43.

⁸ EA at 62.

⁹ No historic properties have been identified in the area of potential effect, but the EA notes that the licensee would be required to follow the Commission-approved cultural resources management plan (CRMP). The CRMP contains specific measures to protect any archaeological resources were any unanticipated discoveries to occur. In addition, construction of the new head works and pipeline would not affect threatened and endangered species at the project. FWS was given an opportunity to comment on the application during pre-filing consultation but did not respond. As previously noted, on October 28, 2010, the United States Department of the Interior, Office of Environmental Policy and Compliance, stated that it had no comments on the application.

pipeline would adversely affect water rights in the basin and would set the stage for future water rights debates.

23. We addressed these same concerns in our November 15 Order, in which we stated that, to the extent water rights users might dispute the licensee's water allocation of flows downstream of the powerhouse, this would be a matter for the State of California to address.¹⁰ We explained that approving the construction of a new return water conveyance facility would not be equivalent to requiring the diversion of tailrace flows through it into Mill Creek. Further, any flow diversion that might occur as a result of reconstructing the return water conveyance facility would not be the result of amending the license to approve the construction but rather of a decision by the licensee to divert additional water into the return conveyance to satisfy calls for water pursuant to water rights and priorities. We stated further in that order that approving a modification or replacement of the existing return ditch and diversion structure would only make such a diversion possible, but the flow diversion would be neither required nor authorized by such a Commission action.¹¹ The licensee would have to obtain any necessary rights to water it proposes to divert into the pipeline, and the Commission would play no role in such actions, since we are not requiring these flows.

24. We are concerned here only with an application to modify the powerhouse tailrace structure and install a buried pipeline in the ditch, not with an application to divert flows through the pipeline. Nevertheless, in its May 2006 EA, Commission staff analyzed environmental effects of diverting flows through such an improved water conveyance facility.

25. As we noted in our November 15 Order, staff concluded that, under some possible water allocation scenarios, outstanding or optimum conditions for brown trout in Wilson Creek would persist, but that, during low-flow months, if all powerhouse flows could be directed through an underground pipe to Mill Creek, a year-round brown trout fishery would be unlikely to persist in Wilson Creek.¹² Staff also considered the effect of potential flow diversions on groundwater, upon which wells in the project area depend. Staff concluded that the effect on groundwater would depend on how water is allocated between the two creeks in any given year.¹³ Staff also found that wetlands near the mouth of Wilson Creek support a rich assortment of plant species and are largely

¹⁰ *Southern California Edison Company*, 121 FERC ¶ 61,154 at P 83.

¹¹ *Id.* at P 91.

¹² *Id.* at P 40.

¹³ *Id.* at P 43-44.

supported by groundwater that originates as surface flow in Wilson Creek.¹⁴ Staff concluded that, if flows were diverted from Wilson Creek to Mill Creek, the riparian corridor in upper Wilson Creek would persist, though it would likely be reduced in extent, while minimal adverse effects should occur in lower Wilson Creek due to the paucity of riparian vegetation in that stretch.¹⁵

26. Mono County and Mono Basin Preservation argue that this EA is inadequate and that an EIS must be prepared. These entities took the same position in the settlement proceeding.¹⁶ However, we considered the EA adequate to support an analysis of the environmental effects of essentially the same proposal for upgrading the water conveyance facility as is under consideration here. As we stated, the EA was virtually equivalent to an EIS, and there was no basis to expect that an EIS would have been more thorough or would have reached different conclusions. In addition, we noted, staff used the best data available, and collection of adequate data on groundwater changes or the relationship between groundwater and riparian habitat might not be obtainable or verifiable in the abstract.¹⁷

27. Mono County and Mono Basin Preservation have not presented any reason for us to reconsider the adequacy of staff's EA. While the project license does include a requirement for minimum flows into Mill Creek, to ensure the protection of resources affected by the project's diversion of flows from that waterway, nothing in the license authorizes or requires the diversion of flows from or into Wilson Creek, so that creek is not affected by the project, and the maintenance of flow levels there is not a project purpose. More to the point, although some additional diversion of flows away from Wilson Creek might be a reasonably foreseeable consequence of granting this amendment application, we reiterate that the diversion of flows would be neither required nor approved by us but would involve the licensee's own action in diverting additional water into the improved conveyance facility. Further, there is no evidence regarding the extent to which additional flows would be diverted, rendering any detailed conclusions regarding the impacts of such activity highly speculative.

28. Mono County and Mono Basin Preservation argue that, if construction of the pipeline is approved, construction should be permissive and not made a license requirement. We agree. As we explained in the November 15 Order, while the licensee

¹⁴ *Id.* at P 46.

¹⁵ *Id.* at P 47.

¹⁶ *See Southern California Edison Company*, 121 FERC ¶ 61,154 at P 61-67.

¹⁷ *Id.* at P 103.

could seek approval of the construction of an improved conveyance facility, diversion of additional flows through that facility to satisfy water rights would be a non-project use. We are not requiring construction of the upgraded facilities, although, in the event that the licensee elects to construct the pipeline, we will require the licensee to implement the measures specified above. Moreover, our authorization to replace the ditch with the pipeline will expire after four years.

29. Mono Basin Preservation argues that the licensee should be required to obtain approval of the Water Board to reallocate tailrace flows before seeking Commission approval to construct the pipeline. While we agree that it is within the authority of the state to ensure that any new allocation of flows respects the rights of water users and conforms to state water rights laws, it is not necessary to delay granting this application until the licensee obtains any such state approvals as may be necessary. As we have stated, a grant of the application to construct a new pipeline does not authorize the redirection of any particular flows within that pipeline, and any disputes regarding such a redirection must be addressed at the state level.

30. Edison requests that we add a license article requiring it to file a plan for engineering, permitting, construction, and operation of a modified powerhouse tailrace diversion structure and return water conveyance facility. However, Edison's application describes the proposed construction in sufficient detail that we do not need to require the filing of a plan but rather will authorize implementation of its proposal here.

31. The licensee filed exhibits A, D, and F to reflect the proposed amendment with the amendment application on August 18, 2010. Because the licensee is not required to construct the pipeline, we do not approve these exhibits in this order.

32. The licensee filed a location map of the proposed pipeline. Staff has reviewed the licensee's approved Exhibit G drawings to analyze the proposed location of the pipeline. The approved drawings identify the project boundary as 30 feet wide in the vicinity of the return ditch. The project boundary is offset 15 feet from the centerline of the return ditch on both sides. As a result of the project boundary being 30 feet wide in the vicinity of the return ditch, the pipeline should not require an amendment to the project boundary. However, if the licensee determines that the pipeline will require a change to the project boundary to include additional lands, it must file an amendment application with the Commission for such authorization.

33. Ordering paragraph (C) requires the licensee, upon completion of construction of the pipeline and head works, to file revised Exhibits A, F, and G to show the project as built.

Conclusion

34. We conclude that authorization to construct the improved return conveyance system would not constitute a major federal action significantly affecting the quality of the human environment. This order approves the installation of a high-density polyethylene pipeline, with a maximum capacity of 52 cfs, within the existing earthen return ditch extending from the Lundy Powerhouse tailrace back to Mill Creek. In addition to the pipeline, this order approves the construction of a new concrete head works at the tailrace of the Lundy Powerhouse.

The Commission orders:

(A) The amendment application for the Lundy Hydroelectric Project No. 1390 filed August 18, 2010, is granted, as provided in this order.

(B) The motion for leave to answer, filed November 12, 2010, by Southern California Edison Company is denied.

(C) Within 45 days from completion of construction, the licensee shall file, for Commission approval, revised Exhibits A, F, and G to describe and show the project as-built after completion of the return conveyance system.

(D) The authorization granted by this order shall expire four years from the date of this order.

(E) At least 60 days prior to the start of any construction, the licensee shall submit one copy of its plans and specifications and a supporting design document to the Commission's Division of Dam Safety and Inspections (D2SI) – San Francisco Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, D2SI). The submittal to the D2SI - San Francisco Regional Engineer must also include as part of preconstruction requirements: a Quality Control and Inspection Program, Temporary Construction Emergency Action Plan, and Soil Erosion and Sediment Control Plan.

The licensee may not begin any land-disturbing activities until the D2SI – San Francisco Regional Engineer has reviewed and commented on the plans and specifications required by this article, determined that all preconstruction requirements have been satisfied, and authorized the start of construction.

(F) Before starting construction, the licensee shall review and approve the design of contractor-designed cofferdams and deep excavations and shall make sure construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of the cofferdam, the licensee shall submit

one copy to the Commission's Division of Dam Safety and Inspection's (D2SI) – San Francisco Regional Engineer and two copies to the Commission (one of these copies shall be a courtesy copy to the Commission's Director, D2SI), of the approved cofferdam construction drawings and specifications and the letters of approval.

(G) At least 90 days prior to the start of construction, the licensee shall file with the Commission, for approval, a plan for revegetating disturbed areas to include: (a) a description of the plant species used and planting densities; (b) a monitoring program to evaluate the effectiveness of the planting, including provisions for filing the monitoring reports with the Commission; (c) a description of procedures to be followed if monitoring reveals that the revegetation is not successful; and (d) an implementation schedule that provides for revegetation within the disturbed area as soon as practicable after the beginning of land-clearing or land-disturbing activities.

(H) This order constitutes final agency action. Any party 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 FPA, 16 U.S.C. § 8251 (2006), and the Commission's regulations at 18 C.F.R. § 385.713 (2010). 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. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.