

135 FERC ¶ 61,164
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. 1390-064

ORDER DENYING REHEARING

(Issued May 19, 2011)

1. The County of Mono, California (Mono County) has requested rehearing of the Commission's March 17, 2011 order granting an application by Southern California Edison Company (Edison), licensee for the Lundy Hydroelectric Project No. 1390, for authorization to install a high-density polyethylene pipeline, mainly within an existing earthen ditch.¹ As discussed below, we deny rehearing.

Background

2. The Lundy 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). The project diverts water from Mill Creek, and historically has for the most part discharged flows from the powerhouse into Wilson Creek, which runs generally north of, and parallel to, Mill Creek. A water return ditch known as the Mill Creek Return Ditch extends from the powerhouse and tailrace back to Mill Creek, so that flows can be returned to the creek when necessary.

3. A new license for the Lundy Project was issued on March 3, 1999.² After the license was issued, various parties that had sought rehearing of the order reached a settlement that, among other things, attempted to resolve contentions raised by Mono County and others that the minimum flow schedule required by the license would interfere with water rights. In filing the settlement, Edison proposed, among other things, that the Commission amend the license to require Edison to develop an annual water

¹ *Southern California Edison Company*, 134 FERC ¶ 61,195 (2011).

² *Southern California Edison Company*, 86 FERC ¶ 61,230 (1999).

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, 2007.³ 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 water distribution arrangement. 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.⁴

5. On August 18, 2010, Edison filed an amendment application proposing 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, along with related works. The purpose of the proposed pipeline was to upgrade the means for returning, when necessary, a portion of the water that had been diverted from Lundy Lake through the Lundy Powerhouse back to Mill Creek.

6. On October 20, 2010, Mono County filed a protest and comments, and, on October 22, 2010, a motion to intervene. The county asserted that the proposed amendment would set 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; that the proposal was inconsistent with the Commission's 2007 order because it sought to make construction of the pipeline a license requirement (which it also asserted necessitated the preparation of an environmental impact statement (EIS)); and 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 the potential effects of reduced flows in Wilson Creek on riparian habitat and the recharge of domestic wells.

³ *Southern California Edison Company*, 121 FERC ¶ 61,154 (2007).

⁴ 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.

7. In the March 17, 2011 order, the Commission reiterated that 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. However, it explained that because the existing return ditch is sufficient to meet project purposes, and because the new facilities are not required to meet any license requirements, the standard for reviewing the proposal to construct the larger-capacity pipeline was whether it will unduly interfere with any project works or project purposes. The Commission concluded that the new facilities would not in any way interfere with the existing project or license requirements and therefore approved the construction.

8. The Commission also discussed the May 2006 EA, in which Commission staff considered, among other things, the settlement proposal to expand or replace the return ditch through installation of a buried pipe. In the EA, staff analyzed the effects of constructing such an improved diversion facility and recommended measures to mitigate any possible adverse effects of that construction.⁵ The Commission found that approval of the amendment application, as conditioned by measures recommended in the EA (erosion control measures, and a plan for revegetating disturbed areas), would be consistent with project purposes and should be granted.

9. The Commission explained that the issues raised by Mono County were directed not to the installation of the proposed pipeline but to its prospective use to divert flows now being directed into Wilson Creek. We stated that we addressed these same concerns in our November 15, 2007 order, in which we noted 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, that approving the construction of a new return water conveyance facility would not be equivalent to authorizing or requiring the diversion of tailrace flows through it into Mill Creek, and that 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.⁶ The Commission agreed with Mono County that construction of the pipeline should be made permissive and not be a license requirement.

10. On April 13, 2011, Mono County filed a request for rehearing, arguing that the Commission erred by not preparing an EIS and by not implementing certain mitigation measures discussed in the EA.⁷

⁵ See *Southern California Edison Company*, 121 FERC ¶ 61,154 at P 49.

⁶ *Southern California Edison Company*, 121 FERC ¶ 61,154 at P 83.

⁷ On April 28, 2011, Edison filed a motion for leave to file and answer in response to Mono County's request for rehearing. Rule 213(a)(2) of the Commission's Rules of
(continued)

Discussion

A. Need to Prepare an EIS

11. Mono County argues that the Commission erred in concluding that it did not need to prepare an EIS, rather than an EA, to support its action here.

12. As an initial matter, Mono County is estopped from raising this issue here. Mono County was party to the amendment proceeding that led to our November 15, 2007 order, in which our staff prepared the EA at issue here. The county argued there, as it does now, that approval of the settlement – which specifically included the upgrade of the return ditch -- required preparation of an EIS, but did not seek rehearing of our determination to the contrary.⁸ The county does not suggest that circumstances have changed or that we are dealing with new matters here. Therefore, to again contend that we were required to prepare an EIS is an improper, untimely collateral attack on the November 15, 2007 order.⁹

13. In addition, we note that Mono County does not provide any support for its general assertions, but rather simply states that the Commission erred in concluding: (1) that the EA adequately analyzed environmental impacts and was virtually equivalent to an EIS, (2) that the Commission was presented with no reason to question the adequacy of the EA, and (3) that there is no evidence regarding the extent to which flows might be diverted from Wilson Creek and thus that the impacts of such diversions are speculative.¹⁰ While Mono County does provide citations to the National Environmental Policy Act (NEPA), the regulations of the Council on Environmental Quality (CEQ), and case law, it does not explain the applicability of these citations to this case, nor does it

Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), generally prohibits answers to requests for rehearing. Accordingly, Edison's motion is denied.

⁸ See 121 FERC ¶ 61,154 at P 62.

⁹ See, e.g. *California Independent System Operator Corporation* 123 FERC ¶ 61,285, at P 226 (2008) (concluding that raising issue previously addressed by Commission was untimely collateral attack on prior order); *Rhineland Paper Company* 111 FERC ¶ 61,419, at P 10 (2005) (stating that failure to raise issue regarding project boundary during licensing process made attempt to raise matter in post-license proceeding untimely collateral attack on licensing order).

¹⁰ See Request for Rehearing at 2-3.

present factual or legal arguments to support its contentions.¹¹ In consequence, the county's argument fails for lack of support or necessary specificity.

14. In any event, the citations provided by the county do not demonstrate any flaw in the March 17, 2011 order. For example, the county cites generally to the entirety of the NEPA,¹² but does not indicate which, if any, sections of that statute apply here or demonstrate any error on our part. Likewise, the county references portions of CEQ's regulations¹³ without any discussion of their applicability to this case. Finally, the county cites, without discussion, three opinions by the United States Court of Appeals for the Ninth Circuit.¹⁴ These cases appear to stand for the general proposition that an EIS must be prepared in cases involving significant or unknown environmental impacts. However, the county does not dispute our finding that the limited action that we are approving here, construction of the pipeline, will have no significant impacts. Rather, it argues that possible future actions – the flow of water through the pipeline – may have such impacts. As we have explained, we are not authorizing any flows, nor is there any evidence as to the extent of such potential diversions.¹⁵ Thus, the impact of such possible actions is far

¹¹ Mono County purports to incorporate the citations from its October 20, 2010 comments. However, the Commission has repeatedly declined to accept arguments incorporated by reference from a prior pleading. *See, e.g., San Diego Gas and Electric Company, Complainant v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange Corporation, Respondents*, 127 FERC ¶ 61,269, at P 295 (2009); *Duke Energy Guadalupe Pipeline, Inc.*, 116 FERC ¶ 61,080, at P 19 (2006) (stating that “the Commission’s standard practice is not to allow parties to incorporate by reference arguments made in prior pleadings”); *City of Santa Clara, California v. Enron Power Marketing, Inc.*, 112 FERC ¶ 61,280 at n.4 (2005).

¹² 42 U.S.C. § 4332 *et seq.* (2006).

¹³ *See* request for hearing at 3, citing “40 C.F.R. §§ 1502.1 *et seq.*, 1502.3, 1502.14, 1502.16, and 1508.27(b).” These sections concern, respectively, the purpose of an EIS, statutory requirements for EISs, alternatives to be discussed, sections on environmental consequences, and a portion of the definition of the term “significantly.” The county does not reference either § 1501.3 or § 1501.4 of the CEQ regulations, which discuss when to prepare an EA or an EIS.

¹⁴ *See* request for rehearing at 3, citing *National Parks and Conservation Association v. Babbitt*, 241 F.3d 722 (9th Cir. 2000); *Sierra Club v. United States Forest Service*, 843 F.2d 1190 (9th Cir. 2000); and *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998).

¹⁵ *See* 134 FERC ¶ 61,195 at P 27; 121 FERC ¶ 61,154 at P 100. *See also DOT v.*

(continued)

too speculative and unrelated to our action to support a requirement that we prepare an EIS.¹⁶

15. Moreover, as we explained in the March 17, 2011 and November 15, 2007 orders, 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 possible or verifiable in the abstract.¹⁷ Finally, the EA concluded that the proposed action would not have a significant impact on the human environment, which, according to the CEQ regulations, provides a basis for proceeding without preparing an EIS.¹⁸ While it is true that an agency must examine the foreseeable consequences of its actions, as well as related environmental impacts, the potential impacts of diversions into the pipeline are so speculative that a meaningful analysis of them is not possible or required.

Public Citizen, 541 U.S. 752, 767 (2004) (explaining that “a ‘but for’ causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations”).

¹⁶ The EA did address, to the extent possible, the potential impacts of reduced flows in Mill Creek, an analysis that satisfied any obligation the Commission might have under NEPA to consider those matters. *See, e.g., South Coast Air Quality Management District v. FERC*, 621 F.3d 1085 (9th Cir. 2010) (holding that Commission met NEPA obligation with respect to proposed natural gas pipeline by conducting reasonably thorough analysis in light of significant amount of uncertainty regarding ultimate impacts).

¹⁷ *See* 134 FERC ¶ 61,195 at P 25-26; 121 FERC ¶ 61,154 at P 61-67; P 103.

¹⁸ *See* 40 C.F.R. § 1501.4(e); 1508.13 (2010). *See Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2010 U.S. LEXIS 4980 (stating that agency need not prepare EIS where it finds, based on EA, that proposed action will not have significant impact on environment). *See also, e.g., Midwest Hydro. Inc.*, 111 FERC ¶ 61,327, at P 47 (2005) (explaining sufficiency of EA providing detailed analysis of project, addressing all important environmental considerations, and concluding that project would not have significant impact on environment); *Idaho Power Company*, 110 FERC ¶ 61,345, at P 39 (2005); *Atlanta Power Company*, 100 FERC ¶ 61,215 at P 14 (stating that NEPA requires agencies to use best available information, not to conduct studies or develop new information).

B. Adoption of Mitigation Measures

16. Mono County contends that the Commission acted inconsistently by concluding that the EA satisfied its obligations under NEPA without adopting certain measures recommended therein. Without further explanation, the county asserts that, once the Commission concluded that the EA was sufficient to satisfy its NEPA obligations, the Commission was required to adopt the measures recommended in the EA, specifically, the establishment of a minimum instream flow requirement for Wilson Creek and groundwater monitoring.¹⁹

17. As an initial matter, there is nothing untoward in finding that the EA was sufficient to support the Commission's action, but not adopting all of the recommendations in that document. The environmental record in a proceeding consists not only of the EA, but also of the Commission's discussion of, and conclusions regarding, environmental issues. Overall, the Commission needs to demonstrate that it has taken a hard look at the environmental impacts of a proposed action and selected a reasonable alternative. We have done that here, by analyzing and imposing mitigation regarding the construction of the pipeline.

18. The Commission discussed both minimum flows and groundwater monitoring in the November 15, 2007 order and concluded that approving the amendment would not lead to negative impacts in Wilson Creek or with respect to groundwater.²⁰ While it is possible that flows through the new pipeline could have such effects, we have not authorized those flows, as previously noted. Moreover, given that we have no information regarding additional flows to Mill Creek, we could not justify requiring mitigation measures with respect to such speculative activities.

19. As we have previously explained, the action that we approved in these proceedings, the construction of the pipeline, was strictly limited. We did not authorize or require the flow of water into the pipeline. Therefore, we reasonably limited our environmental review and our imposition of mitigation measures to the construction activities that we did authorize. Should any agency in the future permit or mandate flows through the pipeline, that entity will need to examine the environmental consequences of that action. Those matters are not before us here.

¹⁹ See request for rehearing at 4. We note that, in its October 20, 2010 comments, the county stated of the minimum flows recommended in the EA that "the efficacy of a 5 cfs minimum flow as a mitigation measure is speculative." Mono County comments at 13. As discussed herein, we agree.

²⁰ See 121 FERC ¶ 61,154 at P 100-101. See also 134 FERC ¶ 61,195 at P 23.

The Commission orders:

(A) The request for rehearing filed on April 13, 2011 by Mono County, California, is denied.

(B) The motion for leave to file answer filed by Southern California Edison Company on April 28, 2011 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.