

113 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Southern California Edison Company

Project No. 1934-014

ORDER DENYING REHEARING

(Issued October 20, 2005)

1. San Bernardino Valley Audubon Society (Audubon Society) and California Trout, Inc. (jointly, petitioners) filed a request for rehearing of the July 22, 2003 Order of the Commission staff issuing a new license to Southern California Edison Company (SCE) to continue to operate and maintain the Mill Creek 2/3 Project No. 1934, located on Mill Creek, in San Bernardino County, California.¹ This order denies the request for rehearing. The order finds that the evidence submitted by petitioners in support of a higher minimum flow release for the project's bypassed reach does not warrant modifying the license's requirement for the release only of leakage flows, and that the license's minimum flow requirement is not prohibited by comprehensive plans or statutory provisions cited by the petitioners.

Background

2. The 3-megawatt (MW) Mill Creek 2/3 Project is located on Mill Creek, a tributary to the Santa Ana River, near the town of Yucaipa, in San Bernardino County, California. The project lies within, and occupies 34.46 acres of, the San Bernardino National Forest. The project first began operation in the early 1900s and was first licensed in 1946.²

3. As originally licensed, the project consisted of two independent water conveyance and generation systems, the Mill 2 and Mill 3 developments, which shared one powerhouse. The Mill 3 development diverts water from Mill Creek at the Mill 3

¹ *Southern California Edison Company*, 104 FERC ¶ 62,048 (2003).

² *Southern California Edison, Ltd.*, 5 FPC 698 (1946).

diversion dam. Water is conveyed through a 5.4-mile-long flowline to a forebay and eventually through penstocks to three turbine/generator units in the powerhouse. Flows discharged from the powerhouse enter the tailrace and eventually return to Mill Creek. Flows in excess of the development's 24.4-cubic-feet-per-second (cfs) capacity spill over the diversion dam into the Mill 3 bypassed reach, but, except during seasonal high-flow events, the bypassed reach typically receives only leakage flows, estimated to be in the range of 0.5 to 2.0 cfs.

4. As designed, the Mill 2 development diverted water from Mill Creek at the Mill 2 River pick-up diversion, located about four miles downstream of the Mill 3 diversion dam, and from Mountain Home Creek, a tributary of Mill Creek, by means of a diversion dam located at the mouth of Mountain Home Creek, also about four miles downstream of the Mill 3 diversion dam. The diverted flows were transported through a 2.9-mile-long flowline to the forebay, then through penstocks to a single turbine/generator unit in the powerhouse.

5. In the early 1990s, the Mill 2 diversion structures and flowlines were damaged or destroyed by an earthquake and floods and, as a result, have not been operable since 1992. Because repair of these facilities would have been cost-prohibitive, SCE proposed to discontinue their use on relicensing. The Commission staff's relicense order included the Mill 2 facilities in the new license but also included Article 406, which requires SCE to file, for Commission approval, a plan and schedule to remove the Mill 2 facilities and restore their sites. SCE filed the plan and schedule, which have been approved by Commission staff. Pending SCE's implementation of the plan, the facilities remain in the new license.

6. The project operates in a run-of-river mode. In addition to producing power, the project serves as a water collector and water-supply conduit for the Crafton Water Company and the San Bernardino Municipal Water District. The project receives and transports water from four groundwater pumps owned by Crafton. SCE uses the water for power generation in exchange for electricity to operate the pumps. SCE delivers water to Crafton at the Mill 3 powerhouse tailrace.

7. With the discontinuance of the Mill 2 diversion facilities, the project effectively has one 7-mile-long bypassed reach, but the lower 3 miles of that reach now receive from the upper portion of the reach and from Mountain Home Creek between 2 and 6 cfs of flow that was formerly diverted into the Mill 2 facilities.³ The original license contained no requirement to release minimum flows into the bypassed reaches. In accordance with

³ Environmental Assessment (EA) at 61.

staff's recommendation in the environmental assessment (EA) prepared for this project,⁴ Article 407 of the new license requires SCE to ensure that existing leakage flows continue to be released into the bypassed reach from the Mill 3 diversion dam.

Article 408 requires SCE to file a plan and schedule to monitor existing leakage from the Mill 3 diversion dam at a point downstream of that dam for a 3-year period to establish a range of existing leakage. The plan is to provide for the continued monitoring of existing leakage through the term of the license.⁵

8. The license contains conditions submitted by the U.S. Forest Service pursuant to section 4(e) of the Federal Power Act (FPA).⁶ The California State Water Resources Control Board (State Water Board) failed to issue water quality certification under section 401(a)(1) of the Clean Water Act within one year of SCE's request for certification and, by letter of December 27, 1995, informed SCE that certification for the project was waived.⁷

9. The U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game (Cal Fish and Game) filed recommendations pursuant to section 10(j)(1) of the

⁴ Staff issued a draft and a final environmental assessment on May 7, 2002 and September 24, 2002, respectively, for this project and two other SCE projects in the Santa Ana River Basin, the Lytle Creek Project No. 1932 and the Santa Ana River 1 & 3 Project No. 1933. Licenses for those projects were issued on June 25 and July 8, 2003, respectively, and those license orders are final. References in this order are to the final EA unless otherwise stated.

⁵ The plan was filed on January 12, 2004 and approved by staff on July 16, 2004. *Southern California Edison Company*, 108 FERC ¶ 62,052 (2004).

⁶ 16 U.S.C. § 797(e) (1994). Under section 4(e), a license for a project located within any reservation of United States lands is subject to such conditions as the department under whose supervision such reservation falls may deem necessary for the adequate protection and utilization of the reservation.

⁷ Under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (1994), any applicant for a federal license for an activity, including the construction or operation of facilities, that may result in a discharge into the navigable waters must obtain certification from the state in which the discharge would originate, but if the state fails to act within one year after receipt of the request for certification, the requirement to obtain certification is deemed waived. The State Board issued certification for the Mill Creek 2/3 Project but, by its own admission, failed to act within the one-year deadline.

FPA.⁸ As relevant here, FWS recommended a continuous year-round instream flow in the Mill 3 bypassed reach of 7 cfs or natural streamflow, whichever is less, in order to enhance long-term habitat conditions for rainbow trout, and Cal Fish and Game recommended a continuous minimum instream flow of 6 cfs from the Mill Creek 3 diversion works into the bypassed reach, measured at a point not more than 200 yards below the diversion. In separate comments on the application, petitioners recommended a similar 7-cfs minimum flow release.⁹

10. The Commission staff did not adopt these minimum flow recommendations. Staff determined that the agency-recommended flows would not be sufficient to enhance long-term habitat conditions for rainbow trout over existing conditions, because flows in excess of 20 cfs would be needed to decrease summer water temperatures to the point where they would be within the tolerance range for this species. Staff also noted that leakage flows would be sufficient to maintain existing small populations of rainbow trout in the cienegas¹⁰ of the bypassed reach and in Mountain Home Creek. Staff determined that FWS's recommended flow of 7 cfs would reduce annual generation by 7,149,000 kilowatt-hours (kWh) and decrease the net annual benefit of the project by \$240,100, and that Cal Fish and Game's recommended flow of 6 cfs would reduce annual generation by 6,010,000 kWh and decrease the net annual benefit of the project by

⁸ 16 U.S.C. § 803(j) (1994). Under section 10(j), licenses are to contain conditions based on recommendations of state and federal fish and wildlife agencies for the protection, mitigation of damages to, and enhancement of fish and wildlife, unless the Commission finds that a recommendation may be inconsistent with Part I of the FPA or other applicable law.

⁹ Specifically, California Trout, in its comments filed October 12, 2001, recommended that the licensee maintain a continuous instream flow in the bypassed reach of 7 cfs, and Audubon Society, in its comments filed October 15, 2001, recommended the release of 7 cfs or inflow, whichever is less, from the Mill Creek diversion to maintain continuous flow in Mill Creek to the powerhouse. Audubon Society filed its comments, and certain other pleadings in this proceeding, under the heading of Natural Heritage Institute, but we will refer to these submissions as Audubon Society's, since Audubon Society was the entity that intervened in the proceeding.

¹⁰ A cienega is a spring or area of accretion from a side channel or the main channel where shallow bedrock or other changes in the geologic subsurface maintains the groundwater at or near the ground surface even during dry spells.

\$194,540.¹¹ Under SCE's proposal, the project would have total annual generation of 12,654,000 kWh and an annual net benefit of \$134,590.¹²

11. For these reasons, staff concluded that these minimum flow recommendations were inconsistent with the comprehensive plan standard of section 10(a)(1) of the FPA, including the equal consideration provisions of FPA section 4(e).¹³ Similarly, staff did not adopt FWS's recommendation that SCE develop a plan to monitor water quality and summer temperatures to meet standards for native trout or Cal Fish and Game's recommendation that SCE conduct fish surveys in the bypassed reach, since these recommendations were based on adoption of the minimum flow recommendations. Staff concluded that its own recommendations for leakage flows and for plans to monitor those flows would adequately protect fish and wildlife resources. Staff also concluded that fish and wildlife resources would be further enhanced by removal of the Mill 2 facilities and by the establishment of a riparian vegetation community on a 0.75-acre parcel within the San Bernardino National Forest, on a stable terrace of the Mill Creek floodplain, just downstream of the Mill 3 diversion dam, as required by Article 413 of the new license.

Request For Rehearing

12. The rehearing request focuses primarily on petitioners' objection to the Article 407 requirement for the provision of leakage flows into the Mill 3 bypassed reach.

¹¹ In a June 17, 2002 letter, Cal Fish and Game revised its recommendations to propose seasonally-adjusted flows of 4 cfs from August to October and 6 cfs for the remainder of the year. Cal Fish and Game agreed that there would be a lack of suitable habitat and flow conditions for rainbow trout in the bypassed reach but recommended these revised flows to develop riparian habitat for supporting recovery of the mountain yellow-legged frog. Commission staff agreed to consider any information from Cal Fish and Game regarding the occurrence of the mountain yellow-legged frog in the bypassed reach, but Cal Fish and Game surveys conducted in May, June, and August of 2002 failed to confirm the existence of this species in the project area. The Commission staff did not adopt Cal Fish and Game's revised flows.

¹² 104 FERC ¶ 62,048 at P 27; EA at 182.

¹³ Section 10(a)(1), 16 U.S.C. § 803(a)(1) (1994), provides that a project for which a license is issued be best adapted to a comprehensive plan for improving or developing a waterway for a number of specified power and non-power uses. Section 4(e) requires the Commission, in deciding whether to issue a license, to give equal consideration to environmental resources and power development.

Petitioners argue that, by requiring the release only of leakage flows rather than of the higher flows urged by petitioners and the agencies, staff has perpetuated the water allocation of the original license, thereby allowing SCE to continue to dewater the bypassed reach during most growing seasons. In petitioners' view, there is no substantial evidence in the record to support staff's conclusion that such diversion of all controllable flow will have an insignificant environmental impact. In this regard, petitioners contend that staff accepted uncritically SCE's evidence that release of the creek's natural flow would not produce any environmental benefit in the bypassed reach, despite petitioners' showing to the contrary.

13. Petitioners contend that, in choosing a flow requirement that favors power development at the cost of impairing the non-developmental uses of Mill Creek, staff failed to ensure that the project would be best adapted to a comprehensive plan of development of the waterway. Petitioners assert that the Article 407 flow requirement is inconsistent with applicable water quality standards and the San Bernardino National Forest Plan. Petitioners also argue that staff erred in not initiating formal consultation under section 7(a)(2) of the Endangered Species Act (ESA)¹⁴ to prevent harm to the southwestern willow flycatcher, an endangered species that, according to petitioners, is known to be present in the vicinity of the bypassed reach during the growing season.

14. Petitioners argue that monitoring and adaptive management of the actual environmental impacts of Article 407 should have been required in connection with a higher minimum flow schedule. In addition, petitioners object to the Article 413 requirement for the establishment of riparian vegetation on a 0.75-acre parcel of National Forest land, on the ground that this requirement purports to substitute artificial irrigation for the riparian vegetation that would emerge if SCE did not divert all controllable flow from the bypassed reach.

15. Petitioners request that the Commission "reverse and remand" Articles 407 and 413. In the event of a remand, petitioners request that the Commission convene a settlement conference or, failing that, a technical hearing before an administrative law judge "to test the relative reliability and probity of the experts and their scientific methods on the disputed issues of fact."

¹⁴ 16 U.S.C. § 1536(a)(2) (1994).

Preliminary Matter

16. In their rehearing request,¹⁵ petitioners call attention to the presence at the Mill 3 diversion site of a berm, apparently consisting of loose rock and other material and constructed by SCE to help divert the creek's flow for use by the project. Petitioners point out that the berm was not listed as a project feature in Ordering Paragraph (B) of the relicense order.¹⁶ They argue that the project may not receive a new license absent inclusion of the berm in Ordering Paragraph (B) and issuance of a dredge-and-fill permit under section 404 of the Clean Water Act to authorize any channel modification undertaken by SCE in constructing the berm.

17. Commission staff conducted an investigation of the site and confirmed the presence of a man-made, 2- to 4-foot-high, 75-foot-long, gravel and cobble berm within Mill Creek, between the upstream end of an existing island and the south bank of the creek. Following this inspection, staff issued a letter, on October 31, 2003, requesting SCE to file detailed information about the structure, including its purpose, association with the project, construction, and maintenance.

18. In a November 21, 2003 response, SCE stated that a large portion of the original 190-foot-long concrete and rubble dam was likely destroyed in a flood, probably before 1970, and that the berm, which SCE described as an earthen dam/soft plug, was probably originally constructed then, from native material in Mill Creek. Since then, SCE has relied on this earthen dam, which it agreed is a project work, to ensure that the creek channel is directed into the project intake. SCE stated that the earthen dam is designed to give way during flood events to protect the concrete and rock dam from damage. The earthen dam is reconstructed after such events and is maintained on an as-needed basis, usually after storm and flood damage, to continue directing the river channel into the intake pond.

19. SCE stated that the existing diversion dam facilities now consist of a 95-foot-long section of the original concrete and rock dam extending south from the intake, a 17-foot-long concrete wing-wall extending east from the original section, and the 150-foot-long earthen dam/soft plug extending east from the wing-wall up the creek. SCE stated that it would include the earthen dam in its revised exhibits A, F, and G,

¹⁵ Rehearing request at n.12.

¹⁶ The license order describes this diversion dam as a 10-foot-high, 190-foot-long rubble concrete diversion dam.

which Article 202 requires it to file to describe and show the project facilities as licensed. On December 1, 2003, SCE filed these revised exhibits.

20. Commission staff has not yet issued an order determining whether to approve the exhibits. If staff approves them, Ordering paragraph (B) of the license should be amended to describe the actual length and composition of the diversion dam, including the earthen dam. The issuance of a dredge-and-fill permit, where applicable, is a matter for the U.S. Army Corps of Engineers¹⁷ but is not required by the Commission either before issuance of a license or as a license requirement. Therefore, neither issuance of the license nor staff approval of the revised exhibits and amendment of the project description is dependent on the prior issuance of any such permit. It would be the responsibility of the licensee to obtain any permits that may be required for activities related to issuance of the license.

21. Petitioners responded to SCE's November 21, 2003 response to staff's letter with a December 24, 2003 filing, in which they insisted that the new information requires institution of a license amendment proceeding, so that regulatory agencies will have an opportunity to determine whether additional environmental conditions are warranted. SCE responded to that filing with a filing of its own, in which it contended that no amendment proceeding is necessary. Correcting the description in the license of the diversion dam's composition and length does not necessitate institution of an amendment proceeding with notice and opportunity for comment. Staff fully analyzed the effects of the project's diversion of water from Mill Creek. The application's inaccurate description of the diversion dam did not affect that analysis.¹⁸

¹⁷ See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.), *cert. denied* 484 U.S. 816 (1987).

¹⁸ Petitioners argue that, under the Commission's regulations, the application was required to include a plan of maintenance for the earthen dam. The Commission's regulations, at 18 C.F.R. § 4.51(f)(3)(iii) and (v)(B) (2005), provide that an application include a description of operation and maintenance procedures for measures and facilities that are to be continued or that are proposed for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or improvement of those resources. The diversion dam is not such a facility.

Discussion

Consideration of the evidence

22. The essence of petitioners' argument is that requiring the release of the flows petitioners recommended, rather than of leakage flows, into the bypassed reach would benefit environmental resources and would represent a more justifiable balance of power and non-power interests. The Commission staff concluded that, under natural conditions, surface flows in Mill Creek are intermittent and have the potential to cease somewhere within the bypassed reach during low-water years.¹⁹ Petitioners challenge staff's conclusions that releases into the bypassed reach of around 6 or 7 cfs, as recommended by the agencies (as well as by petitioners), would not maintain continuous flow from the diversion to Mountain Home Creek in all seasons, produce a stable riparian corridor, maintain coldwater temperature, or create suitable habitat for trout and other coldwater fish. Petitioners argue that staff, in reaching these conclusions, uncritically accepted SCE's evidence, which petitioners characterize as largely untestable and speculative, while rejecting petitioners' contrary evidence without adequate justification.

23. Petitioners contend that the historic conditions of Mill Creek, predating the construction of the Mill 3 diversion in 1898, demonstrate the restoration potential of the bypassed reach if a minimum flow schedule were to be established. Petitioners argue that they presented extensive evidence, in the form of eyewitness accounts from the mid-1800s to the early 1900s, that the portion of Mill Creek constituting the present Mill 3 bypassed reach had continuous or perennial flows. Petitioners state that, for example, farms located on that reach used the creek's waters for irrigation, and mills were located on Mill Creek, including on the reach below Forest Falls, a town located in the area of the present diversion dam, to take advantage of the creek's continuous flow. Petitioners state that their evidence also referred to a history of the San Bernardino Mountains that described Mill Creek, including the bypassed reach, as having continuous flow and a substantial riparian corridor before project operation.²⁰ In addition, petitioners cite their evidence that, through the late 1800s, Mill Creek was a cold water creek with deep, tree-shaded pools and a thriving trout fishery. This includes evidence that, into the early 1900s, Mill Creek Canyon from Mentone (about 5 miles downstream of the powerhouse) to Forest Falls was a favorite trout-fishing destination, and that eyewitness reports and

¹⁹ EA at 87.

²⁰ Robinson, J., *The San Bernardinos* (Big Santa Anita Historical Society (1989)), attachment 4 to petitioners' rehearing request. Previous submissions of the petitioners cited but did not include this article.

photographs reveal the existence of fishing camps at many locations throughout the canyon, including the reach between Forest Falls and Mountain Home Creek.

24. Petitioners argue that SCE's evidence purporting to show that a riparian corridor could not exist in the bypassed reach does not comport with this historical evidence. They contend that the loss of the historical riparian corridor was caused by the diversion of all controllable flow by the project. Deprived of surface flow, the groundwater table sank well below the root zones, causing the mature trees to die, the channel to become unstable, and shifting and erosion to result from periodic floods. Petitioners assert that the EA did not respond to this evidence.

25. A review of the evidence confirms that petitioners presented considerable information suggesting that continuous flow and riparian vegetation existed in Mill Creek from the present diversion below Forest Falls to the confluence of Mill and Mountain Home Creeks before the project began diverting stream flow. This information was compiled or cited by Audubon Society's expert Robins, who prepared a report on the potential for vegetation reestablishment in the bypassed reach.²¹ The cited information includes, for example, statements from publications that the creek in that reach provided a never-failing supply of water because it never went dry in the summer, that it was a reliable and perpetual water source, that it was well-vegetated and full of wildlife, and that it contained a wealth of aquatic life.²² Robins also provided a number of photographs.

26. The evidence of continuous flows and a substantial riparian corridor prior to project diversion is not conclusive. No quantitative flow information exists from the years before construction of the diversion dam, and much of the information petitioners provided was fairly qualitative and not well-documented with regard to specific locations.

²¹ Robins, J., Final Report on the Potential for Riparian Vegetation Re-establishment in the Mill Creek bypass reach: The effect of surface flow re-perennialization and groundwater recharge on a suite of species (Final Report), Exhibit 5 to Audubon Society's October 15, 2001 comments.

²² Robins, Final Report at 3-5.

Many of the narratives and photographs provided did not appear to pertain specifically to the Mill Creek bypassed reach but rather to other portions of Mill Creek.²³ Other narratives and photographs appeared to describe not the losing areas found in the bypassed reach but rather the gaining areas of the reach (the cienegas),²⁴ where groundwater is forced to the surface due to changes in the bedrock or substantial accretion from the canyon walls, and where there would therefore be more permanence in the quantity of surface water.²⁵

27. On the other hand, staff reviewed evidence in the record that showed some discontinuous vegetative zones but not a continuous riparian corridor throughout the bypassed reach.²⁶ In addition, areas upstream of the diversion, which have geomorphic characteristics similar to those of the losing areas of the bypassed reach, have the same scarcity of vegetation.²⁷ The fact that farms and mills may have been located on what is

²³ In commenting on the photographs, Robins conceded this uncertainty, stating that “[a]lthough it is difficult to ascertain exactly where in Mill Creek Canyon these photographs were taken, many appear to be on the road between the mouth of the canyon and the Forest Home Camp (location of the present day Forest Home Christian Camp).” Robins, Final Report at 5. The bypassed reach is essentially the lower 7 miles of the 10-mile-long Mill Creek Canyon. The Forest Home Christian Camp is located about 0.75 miles downstream of Forest Falls.

²⁴ A losing area exists where surface water (streamflow) is lost to groundwater; a gaining area exists where groundwater is added to surface water. The cienegas in Mill Creek are gaining areas.

²⁵ Petitioners’ witness Robins notes historical observations of “tremendous vegetation growth in the gaining areas; vegetation restricted to stream banks in the losing reaches.” Robins, Final Report at 4.

²⁶ December 1903 map prepared by C.C. Brown, in Leidy R., J.F. Irwin, E.A. Read, J.H. Humphrey, S.K. Dickey, and J. Spranza. 2001. The ecology of Mill Creek. Prepared for Bear Valley Mutual Water Center. November 27, 2001 (Leidy *et al.*, 2001). The field work for the preparation of this map was completed in August 1903, 5 months after start of project operations and during a wet year with a moderate flood, before project operations would have been likely to affect riparian vegetation.

²⁷ Read, Edith and Dickey, Stephen, Technical Responses to Exhibit 5 (Robins 2001) of the NHI comments dated October 15, 2001 regarding SCE’s application for the Mill Creek Hydroelectric Project (November 29, 2001), Attachment 8.

now the bypassed reach does not demonstrate that there was a continuous flow in that reach of the creek in all seasons and at all places.

28. While there appears to have been a thriving trout fishery in Mill Creek in the late 1800s, it is not clear that such a fishery occurred throughout the entire bypassed reach. Most of the suitable trout fishery habitat may have occurred then, as now, not on the higher gradient losing sections of Mill Creek but rather in the cienegas. Because bedrock causes groundwater to be forced to the surface in these gaining areas, they provide relatively stable vegetation, physical structures such as pools and woody debris for aquatic macroinvertebrates, and cooler water temperatures due to groundwater inflow and reliable shade. Moreover, as petitioners themselves note, the fishery had suffered from intense over-fishing by the time of hydro development, so that in the later 1800s fish had to be stocked. Given this fact, and contrary to petitioners' claims in the rehearing request, there is no reason to conclude that the deterioration of the trout fishery was attributable to the disappearance of a riparian corridor as a result of the project's diversion of flow.

29. While the extent and nature of pre-project flows below the present diversion may not be entirely clear from the evidence, the record suggests that the bypassed reach had continuous flows during at least a large part of the year and that riparian vegetation and trout habitat existed at least in some areas of the reach. Further, it is reasonable to conclude that project diversion of flows played a part in changing the vegetation and stream bed character of this reach of the creek. These conclusions, and petitioners' evidence, are not inconsistent with staff's findings in the EA that, under natural conditions, surface flows in Mill Creek are intermittent and have the potential to cease somewhere within the Mill Creek bypassed reach during low-water years.²⁸

30. Nevertheless, petitioners' historic information is of limited use in determining appropriate flow conditions for the new license. Petitioners' characterization of pre-project conditions reflects the presence of full creek flows in the present bypassed reach. Subsequently, under the original license, the project diverted an average flow of about

²⁸ Petitioners also call attention to staff's statement, EA at A-10, that the Upper Mill Creek watershed "was not perennial in historical timeframes." They question whether this statement is intended to refer to the present bypassed reach or only to the basin above the site of the present diversion dam "where all parties agree that the creek is intermittent." It is clear from the context of the comment and staff's response that the statement refers only to the basin above the site of the present diversion dam and therefore does not reflect staff's characterization of the pre-project nature of the present bypassed reach.

22 cfs from Mill Creek.²⁹ Neither the petitioners nor the resource agencies have advocated the return to the bypassed reach of more than 6 or 7 cfs. There is no reason to expect that releasing this limited flow would produce the extent of riparian vegetation and habitat that petitioners claim existed in this stretch of Mill Creek before the project was constructed. Indeed, this has been conceded by petitioners' own expert, Robins, who stated:³⁰

Although the historical record paints a picture of the bypass reach as a riparian corridor dominated by patches of dense vegetation, this ideal is likely beyond reach. Major changes in the physical, ecological, and socio-economic climate will limit the extent to which we can re-integrate a more "pristine" hydrological and biological regime.

Conditions in the project area are not what they were in the 19th Century. In addition to the diversion of water for generation, there has been a significant increase in the consumptive use of the water. As staff pointed out, the Commission's baseline for relicensing a project is existing conditions.³¹ We do not seek to restore pre-project conditions, which, in this case, had changed in the early 1900s, well before the project received its original license in 1946.

31. The relevant question, rather, is whether, and to what extent, the flow release recommended by petitioners and by the agencies would be sufficient to establish a riparian corridor that would benefit fish and wildlife, given present conditions in the bypassed reach. Petitioners cite their experts' evidence that included analyses of a fate-of-flow study conducted for the bypassed reach,³² of the tendency of alternative flow schedules to raise the groundwater level in the bypassed reach and affect the presence and health of a riparian corridor, and of the ability of an established riparian corridor to

²⁹ EA at 61.

³⁰ Robins, Final Report at 15.

³¹ See *American Rivers v. FERC*, 201 F.3d 1186 at 1195-99 (9th Cir. 2000).

³² The fate-of-flow study was developed in the course of this proceeding by a Joint Flow Recommendation Subcommittee, comprising representatives of SCE, petitioners, Cal Fish and Game, the San Bernardino National Forest, Big Bear Municipal Water District, and City of Redlands, to study the extent to which flow spilled by the Mill 3 diversion dam remained in the channel, evaporated or transpired, or percolated into the groundwater.

withstand the stress associated with flood flows. This evidence was attached as exhibits to Audubon Society's October 15, 2001 comments on the application. Petitioners criticize staff for failing to address their evidence in concluding that the recommended flow releases would not benefit the bypassed reach.

32. In response to a similar criticism in petitioners' comments on the draft EA, staff stated that it had reviewed all of the reports and comments submitted in the proceeding, and that it had conducted its analysis on the basis of information contained therein and in accordance with its best professional judgment.³³ In view of petitioners' continued objection to staff's treatment of their evidence, it is appropriate here to discuss in some detail petitioners' specific contentions and the related evidence and analysis.

33. Petitioners criticize staff for relying on SCE's analysis of the fate-of-flow study to conclude that 2 to 4 cfs of flow released into the bypassed reach would be lost to percolation and evapotranspiration.³⁴ Petitioners complain that staff did not comment on their evidence that the loss to groundwater or evapotranspiration would be only 2.3 cfs. Petitioners note that the fate-of-flow study itself showed that a release of 6 cfs would produce a flow of 3.7 cfs measured at Mountain Home Creek.

34. The fate-of-flow study analysis prepared by petitioners' expert focused on flow between the diversion and Mountain Home Creek. It found that, in all observed cases of released flows, water would continue to flow on the surface for much of the reach, and in some cases for most of the reach, before the amount that infiltrates into the ground saturates the subsurface. The analysis also concluded that, based on a maximum observed flow release of 3 cfs at the diversion dam, surface water losses to evaporation or infiltration in that reach would range from 1.9 to 2.3 cfs, with higher losses expected for discharges greater than 3 cfs.³⁵

35. Petitioners' estimate of flow losses to groundwater and evapotranspiration is in fact not substantially different from the estimate in SCE's evidence. Petitioners' fate-of-

³³ EA at A-11.

³⁴ Percolation refers to the movement of water through openings in rock or soil or the movement of a portion of the stream flow into the channel materials. Evapotranspiration refers to the combined loss of water from the soil surface by evaporation and from plant tissue by vaporization.

³⁵ Larsen, E., Technical Report Joint Flow Recommendations Subcommittee: Draft Mill Creek Fate of Flow Analysis, Exhibit 1 to October 15, 2001 comments.

flow analysis characterized 2.3 cfs as a rough best estimate of the total surface water losses to evaporation or infiltration. SCE's analysis, with which the staff agreed, estimated expected losses to percolation and evaporation ranging from slightly below 2 cfs to slightly below 4 cfs, over a range of 2 to 16 cfs at the Mill Creek 3 diversion.³⁶ SCE's evidence also showed approximately 3.1 cfs of surface water remaining in the bypassed reach above Mountain Home Creek with a release of 6 cfs from the diversion dam.³⁷ This evidence is not inconsistent with petitioners' statement that such a release would produce a flow of 3.7 cfs at Mountain Home Creek. Variables such as aquifer levels, rainfall, streambed sealing, and meteorological conditions make it difficult to determine the precise amount of surface water flow that could be lost to groundwater and evapotranspiration. Under the circumstances, SCE's and petitioners' estimates are in general agreement.

36. However, the record indicates that 6 cfs of flow would not always be available for release into the bypassed reach. Two United States Geological Survey (USGS) gages are located near the powerhouse, one in the bypassed reach just upstream of the powerhouse and the other in the powerhouse tailrace. USGS gage 11054001 records the combined flow measured by the other two gages. Commission staff considered the gage records of this combined flow measurement to be the best available data for estimating flow in Mill Creek Canyon.³⁸ Petitioners state, and staff essentially agrees, that 6 cfs is the 100 percent exceedance value for gage 11054001; that is to say, flows recorded by this gage exceed 6 cfs nearly 100 percent of the time.³⁹ But the flow measured by the gages includes groundwater pumped from wells in the bypassed reach and added to the flowline leading to the project's powerhouse for generation. This pumped groundwater, which could account for as much as 1.6 cfs of the flow attributed to the powerhouse tailrace,⁴⁰

³⁶ EA at 107. Leidy R., J.F. Irwin, E.A. Read, J.H. Humphrey, S.K. Dickey, and J. Spranza. 2001. The ecology of Mill Creek. Prepared for Bear Valley Mutual Water Center. November 27, 2001 (Leidy *et al.*, 2001), at Figure 4-17. Dickey, Mill Creek Fate of Surface Flow Under Losing Reach Conditions, Diversion to Above Mountain Home (2001).

³⁷ Leidy *et al.*, at Figure 4-17.

³⁸ EA at 61. The data cover the water years 1920-1986, except for years 1939-1947.

³⁹ Table 4 of the EA does not list a 100 percent exceedance flow but shows that a flow of 12 cfs would be met or exceeded 90 percent of the time.

⁴⁰ EA at 62.

would not be released into the bypassed reach itself. Therefore, flows that could actually be released into the bypassed reach during the driest periods, when gage 11054001 records show a combined flow of 6 cfs, could be correspondingly less than 6 cfs.⁴¹

37. If, in the driest years, somewhat less than 6 cfs could be available for release into the bypassed reach at certain times, and if between 2 and 4 cfs of flow is lost to percolation and evapotranspiration in the bypassed reach, then at some places in the bypassed reach above Mountain Home Creek (at which point additional flow would be added to Mill Creek from Mountain Home Creek) there would sometimes be very little flow. Even considering petitioners' evidence, it is reasonable to conclude that release of all available flow may not be enough to maintain flow throughout the whole bypassed reach during the entire dry season of some years.⁴²

38. Petitioners nevertheless contend that staff erred in finding that alternative flow schedules would not "support the hydrology and geomorphology necessary to establish

⁴¹ Petitioners appear to object to staff's use of these gage records, but the nature of their objection is not entirely clear. They criticize the EA for not explaining whether these flow data describe "historical" (implicitly, pre-project) conditions. Staff relied on these records, which do not include any data from pre-project-diversion years, to describe the existing (baseline) environment in respect to water quantity and to assess the effect on that resource of relicensing the project, not to describe pre-project flow conditions. Petitioners also note that the gage records do not report unimpaired flow, because they reflect well pumping operations. Staff readily conceded (EA at 61) that the gage data had limitations and might overstate flows at certain times. Finally, petitioners complain that the EA did not respond to the flow exceedence curves that Audubon Society attached to its October 15, 2001 comments on the application and that showed the 100-percentile flow to be 6 cfs. As noted, staff did not disagree that flows reported by the combined gage were nearly always at least 6 cfs.

⁴² Petitioners challenge SCE's claim that pumping of creek flow by the water agencies could prevent continuous flow in the bypassed reach during the dry season even if no flow were diverted by the project, a claim that petitioners note has been disputed by State Water Board. Although staff appears to have accepted this claim (EA at 107), we do not think the issue warrants extensive discussion here. As indicated in staff's response to comments on the draft EA (EA at A-8), SCE itself commented that more recent studies show that well water pumping in the bypassed reach has little or no effect on decreasing flow in the reach, a conclusion with which staff essentially agrees (EA at 63). In any event, staff's analysis and conclusions regarding the effect of releasing additional flows into the bypassed reach do not rest on the effects of pumping water from that reach.

riparian vegetation in new areas.”⁴³ Petitioners complain that staff did not address their evidence that riparian vegetation could be established because the release of natural flow would, over time, raise the aquifer and reduce the loss of surface flows to percolation. Several of the exhibits attached to Audubon Society’s comments relate to this issue.

39. One groundwater analysis, focusing on Bear Paw, a location on the bypassed reach between the diversion and Mountain Home, found that water tables and stream flow are tightly linked at that location, that augmented stream flows could provide recharge critical to the maintenance of shallow water tables there, and that Mill Creek at Bear Paw would support near-channel saturation in the shallow subsurface if consistent stream discharges were made available. This groundwater study concluded that this reach of the creek might support riparian vegetation, particularly if stream flows were augmented to increase available soil moisture.⁴⁴ Another groundwater study found that stream flow augmentation would result in ground water recharge and the expansion of riparian vegetation resources on the lower portion of the bypassed reach.⁴⁵ Robins concluded from data on the alluvial system that shallow layers of impervious alluvium existing in the bypassed reach impede infiltration and foster saturated conditions in the shallow substrate; that, during certain years and at certain times of the year, there is a connection between groundwater and surface water; and that greater surface flows and the resulting increase in streambed seepage would lead to a proliferation of riparian resources and increased channel stability in the bypassed reach.⁴⁶

40. Under the conditions prevailing in the bypassed reach, a continuous flow would be unlikely to raise the aquifer, reduce surface flow losses to percolation, and create

⁴³ EA at 123.

⁴⁴ Rains, Mark Cable, Selected Evidence of Shallow Ground Water and/or Shallow Soil Moisture Sufficient to Sustain Riparian Vegetation on the Mill Creek at Bear Paw Site (Rains), Exhibit 2 to October 15, 2001 comments.

⁴⁵ Rains, Mark Cable, Eric W. Larsen, and Jim Robins, Potential Ground Water Recharge by Stream Flows, Flow Paths or Perched Ground Water, and Vegetation Modeling for the Mill Creek Bypass Reach, San Bernardino, California (Rains *et al.*), Exhibit 3 to October 15, 2001 comments.

⁴⁶ Robins, Final Report.

substantial riparian habitat. Significant streambed sealing and layering help to limit the amount of surface water recharge that would reach the groundwater table.⁴⁷ In contrast to the conclusions of Robins, monitoring well data and geophysical surveys show that the groundwater level is much deeper than the ground surface and that a saturated substrate below the streambed extending to the groundwater surface is often not present.⁴⁸ Direct connection of the surface water with the groundwater table along the losing reaches of Mill Creek has been shown to be short-lived and unsustainable other than during brief periods of high subsurface recharge due to floods and general basin recharge from precipitation.⁴⁹

41. Further, several conditions, including groundwater depth, the width of the canyon, the high hydraulic conductivity of the alluvium deposits in the creek, and the gradient of the bedrock in most of the canyon, cause a substantial flow of groundwater downstream through the canyon's alluvium deposits.⁵⁰ Any surface water that could reach the groundwater table would be too limited in relation to this flow to replenish the groundwater significantly. In addition, due to alluvial floodplain deposits in Mill Creek, the ratio of horizontal to vertical movement of groundwater is probably such that a high water table, necessary to sustain riparian vegetation, is not likely to extend very far from

⁴⁷ EA at 63.

⁴⁸ Data from the Bear Paw monitoring wells showed that groundwater levels were more than 27.8 feet below the surface at the deepest monitoring well during almost all of the monitoring period 1998 to 2000, and geophysical surveys conducted for SCE during September and October 2000 indicated that the groundwater surface at the time of survey was 66 to 96 feet below the surface near Bear Paw Crossing. These surveys were conducted in connection with Dickey, Relationship Between Surface Water and Groundwater at Mill Creek, *supra*.

⁴⁹ Leidy *et al.*

⁵⁰ Reflecting estimates detailed in Groundwater Balance Analysis for Alluvium Mill 3 Losing Reach, Based on Precipitation and Crafton Well Records, 1965-2000, Mill Creek Canyon (Dickey 2001), the sustained rate of groundwater flow through Mill Creek Canyon could be between about 15 and 40 cfs.

the stream channel.⁵¹ While Audubon Society's evidence suggests that some areas of perched groundwater may exist, these may occur in the cienegas and are likely not very significant or common in the reach, given other evidence on the depth of the groundwater.

42. Under these conditions, a substantial amount of water - - - certainly much more than the recommended flow releases - - - would be required to raise the groundwater in the Bear Paw area of the bypassed reach of Mill Creek.⁵² Therefore, it is not likely that the recommended flow releases would produce a substantial riparian corridor by contributing significantly to the recharge of groundwater.

43. Petitioners criticize the EA for relying on SCE's modeling results to conclude that an alternative flow schedule of less than 20 cfs would not maintain a coldwater condition in the growing season. They reject the assumption that the bypassed reach would continue to have no shade and would maintain its existing channel shallowness and width, because, they assert, their own evidence shows that a minimum flow schedule would cause the channel of the bypassed reach, over time, to become deepened, stabilized, and shaded with trees. Petitioners claim that their evidence shows that the proposed minimum flows would cause 11 or more acres of riparian vegetation to be reestablished in this reach.

44. Petitioners claim that channel instability and flood destruction have been a result of the project's diversion of water, and that, with the release of continuous flows, riparian vegetation could establish itself and resist damage from flooding. In this context, a report submitted by Audubon Society on the survival of plant species concluded that substantial amounts of white alder, willow, and cottonwood could survive moderate and longer-term

⁵¹ Rains postulates a horizontal to vertical ratio of 100 to 1, but staff believes that such a ratio would not be likely in a mountainous canyon such as Mill Creek, where, according to Read and Dickey, the ratio is more likely to range between 10 to 1 and 1 to 1. The higher ratio of vertical to horizontal groundwater movement essentially reflects the movement of groundwater downward rather than outward. Rains *et al.*, at p.3, concede that their "knowledge of the subsurface of the reach is insufficient to allow us to determine whether stream flow augmentation would be sufficient to raise water tables to within the active layer throughout the entire bypassed reach," although they assert that at least it would be enough to expand riparian vegetation resources on the lower portion of the reach.

⁵² Dickey estimates that 4 to 19 cfs per thousand feet of stream reach would be required. Dickey, Relationship Between Surface Water and Groundwater at Mill Creek.

recurrence interval flood flows. The report showed, for example, that over half of the alder sites on Mill Creek would withstand a 30-year flood event.⁵³

45. It is far from certain that the recommended flow release would create the established and enduring riparian areas that petitioners predict. The alluvium in the losing reaches is highly prone to erosion. Regular flooding of the reach results in frequent channel migration, inhibiting the channel from deepening and stabilizing. In areas where deepening of the channel may occur, only transient and limited additional riparian vegetation would be likely to result, since continuous surface water would be required to sustain vegetation during dry periods. With any increased separation of surface water and groundwater, the vegetation would lose the source of water and be much more susceptible to droughts. Therefore, deeper channels would not ameliorate the effects of the destructive floods on riparian habitat and channel stability. Rather, it is likely that channel instability and frequent floods would often destroy such riparian vegetation as might be established along the channel banks in the losing sections or separate these riparian areas from their water supply, resulting in only limited and temporary gains in habitat.⁵⁴

46. Although some of the mature alder in the bypassed reach could survive significant floods, it is doubtful that young riparian vegetation would survive to its maturation in the deep alluvium of the losing reaches. Any vegetation on the channel banks that might survive destructive floods themselves would likely lose its limited water supply due to channel migration resulting from the floods, and riparian species such as alders would die relatively quickly due to lack of water.⁵⁵ Thus, flooding would keep vegetation growth in a juvenile stage, and insufficient shade would be produced to create coldwater conditions. The record indicates that floods in 1862, 1916, 1938, and 1969 “virtually scoured away all of the riparian vegetation along the canyon except in sheltered areas.”⁵⁶ Even if the project’s diversion of water may have contributed to the effects of the floods that

⁵³ Larsen, Eric, Draft: Survival of Plant Species in Flows at Mill Creek, Exhibit 4 to October 15, 2001 comments.

⁵⁴ EA at 44.

⁵⁵ An example of the effects of channel migration on riparian vegetation in the bypassed reach is found in Leidy *et al.* This example suggests that following a flood event in 1903, white alders along the Mill Creek bypassed reach had died shortly after their surface water supply was removed due to migration of the stream channel.

⁵⁶ Leidy *et al.*

occurred after project operations began, as petitioners contend, the reestablishment of riparian vegetation to the extent that it previously existed would be problematic, especially in the absence of full pre-project stream flows, which petitioners are not advocating.

47. Petitioners' claim that a shaded, coldwater environment could be created rests on the assumption that groundwater is close to the surface and would be replenished over time by continuous flows in the bypassed reach. As already noted, during dry periods release of the recommended flows would not guarantee a significant continuous flow throughout the bypassed reach, and the relationship between groundwater and surface water is not such that the recommended flows would be likely to replenish groundwater significantly. Petitioners' evidence regarding the establishment of 11 acres of riparian vegetation concludes that "[a]ugmented flows maintaining saturation in the active layer at a lateral distance of 10.5 feet from the low flow channel translates into approximately 11.6 acres of potential riparian vegetation along the bypass reach."⁵⁷ This conclusion assumes a lateral movement of the surface water that is questionable in light of other evidence, discussed above, regarding hydrological conditions in the losing reaches of the stream.

48. The fact that the bypassed reach is primarily a losing reach, the depth of the groundwater and its general lack of connection with the surface water, the frequency of flooding, and other factors render it unlikely that significant habitat, and therefore a shaded, coldwater environment, would be established in most of the reach.⁵⁸ Under the recommended flow release schedule, an increase in existing vegetation in the gaining reaches could occur due to the proximity of groundwater, and limited improvement in

⁵⁷ Rains *et al.* at 4. Robins, at 15, states that Rains's model shows that flows of 7-12 cfs would likely maintain saturation in the active layer 10.5 feet from the low flow channel.

⁵⁸ Whether flows of at least 20 cfs would be needed to create a coldwater condition, as the EA concluded, need not be discussed here, since the petitioners and the agencies recommended flows of only 6 or 7 cfs.

riparian vegetation in the losing reaches might be possible. However, significant and lasting improvement in the losing reaches would be unlikely.⁵⁹

49. Petitioners dispute SCE's finding that fish habitat within the Mill 3 bypassed reach would be optimized at lower flows. SCE's studies found that flows of 2 cfs would optimize habitat for five of eight native fish species in the bypassed reach, that a higher release would benefit slightly fewer species/life stages, and that a flow of 3 to 4 cfs would optimize trout habitat in the reach.⁶⁰ Petitioners contend that higher flows, by deepening and narrowing the bypassed reach channel, and by promoting shade trees, would create more favorable habitat conditions for trout and other coldwater fish. Since we do not agree that the recommended flows would be likely to establish these conditions, this argument does not require additional discussion. In any event, higher flows in steep channel conditions do not always create more habitat, since the water velocity may sometimes become too fast for species or life stages.

50. Petitioners request a technical hearing before an administrative law judge to resolve the various disputed factual issues set out above. We consider this unnecessary. To the extent that petitioners' evidence is inconsistent with other evidence in this proceeding, we are confident that we have addressed any such inconsistencies sufficiently based on the existing record. Moreover, we do not believe that a resolution of these issues in petitioners' favor would justify modifying the Article 407 flow requirements.

51. Staff rejected the recommended flow regime on the ground that it would have significantly reduced project generation while failing to enhance habitat conditions for fisheries in the bypassed reach. Even accepting petitioners' assertions about the historical and existing physical conditions in the bypassed reach, the creation and sustainability of 11 acres of riparian habitat by the release of the recommended flows could be considered no more than a possibility in the abstract. Petitioners admit as much in asserting that the licensing decision "must address the uncertainty inherent in predicting how a flow schedule in excess of the existing leakage will affect the bypass

⁵⁹ Petitioners assert that restored flows have produced just such beneficial changes in channel form and riparian vegetation over time in other streams. That restored flows may have produced riparian vegetation in other streams does not demonstrate that they would do so in the Mill Creek bypassed reach, since the success of any flow restoration initiative would certainly depend on the degree of flow and on the geological and hydrological conditions of each individual stream.

⁶⁰ EA at 108-11.

reach” and that the Commission is seeking “to predict the responses of a creek that has not had continuous flow in the growing season for decades.”⁶¹

52. However, petitioners, citing section 10 of the FPA in particular, argue that staff has impermissibly chosen the certainty of no change and continuation of the environmental baseline at the expense of non-developmental uses of Mill Creek. The provisions of section 10 do not support this argument. Section 10(j) permits the Commission to reject fish and wildlife recommendations if they are inconsistent with Part I of the FPA, including the section 10(a)(1) provision for ensuring that a project is best adapted to a comprehensive plan for improving or developing a waterway. The release of the recommended minimum flows would reduce annual generation by between 40 and 50 percent,⁶² a fact that is conceded by petitioners.⁶³ Even under the most favorable view of petitioners’ evidence, the countervailing benefit would be the creation of some 11 acres of fisheries habitat, and that result is far from assured. The loss of this much generation, which might well threaten the economic viability of the project, for an uncertain and limited improvement in riparian habitat does not represent a justifiable balance of developmental and non-developmental uses of the waterway.

53. In short, we believe that there is sufficient evidence to support the conclusion that the physical characteristics of the bypassed reach would not be likely to produce and sustain significant riparian habitat. However, even considering the possibility that petitioners’ evidence has some validity, we do not believe that the possibility of creating some additional fisheries habitat in the bypassed reach outweighs the loss of generation that would accompany the release of additional flows. For these reasons, we see no need for any additional procedures to examine the conflicting evidence. Similarly, our

⁶¹ Rehearing request at 5. This uncertainty also informs Audubon Society’s expert evidence. Robins, for example, states that increased daily surface flows and a resultant increase in streambed conditions will facilitate the establishment of perched water conditions in the bypassed reach, and that “[i]f these conditions can be maintained through the dry season, the result should be a proliferation of riparian resources in the bypass reach.” [emphasis added] Robins at 9. Robins also states that, “[g]iven the high level of uncertainty regarding sub-surface hydrology in the bypass reach,” his conclusions about the relationship between the flow releases and establishment of riparian vegetation “have been specifically designed to be testable within an adaptive management scenario.” Robins at 20.

⁶² EA at A-11.

⁶³ Rehearing request at 5.

acceptance of staff's disposition of the flow release issue makes it inappropriate to convene a settlement conference.

Consistency with pertinent plans, standards, and statutes

54. Petitioners note the section 10(a)(1) requirement that a licensed project must be best adapted to a comprehensive plan for improving or developing a waterway. They cite the license order's statement that staff reviewed nine comprehensive plans relevant to the project and found no inconsistencies between them and the project as relicensed by staff. Petitioners attack this finding as conclusory and argue that Article 407 is inconsistent with the San Bernardino National Forest Plan (Forest Plan) and the Water Quality Control Plan, Santa Ana River Basin (Basin Plan), both of which, it states, are comprehensive plans under section 10(a)(1).

55. Petitioners confuse the comprehensive plan reference in section 10(a)(1) with the requirement in section 10(a)(2) that the Commission, in applying the section 10(a)(1) standard, consider the extent to which the project is consistent with comprehensive plans prepared by federal and state agencies for improving, developing, or conserving a waterway. The reference in section 10(a)(1) is not to detailed, written, federal- or state-prepared plans but rather to the Commission's general obligation to ensure the comprehensive development of the waterways.

56. The Commission's rules require that section 10(a)(2) comprehensive plans be filed with the Commission.⁶⁴ The Commission has no record that the Forest Plan was filed by the Forest Service with a request for adoption by the Commission as a comprehensive plan. Consequently, the consistency provisions of section 10(a)(2) do not apply to it. Staff nevertheless found that the proposed action would be consistent with the Forest Plan⁶⁵ and that the Forest Service "proposal to provide new conditions to the Commission for inclusion in the licenses will make the licenses consistent with the management direction" in the Forest Plan.⁶⁶ Petitioners complain that staff, in making these findings, did not analyze or apply any of the Forest Plan's numerous specific management requirements, which petitioners set out in detail, respecting water quality, riparian areas and wetlands, and wildlife and fish. Petitioners ask us to explain how the Article 407 leakage flow regime would meet each of these management requirements.

⁶⁴ Section 2.19 of the Commission's regulations, 18 C.F.R § 2.19 (2005).

⁶⁵ EA at 237.

⁶⁶ EA at 6.

57. The management requirements of a forest plan indicate how the Forest Service intends to manage a forest and are not binding on other entities, such as the Commission, unless the Forest Service requires these entities to comply with them. Here, the Forest Service had the opportunity to submit such licensing conditions under section 4(e) of the FPA as it deemed necessary for the adequate protection and utilization of a national forest on which a project is located. The Forest Service submitted such conditions, including a condition directing the licensee to maintain sufficient flows through the diversion to provide visible surface flow through Forest System land and specifying that this could be accomplished with leakage.⁶⁷ The Forest Service directed no greater flow releases for any other purposes, nor did it suggest that SCE be subject to the general requirements of the Forest Plan. Under these circumstances, it was reasonable for staff to conclude that issuance of a new license for this project would be consistent with the Forest Plan. It was not incumbent on Commission staff to analyze the project's relationship to each management requirement of the Forest Plan.⁶⁸

58. Petitioners also argue that the Forest Plan does not allow the favoring of developmental uses to be given all of the weight in the choice of flow schedule and to prevent the restoration of beneficial uses of the renewable resources of the forest. As an initial matter, we have not given developmental uses "all of the weight" but rather have balanced them against non-developmental uses, as required by the FPA. As we have already noted, releasing the agency-recommended flows in the hope of creating riparian habitat would involve a significant reduction in generation and would be unlikely to create the environment petitioners envision. Second, petitioners do not provide any support for their argument that the staff's balancing of developmental and non-

⁶⁷ Staff found that certain of the conditions did not apply to lands of the San Bernardino National Forest within the project boundary but in most cases adopted license articles that contained requirements similar to those of the rejected conditions. This was the case with respect to Condition 6, providing for the maintenance of visible surface flow.

⁶⁸ Under section 4(e), the Commission must find that a license will not interfere or be inconsistent with the purpose for which a reservation, including a national forest, was created or acquired. This purpose, as to the San Bernardino National Forest, was not established by the Forest Plan but by the various proclamations and executive orders cited in the staff's relicense order at n.12.

developmental uses, as reflected in the leakage flow release condition, would be prohibited by the Forest Plan.⁶⁹ Certainly the Forest Service, the author and implementer of the plan, has made no such claim.

59. Petitioners criticize the relicense order for failing to explain how Article 407 would further the purposes of the Organic Administration Act⁷⁰ and the Multiple Use-Sustained Yield Act.⁷¹ Petitioners cite the former act as providing that “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. . . .” They cite the latter act as providing that each national forest is to be administered for multiple uses, and specifically for the “harmonious and coordinated management” of timber, water, outdoor recreation, fish, and wildlife. Petitioners assert that the release of leakage will not secure favorable flow or furnish timber, since all controllable flow will be diverted out of the creek during the growing season, and will not further administration of the forest for multiple uses, since it will assist only energy generation while interfering with the productivity of fish, wildlife, and other resources that depend on natural flow.

60. The Organic Administration Act does not place a responsibility on the Commission to ensure that a licensing action will actively promote the maximization of water flow and the production of timber in the particular area of a national forest in which

⁶⁹ Petitioners complain that the EA does not identify Forest Service land in the bypassed reach by coordinates or in any other specific manner. Since, they assert, the Article 407 and 413 measures were intended to benefit this Forest Service land, petitioners request that the Commission and the Forest Service determine and report the exact scope of National Forest lands in this reach and evaluate whether the measures in those articles will achieve their intended purpose. Granting this request would be inappropriate. It is not disputed that the bypassed reach runs through lands of the San Bernardino National Forest, and specifying their exact location is unnecessary to address any issues raised in this rehearing request. The Forest Service indicated, in its conditions, that visible surface flow on Forest Service lands in the bypassed reach would be sufficient, and it has not objected to the measures required by either of these license articles. The opportunity for evaluating impacts on and measures to protect or enhance Forest Service lands was provided in the relicensing proceeding itself.

⁷⁰ 16 U.S.C. § 475.

⁷¹ 16 U.S.C. §§ 528 *et seq.*

a project may be located. As the Commission does not manage national forests, it has no responsibilities under the provisions of the Multiple Use-Sustained Yield Act directing administration of national forests for a variety of uses. The Mill Creek 2/3 Project occupies only about 34 acres of national forest land, and there is no basis in the record to conclude that licensing the project will interfere with favorable water flow conditions, timber production, or the overall balance of uses and resources in the San Bernardino National Forest generally. As noted, the Forest Service, which is responsible for complying with those acts, has provided those conditions it deems necessary to protect the San Bernardino National Forest.

61. Petitioners also allege that the licensing action is inconsistent with the Basin Plan. The Basin Plan comprises volume 8 of the State Water Board's nine-volume Water Quality Control Plan, issued in 1995. Although the EA treated the Basin Plan as separate from the listed comprehensive plans, staff nevertheless considered the extent to which the proposed action would be consistent with it.⁷²

62. Acknowledging that the State Water Board failed to issue timely water quality certification, petitioners argue that the duty to ensure compliance with water quality standards devolves to the Commission under section 10(a)(1) of the FPA, insofar as it is required to evaluate the consistency of Article 407 with those standards. Petitioners identify various designated beneficial uses and narrative objectives of the Basin Plan as applicable water quality standards and complain that the final EA did not analyze the consistency of the Article 407 requirements with most of these uses and objectives, even though petitioners had identified them in their comments on staff's draft EA.⁷³

⁷² The 1975 version of the plan is listed in both the EA and the licensing order as one of the comprehensive plans that were considered. However, staff also considered volume 8 of the revised nine-volume Water Quality Control Plan, issued in 1995 and on file with the Commission. *See* EA at 237.

⁷³ Petitioners identify the designated beneficial water uses as (1) water contact recreation, including swimming, wading, fishing, water-skiing, skin and scuba diving, surfing, whitewater activities, and use of natural hot springs, (2) non-contact water recreation, including picnicking, camping, boating, hiking, and aesthetic enjoyment, (3) cold freshwater habitat, (4) preservation of biological habitats of special significance, including established refuges, parks, sanctuaries, and other areas where the preservation and enhancement of natural resources requires special protection, (5) habitat for rare, threatened, or endangered species, (6) hydropower generation, and (7) municipal and domestic water supply systems. The narrative objectives identified by petitioners specify the minimum dissolved oxygen content of waters designated "WARM" and "COLD,"

(continued)

63. In particular, petitioners state that Article 407 is inconsistent with the Basin Plan's Cold Freshwater Habitat designated use. As petitioners note, the EA acknowledged that the licensing proposal would be inconsistent with the Basin Plan in that the minimum flows would not maintain the 20-degree temperature objective for coldwater fisheries in segments of the bypassed reach.⁷⁴ However, the EA concluded that the recommendations in the draft EA were "generally consistent" with the State Water Board's recommendations, which were contained in comments filed on October 12, 2001. The EA noted that the State Water Board recommended sufficient minimum flow to maintain coldwater conditions in the bypassed reach only where feasible and that hydropower is one of the designated beneficial uses of the Basin Plan.⁷⁵

64. Petitioners contend that the EA's interpretation of the State Water Board's recommendations is not reasonable. They assert that the water quality certification provided for continuous release in an amount sufficient to maintain all beneficial uses in the bypassed reach, whether coldwater or warmwater. They add that the State Water Board, in its October 2001 comments, recommended that flow releases "maintain the "COLD" water objective (20 degrees C. mean daily average or less) in Mill Creek where feasible whenever daily streamflows above the projects [sic] point of diversion meets the "COLD" water designation by bypassing an adequate flow from or around their points of diversion to maintain cold freshwater habitat throughout the diverted reach."⁷⁶ Petitioners argue that the plain meaning of this language is that there should be continuous release into the bypassed reach whenever the flow at the diversion is cold water.

and the maximum extent to which the temperature of waters designated "COLD" may be increased.

⁷⁴ EA at 237. Petitioners claim that the EA improperly speculated that this inconsistency would disappear if the Regional Water Quality Control Board changed the designation of Mill Creek between Forest Falls Road and Highway 38 from coldwater to warmwater, as that Board had considered doing at the time the EA was issued. The EA simply noted that this redesignation would remove the inconsistency; it did not purport to justify the proposed minimum flows on the assumption that a redesignation would occur.

⁷⁵ *Id.* at A-5.

⁷⁶ October 12, 2001 comments on notice of application ready for environmental analysis. The quote is from the comments themselves, not from petitioners' rehearing request.

65. Petitioners criticize Commission staff for failing to consult with State Water Board staff before preparing the final EA to confirm the consistency of Article 407 with applicable water quality standards. They also argue that favoring two developmental uses of Mill Creek, hydropower and municipal water supply, at the cost of all of the non-developmental uses that rely on continuous flow, violates the Clean Water Act's requirement that water quality standards and implementing decisions ". . . restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁷⁷

66. In a licensing proceeding, the Commission must consider all resources, including water quality, that would be affected by a proposed action. However, the Commission's obligations under the Clean Water Act are defined by section 401, which provides that no license may be granted unless certification has been obtained or waived and that any certification shall become a condition of a license. Because the water quality certification was not timely issued and was therefore deemed waived, the Commission has no further obligations under provisions of the Clean Water Act in this proceeding. This does not mean that the Commission does not consider water quality issues in such a situation, and staff in fact analyzed and discussed water quality issues relating to the Mill Creek 2/3 Project extensively in its EA.⁷⁸

67. We do not find staff's interpretation of the State Water Board's recommendation unreasonable. Recommending the release of flows to maintain a temperature of 20 degrees centigrade (about 68 degrees Fahrenheit) "where feasible" whenever daily stream flows above the project meet a "COLD" water designation provides a considerable allowance for circumstances in which such a release would not be feasible. Staff's analysis of stream flow monitoring showed that a flow of at least 20 cfs would be needed in the Mill Creek bypassed reach to meet the Basin Plan's 20-degree temperature objective.⁷⁹ Staff concluded that, if a portion, or even all, of the average monthly flow above the diversion dam were diverted into the bypassed reach, there would not be enough surface water in the reach (due to evapotranspiration and percolation into the alluvium of the streambed) to meet the 20-degree temperature objective in certain years without a substantial loss in power generation. These circumstances preclude inclusion of a flow release condition in the new license that would achieve consistency with the

⁷⁷ Rehearing Request at 14, *citing* 33 U.S.C. §1251(a).

⁷⁸ EA at 51-53, 63-67, 78-79.

⁷⁹ *Id.* at 94.

Basin Plan's 20-degree temperature objective for coldwater fisheries in this segment of Mill Creek.⁸⁰

68. Staff noted that water sampling conducted at the Mill 3 project intake indicated that water quality in the bypassed reach is good.⁸¹ The State Water Board filed no comments on the draft EA responding to the staff's analysis or objecting to staff's failure to recommend higher minimum flows; nor did the State Water Board seek rehearing of the license order. We agree with staff that, except in respect to meeting the coldwater fisheries temperature objective, the project, as licensed, is consistent with the Basin Plan.⁸² More important, the project, as licensed, adequately protects water quality.

69. Finally, we point out that, under section 10(a)(2), the Commission is required only to consider the extent to which a project is consistent with a comprehensive plan, not to ensure consistency. Staff clearly fulfilled this statutory requirement with respect to the Basin Plan.

FPA Section 10(j)

70. Petitioners claim that the agencies' section 10(j) flow recommendations are consistent with the Forest Plan and Basin Plan and that the staff did not identify any other comprehensive plans with which the release of continuous flow would be inconsistent. Therefore, staff gave inadequate deference to the agencies' recommendations in rejecting them as inconsistent with the comprehensive plan standard of section 10(a).

71. The section 10(a)(2) directive to consider the consistency of a licensing proposal with comprehensive plans that have been filed with the Commission is distinct from the requirement to consider recommendations under section 10(j). Section 10(j) requires the Commission to accept fish and wildlife recommendations unless they are found

⁸⁰ EA at 213.

⁸¹ EA at 64.

⁸² There is no merit to petitioners' objection that Commission staff failed to consult with staff of the State Water Board to ensure that Commission staff recommendations were consistent with state water quality standards. Other than through issuance of a water quality certification, the Board's participation in a Commission proceeding once environmental analysis has begun is not elicited by consultation but rather by the opportunity to comment on Commission staff's recommendations and findings in a draft environmental document.

inconsistent with Part I of the FPA or other applicable law. In this proceeding, staff found that the recommendations would be inconsistent with the section 10(a)(1) comprehensive plan standard because they would significantly reduce generation while failing to improve habitat conditions in the bypassed reach. Consistency of the section 10(j) recommendations with comprehensive plans filed under section 10(a)(2) is not relevant to this determination.

Cumulative effects

72. Petitioners criticize the EA's finding that adoption of Article 407 would not have a cumulative effect on water resources because there would be no change in the amount of diverted flow.⁸³ Petitioners note that the Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) define "cumulative impact" as the impact on the environment that results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions.⁸⁴ Petitioners contend that, even though the environmental baseline in this proceeding is existing conditions, "the cumulative impact of issuing a new license includes how it affects the past and continuing impacts of the original license." They argue that the cumulative impact of Article 407 is the lost potential that may exist under a minimum flow schedule for restoration of the environmental baseline created by the original license.

73. In effect, petitioners are asserting that consideration of the project's cumulative impacts on water resources requires analyzing the effect of releasing leakage flows under the new license in connection with the "past action" of diverting all flows except leakage flows under the original license. We see no basis for construing the CEQ definition of a cumulative impact in this manner.⁸⁵ Providing for the release of leakage flows is not

⁸³ EA at 80.

⁸⁴ 40 C.F.R. § 1508.7.

⁸⁵ Petitioners cite *American Rivers v. FERC*, 201 F.3d 1186 at 1198 (9th Cir. 2000) (*American Rivers*), in support of their statement that a cumulative impact of a new license includes its effect on past and continuing impacts of an original license. We see nothing in that decision to support petitioners' interpretation. In sanctioning the Commission's use of existing conditions as an environmental baseline, the court merely agreed with the Commission's own statement that the Commission is not thereby precluded from including conditions that would reduce negative impacts attributable to a project since its construction. *American Rivers* at 1197-98.

“added to” the past action of diverting all but leakage flows; it simply continues that action.⁸⁶ Petitioners’ approach is essentially a collateral attack on the Commission’s position, which has been sustained in court,⁸⁷ that it is appropriate to consider current environmental conditions as the baseline for environmental analysis in relicensing proceedings. The present action creates no incremental impact on the environmental baseline in respect to the bypassed reach.

Endangered Species Act

74. Under section 7(a)(2) of the ESA, the Commission, in consultation with the Secretary of the Interior, must ensure that any action authorized is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. Petitioners claim that the Commission did not undertake formal consultation under section 7(a)(2) in response to evidence that the southwestern willow flycatcher, a federally-listed endangered species, is present in the Mill Creek 3 bypassed reach.

75. By letter of May 7, 2002, Commission staff notified FWS of its conclusion in the draft EA that relicensing the Mill Creek 2/3 Project would not be likely to adversely affect a number of species, including the southwestern willow flycatcher, and that therefore formal consultation was not required. By letter of August 27, 2002, FWS concurred with staff’s assessment, stating that future direct and indirect effects of project operation over the license period are not likely to adversely affect any listed species, as none are known to occur within the bypassed reach.⁸⁸ However, FWS stated that, if any listed plant or animal species were found in the bypassed reach during the license period, consultation should be initiated to ensure that project operation does not jeopardize the continued existence of the species.

⁸⁶ Petitioners state, correctly, that a new license represents a new decision whether to continue or change the original license. The fact that issuance of a new license is a “new action” does not warrant treating environmental conditions that existed under an original license and the same environmental conditions existing under a new license as if they interact with one another.

⁸⁷ *American Rivers v. FERC*, *supra* at 1195-99.

⁸⁸ In its comments on the application, FWS noted that southwestern willow flycatchers occur in several other locations along Mill Creek, and staff also found, in the EA, that southwestern willow flycatchers are known to nest at other sites within the project area. EA at 139.

76. By letter of October 31, 2002, to FWS, petitioners contested FWS's conclusion that the southwestern willow flycatcher was not known to occur within the bypassed reach. Petitioners attached a declaration from an interim curator of the San Bernardino County Museum, Gerald Braden, that birds of that species fly through and forage in the bypassed reach. Petitioners stated that Mr. Braden's declaration was based on his participation in surveys conducted by the museum from 1999 to 2002 under contract with the Forest Service and on his own eyewitness observations.⁸⁹

77. By letter of April 1, 2003, to the Commission, FWS noted petitioners' letter and the Braden declaration. FWS explained that the federally-listed southwestern willow flycatcher is one of three or four subspecies of flycatcher that could be present in southern California as transients during migration periods. FWS stated that these species are difficult or impossible to distinguish visually, but that only the southwestern willow flycatcher nests in southern California. FWS concluded that, because the willow flycatcher observations noted in the Braden declaration occurred during migration, the individuals observed could not be positively identified as the federally-listed subspecies. FWS indicated that, at that time, it did not have sufficient information to reassess its determination, but that reconsidering the necessity of consultation under section 7 might be appropriate if southwestern willow flycatchers were confirmed within the bypassed reach during the nesting season.

78. By letter of April 28, 2003, to FWS and the Commission, petitioners stated that Mr. Braden confirmed to them by telephone that he had observed flycatchers in the bypassed reach during the nesting periods of past years and that his prior declaration was intended to describe such observations. Petitioners indicated that they intended to submit Mr. Braden's written declaration to this effect in mid-May 2003. No such declaration was submitted, and Commission staff received no further communication from FWS on this matter. In the July 22, 2003 Relicense Order, staff, noting petitioners' earlier letter and FWS's response, concluded that no new information had been provided to warrant initiating further consultation.

79. Petitioners complain that staff's relicense order ignored their April 28, 2003 letter, and they attach to the rehearing request a written declaration of Mr. Braden indicating that he has observed the southwestern willow flycatcher in the bypassed reach during the nesting season. Petitioners state that FWS has not subsequently determined whether to initiate formal consultation, and they assert that, absent such a determination, issuance of the license was not permitted by section 7(a)(2). Petitioners state that, under the

⁸⁹ Cal Fish and Game submitted a November 5, 2002 letter to FWS in support of petitioners' letter, based on petitioners' documentation.

regulations administering the ESA, formal consultation is required once a lead agency determines that a listed species is present in the action area.⁹⁰ They argue that formal consultation with FWS is now necessary, since they have confirmed that listed flycatchers are present in the bypassed reach.

80. The declaration provided by petitioners lacks supporting documentation. The nesting season runs from mid-May through late July. The time period during which it would be safe to assume that the observed species is in fact a southwestern willow flycatcher is a narrow window – roughly June 22 through July 17.⁹¹ Before or after that window, the unlisted sub-species may be present. Absent direct observations of nesting behavior (such as territorial behavior or nest defense) or evidence of nesting (such as locating active nest or young), the timing of the observation is critical in determining if an observed bird would be a southwestern willow flycatcher.⁹² Petitioners provide no dates or locations of observations, and their evidence is insufficient to determine when in the nesting season the observations were made. Therefore, we do not consider the presence of willow flycatchers in the bypassed reach to be conclusively demonstrated.

81. The implementing regulations provide that, if during informal consultation it is determined by the federal agency, with the written concurrence of the Secretary, that the proposed action is not likely to adversely affect listed species, the consultation process is terminated and no further action is necessary.⁹³ The Commission staff reached such a determination in this proceeding with respect to the southwestern willow flycatcher, and

⁹⁰ Petitioners cite 50 C.F.R. § 402.12(a) (2005), which, however, simply provides that a biological assessment shall evaluate the potential effects of the action on listed and proposed species, shall determine whether any such species are likely to be adversely affected, and is to be used in determining whether formal consultation is necessary. Petitioners also assert that the requirement for formal consultation is subject only to limited exceptions, including instances in which a biological assessment has already been prepared or informal consultation has occurred, and they argue that no biological assessment has been prepared here. Petitioners' assumption is incorrect; the EA constituted the staff's biological assessment. *See* EA at 222.

⁹¹ *See* Southwestern Willow Flycatcher Protocol Revision 2000, U.S. Fish and Wildlife Service, Sacramento, California, July 11, 2000.

⁹² *See* A Southwestern Willow Flycatcher Natural History Summary and Survey Protocol, Technical Report NPS/NAUCPRS/NRTR-97/12, May 1977.

⁹³ 50 C.F.R. § 402.13(a).

FWS concurred with the determination. Further, FWS declined to reassess its concurrence upon petitioners' initial challenge to it. Under the regulations, the consultation process was completed. That FWS did not respond to petitioners' second challenge to its concurrence cannot be construed, as petitioners imply, as requiring the Commission to await yet another concurrence before issuing the license. The Commission and FWS are not required to extend consultation based on continued submissions from other entities. Standard license article 15 allows the Commission to reopen the license to consider information that might warrant initiating formal consultation in the future.⁹⁴

82. Petitioners criticize the EA for citing, at A-11, the Article 413 upland parcel irrigation requirement and the decommissioning of the Mill 2 diversion as justification for not initiating formal consultation. They assert that section 7(a)(2) does not permit the Commission to skip formal consultation with FWS on the hope that off-site mitigation will compensate for the direct impacts of the new license.

83. The EA stated that establishing a patch of riparian habitat near the Mill Creek 3 diversion and continuing reestablished flows in the Mill 2 bypassed reach would provide opportunities for increasing or restoring habitat for the willow flycatcher. The EA did not cite these measures to justify non-initiation of formal consultation but to explain why continued project operation would not be in conflict with recovery objectives to increase the willow flycatcher breeding population in the Santa Ana watershed. The decision not to initiate formal consultation was, rather, justified by FWS's concurrence, in which, we note, FWS specifically cited the Mill 2 restored flows and the 0.75-acre riparian habitat restoration as beneficial compared to the environmental baseline.

84. Petitioners also claim that the relicense order's leakage flow requirement does not comply with the requirement in section 7(a)(1) of the ESA that federal agencies actively

⁹⁴ Petitioners claim that FWS, in its October 11, 2001, comments on the application, essentially found that release only of leakage would have some adverse impacts on listed species if they were present in the bypassed reach. Petitioners add that FWS recommended the establishment of minimum flows to restore habitat conditions for a variety of species, including the southwestern willow flycatcher. In its 2001 comments, FWS cited reduction of surface and subsurface water due to diversion and groundwater pumping as a primary reason for the decline of the willow flycatcher, and it stated that restoration of stream flows in the bypassed reach would likely lead to an increase in the flycatcher population. These statements cannot be taken as a finding by FWS that the proposed action would have an adverse effect on the willow flycatcher, especially in light of its later-filed letters concurring with the staff's finding and affirming that concurrence.

contribute to the conservation of members of listed species in the project vicinity. Section 7(a)(1) provides that federal agencies shall, in consultation with the Secretary, “utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.”⁹⁵ This provision does not require the Commission to establish a program to conserve endangered species in the bypassed reach specifically. Section 7(a)(1) does not expand the authority conferred on an agency by its enabling act or provide any independent grounds for agency action not otherwise authorized or required.⁹⁶

Migratory Bird Treaty Act

85. Petitioners state that other migratory birds are present in the bypassed reach. They complain that the order did not address whether Article 407 complies with the Commission’s duties to protect migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*

86. The Migratory Bird Treaty Act makes it unlawful to pursue, hunt, take, capture, or kill any migratory birds except as permitted by regulations. The maintenance of existing leakage flows in the Mill Creek 3 bypassed reach would not result in any such action in respect to migratory birds.⁹⁷

⁹⁵ 16 U.S.C. § 1536(a)(1).

⁹⁶ See *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34, *reh’g denied*, 972 F.2d 1362 (D.C. Cir. 1992); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995).

⁹⁷ Petitioners cite Executive Order 13186, which, they claim, requires that any Commission action that may affect migratory birds must be consistent with a memorandum of understanding (MOU) executed with the FWS no later than January 2003. Executive orders are not binding on the Commission, which is an independent regulatory agency, not an executive agency. See *Georgia Power Company*, 98 FERC ¶ 61,105 at n.13 (2002). No MOUs have yet been issued under Executive Order 13186. It is our understanding that FWS is in the process of developing MOUs under Executive Order 13186 but that none have yet been signed.

Other Issues

87. Article 413 requires the licensee to file, for Commission approval, after consultation with Cal Fish and Game, FWS, and the Forest Service, a plan and schedule to prepare, plan, and establish riparian vegetation on a 0.75-acre parcel within the San Bernardino National Forest near the Mill 3 diversion dam and to monitor the effectiveness of the plantings. The plan is to include creation of a permanent water supply to nurture the native riparian species and develop a two-story canopy.⁹⁸ Petitioners seek rehearing of this article on the ground that the artificial irrigation of this parcel is not an adequate substitute for the riparian vegetation that would emerge if releases were made in the bypassed reach. Petitioners contend that the EA did not show that this “off-site mitigation” is comparable in quality or quantity to the habitat lost as a result of the Mill 3 diversion of all controllable flow.

88. The 0.75-acre parcel was not intended to be a substitute for riparian vegetation in the bypassed reach. The Article 413 requirement was included in the license as an enhancement measure that could result in the overall improvement of habitat for plant and wildlife species that use aquatic and riparian habitats in the area. Since the environmental baseline for analysis of the relicensed project’s effects is existing conditions, staff did not impose requirements to mitigate for effects of the project’s original construction and operation. For the same reason, the Commission is under no obligation to ensure that gains in habitat resulting from development and irrigation of this parcel would be equivalent to any losses in habitat that might have occurred when the project originally began diverting flows.⁹⁹

89. Petitioners question the staff’s decision not to require monitoring and adaptive management of the “actual environmental impacts” of Article 407. Petitioners refer specifically to staff’s rejection of Cal Fish and Game’s section 10(j) recommendation for conducting periodic fish surveys to document the condition of fish in the bypassed reach. Staff rejected this recommendation because it was related to Cal Fish and Game’s

⁹⁸ Commission staff approved this plan on January 7, 2005. *Southern California Edison Company*, 110 FERC ¶ 62,015 (2005).

⁹⁹ Petitioners also argue that the Forest Plan does not permit upland mitigation to substitute for proper management of riparian land. Petitioners do not explain why requiring development of the parcel would conflict with the Forest Plan, and, as we have explained, consistency of the proposed action with the Forest Plan is not required.

rejected recommendation for minimum flows above leakage and would have had no ecological value standing alone. Cal Fish and Game has not sought rehearing on this issue, and petitioners themselves acknowledge that the appropriateness of monitoring and adaptive management is a function of adopting the requested minimum flow schedule. Since we are not altering the Article 407 leakage flow requirement, there is no reason to revisit the staff's monitoring and adaptive management determination.

90. Included in petitioners' rehearing request are 39 questions related to the issues that we have discussed in this order. Petitioners request that the Commission respond to each of these questions individually. They claim that these specific responses are necessary because staff did not respond to all of their previous comments in the EA and relicense order. Petitioners claim that this inadequate response is inconsistent with staff's duties under NEPA.

91. Where, as here, a proposed action is not a major one, preparation of an EA by an action agency is sufficient. Typically, an EA is a concise document that includes a brief discussion of the need for the proposal, of alternatives to the proposal, and of the environmental impacts of the proposal and the alternatives, and a listing of the agencies and persons consulted and public comments received.¹⁰⁰ An EA must sufficiently address all significant environmental concerns in order to demonstrate reasoned decision-making,¹⁰¹ but it cannot be both concise and brief and at the same time provide detailed responses for every question raised.¹⁰²

92. Questions 1 through 7 ask how the Article 407 flows will contribute to uses and resources of the San Bernardino National Forest and to standards, guidelines, and management directions of the Forest Plan. Questions 8 through 13 ask how the Article 407 flows will comply with water quality standards, the Santa Ana Basin Plan, and the Clean Water Act. Question 14 asks whether the Article 407 flows will have a cumulative effect on the bypassed reach. Questions 15 through 20 and 27 concern the presence of the southwestern willow flycatcher in the bypassed reach and the staff's discharge of its obligations under the ESA. Questions 21 through 26 ask the Commission to determine whether Mill Creek had continuous flows, a coldwater condition, a riparian corridor, and

¹⁰⁰ See, e.g., *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994); *Committee to Preserve Boomer Lake Park v. Department of Transportation*, 4 F.3d 1543 (10th Cir. 1993); *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).

¹⁰¹ *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985).

¹⁰² *Sierra Club v. Forest Service*, 46 F.3d 835 (8th Cir. 1995).

a thriving trout fishery before construction of the project. Questions 28 and 29 concern staff's evaluation of petitioners' fate-of-flow and groundwater evidence. Questions 30 through 39 concern staff's evaluation of petitioners' evidence on likely future conditions in the bypassed reach, particularly as to shade, channel stability, fisheries, and the establishment of riparian vegetation, if petitioners' recommended flows were adopted.

93. This order has dealt with all of the issues to which the questions relate. Therefore, to the extent that we have not specifically addressed each individual question, we see no need to do so.

94. On January 3, 2005, petitioners filed a motion to establish further procedures and a schedule. Specifically, petitioners requested that we require the licensee to consult with regulatory agencies regarding the design, operation, and maintenance of the earthen dam and file a license amendment application in respect to it. Petitioners also requested that we establish a schedule for ruling on the motion, deciding whether to permit parties to brief the issues raised in the rehearing request, and, not later than April 30, 2005, decide the rehearing request. In light of our earlier discussion of the earthen dam and of our present issuance of this rehearing order, we will deny the motion.¹⁰³

95. On review of the record in light of petitioners' arguments, we conclude that staff properly considered and weighed the evidence submitted by all parties in respect to flows and conditions in the bypassed reach; that staff's decision to require the release only of leakage flows, while providing for additional enhancement, was supported by evidence in the record and represented a justifiable balance of beneficial uses of Mill Creek; and that staff fulfilled its responsibilities under the FPA and other pertinent statutes, as discussed in this order. Because staff's order is supported by the existing record, there is no need to establish further procedures, such as a settlement conference or a technical hearing to reexamine evidence, as petitioners request.

The Commission orders:

(A) The request filed August 21, 2003, by San Bernardino Valley Audubon Society and California Trout, for rehearing of the Commission staff's July 22, 2003 Order issuing a new license for the Mill Creek 2/3 Project No. 1934 is denied.

¹⁰³ Petitioners also included a request to initiate formal consultation under the ESA in respect to the Santa Ana sucker but amended the motion on January 4, 2005, to withdraw that request.

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(B) The motion filed January 3, 2005, by San Bernardino Valley Audubon Society and California Trout to establish further procedures and schedules is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.