

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 05-77186

**SAN BERNARDINO VALLEY AUDUBON SOCIETY, *ET AL.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**ON PETITION FOR REVIEW OF ORDERS OF THE
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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF ISSUES

1. Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”), in issuing a license to Southern California Edison Company (“Edison”) for the continued operation of a hydroelectric project in San Bernardino County, California, reasonably balanced environmental concerns with the need for power development pursuant to Sections 4(e) and 10(a)(1) of the Federal Power Act (“FPA”), 16 U.S.C. §§ 797(e) and 803(a)(1), where substantial evidence demonstrated that substantially higher flow releases, proposed by Petitioners,

would have offered little, if any, benefit to fish habitats or increased riparian vegetation while significantly reducing project generation.

2. Whether the Commission satisfied all of its responsibilities under FPA § 10(a)(2), 16 U.S.C. § 803(a)(2), to consider the extent to which the project is consistent with the federal and state comprehensive plans.

3. Whether the Commission satisfied all of its responsibilities under Sections 7(a)(1) and 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1536(a)(1) and (a)(2), when the record was inconclusive as to the presence of the southwestern willow flycatcher in the Mill Creek 3 bypassed reach.

4. Whether the Commission properly concluded that Edison, as the licensee, was responsible for obtaining any necessary water quality permits consistent with Sections 401 and 404(a) of the Clean Water Act, 33 U.S.C. §§ 1341 and 1344(a), for activities related to the issuance of a new license.

STATUTES AND REGULATIONS

Pertinent sections of relevant statutes and regulations are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

In this proceeding, the Commission issued a new license for the continued operation and maintenance by Edison of the Mill Creek 2/3 Project No. 1934.

Southern California Edison Co., 104 FERC ¶ 62,048 (2003) (“Licensing Order”), *reh’g denied*, 113 FERC ¶ 61,063 (2005) (“Licensing Rehearing Order”). Pet. Rec. Ex. 20 and 27, respectively.¹ This appeal primarily concerns whether the Commission properly balanced power and non-power values when it evaluated often conflicting evidence submitted by Edison, Intervenor Water Agencies,² and San Bernardino Valley Audubon Society (“Audubon”) and California Trout, Inc. (collectively, “Petitioners”) regarding the new license for the continued operation and maintenance of the Mill Creek 2/3 Project.

On one hand, Edison and the Intervenor Water Agencies presented substantial evidence supporting Edison’s proposal: (1) to produce low cost hydropower, which benefits power consumers and water users in an area of California where peak demand and annual energy requirements are expected to increase annually by 2.6 and 2.8 percent between 2001 and 2010, respectively; (2) to provide leakage flows of approximately 1.5 cubic feet per second (“cfs”) into the Mill Creek 3 bypassed reach and to establish a separate riparian vegetation habitat (natural home for plants and animals occurring in a thin strip of land

¹ Pet. Rec. Ex. refers to Petitioners’ Excerpts of Record and FERC Rec. Ex. refers to the record excerpts submitted by the Commission.

² Bear Valley Mutual Water Company; the City of Redlands, California; Crafton Water Company; East Valley Water District; North Fork Water Company; and San Bernardino Valley Municipal Water District (collectively, “Intervenor Water Agencies”).

bordering the creek) near Mill Creek 3; and (3) to provide water collection and delivery services required by its agreements with the Intervenor Water Agencies.

On the other hand, Petitioners presented evidence in support of minimum flows of 7 cfs. Petitioners claimed that these higher minimum flows would create a habitat for rainbow trout and create a riparian vegetation habitat for the southwestern willow flycatcher, a federally endangered bird, species that the Commission found the evidence inconclusive as to whether such birds are present in the Mill Creek 3 bypass reach.

After fully considering the entire record, including comments and license recommendations, the Commission concluded that the project, as conditioned in the new license, was best adapted to a comprehensive plan for developing a waterway for beneficial public purposes and, therefore, issued Edison a new license for the Mill Creek 2/3 Project. In particular, the Commission found that “the evidence submitted by [P]etitioners 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 [P]etitioners.” Licensing Rehearing Order at P 1 (Pet. Rec. Ex. 27 at 1).

Petitioners challenge various rulings. First, Petitioners object to the Commission’s balancing of power and non-power values - in particular, the

Commission's rejection of their higher minimum flow proposal - and argue that environmental considerations should have been afforded higher priority in the Commission's licensing decision. Petitioners also claim that the Commission violated ESA § 7 by purportedly failing to insure that the license will not jeopardize the continued existence and recovery of the southwestern willow flycatcher. Likewise, Petitioners object to the Commission's purported failure to examine the project in light of federal and state comprehensive plans. Last, Petitioners assert that the Commission should have evaluated a maintenance plan for the earthen berm (or soft plug) part of the diversion dam or, at least, should have required Edison to consult with the State Water Resources Control Board and the United States Army Corps of Engineers regarding permitting requirements relating to an earthen berm.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

1. Federal Power Act

Part I of the Federal Power Act constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). FPA § 4(e), 16 U.S.C. § 797(e), grants FERC authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on waterways

that are subject to congressional regulation under the Commerce Clause. *American Rivers v. FERC*, 201 F.3d 1186, 1191 (9th Cir. 1999).

In recognition of “an increased sensitivity to environmental concerns,” Congress amended the FPA’s hydroelectric licensing provisions in the mid-1980s to provide for greater consideration of a project’s overall effect on fish and wildlife. *Id.* Thus, before issuing a license, FERC must decide that, in its judgment, an approved project “will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation and enhancement of fish and wildlife . . . , and for other beneficial public uses” FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). “[I]n addition to the power and development purposes for which licenses are issued,” the Commission must “give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” FPA § 4(e), 16 U.S.C. § 797(e).

Moreover, FPA § 10(j)(1), 16 U.S.C. § 803(j)(1), requires that each license include conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the project. While such conditions shall be based on

recommendations received from specified state and federal resource agencies, the Commission may determine not to adopt or to modify those recommendations after giving them due weight. FPA § 10(j)(2), 16 U.S.C. § 803(j)(2); *see also American Rivers*, 201 F.3d at 1202.

The FPA also establishes a relicensing regime. FPA § 15(a), 16 U.S.C. § 808(a), authorizes the Commission, at the expiration of a license, “to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations.” If, at the expiration of a license, the Commission “does not issue a license to a new licensee, or issue a new license to the original licensee . . . then [it] shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until . . . a new license is issued as aforesaid.” *Id.*

2. Endangered Species Act

Congress passed the Endangered Species Act to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), imposes on an agency a duty to “insure” that any action it takes is “not likely to jeopardize the continued existence of any endangered species or threatened species. . . .” 16 U.S.C. § 1536(a)(2). *See Defenders of Wildlife v. United States EPA*, 420 F.3d 946 (9th Cir. 2005), *reh’g denied en banc*, 2006 U.S. App. LEXIS 14066 (2006); *Sierra Club v.*

Babbitt, 65 F.3d 1502, 1504 (9th Cir. 1995). ESA § 7(a)(1) imposes a duty on federal agencies to “consult with the Secretary [of the Fish and Wildlife Service] to carry out programs for conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1).

Moreover, it is the responsibility of the federal agency to determine whether its actions may affect listed species or their critical habitat and, if so, to enter into formal consultation concerning those actions. The Commission routinely engages in consultation with the United States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service with respect to its hydropower licensing. Licensing Order at PP 16-18 (Pet. Rec. Ex. 20 at 5-6). *See Pacific Gas & Elec. Co.*, 106 FERC ¶ 61,065, *reh’g denied*, 107 FERC ¶ 61,232, *reh’g denied*, 108 FERC ¶ 61,266 (2004), *appeal pending sub nom., California Sportfishing Protection Alliance, et al. v. FERC*, Nos. 04-73498, *et al.* (9th Cir.). Initially, FERC prepares a biological assessment to determine whether ESA § 7(a)(2) applies, *i.e.*, whether the hydropower licensing is likely to jeopardize a listed species. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. If the Commission concludes that a licensing action may adversely affect an endangered species, it initiates formal consultation under § ESA 7(a)(2), 16 U.S.C. § 1536(a)(2), unless the federal agency obtains the written concurrence of the FWS that the proposed action is “not likely to adversely affect” listed species. *See* 50 C.F.R. § 402.14. As

relevant here, in the instant proceeding, the Commission consulted with the FWS and concluded that a licensing action would not adversely affect the southwestern willow flycatcher, a federally endangered bird; and the FWS concurred with that finding.

3. Clean Water Act

Section 401(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1341(a), requires any “applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters” to provide the licensing or permitting agency a certification from the state in which the discharge originates that the discharge will comply with applicable water quality standards. *See California v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992); *Dep’t of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992). *See also S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 126 S. Ct. 1184 (2006). The Commission thus may not issue a license for a hydroelectric project unless the state certifying agency has either issued water quality certification for the project or waived certification. By letter dated December 27, 1995, the State Water Resources Control Board informed Edison that the certificate for the Mill Creek 2/3 Project was not issued within the 1-year period, and, therefore, was waived. Licensing Order at P 14 (Pet. Rec. Ex. 20 at 5).

CWA § 404(a), 33 U.S.C. 1344(a), requires hydroelectric license applicants

to obtain a dredge and fill permit from the United States Army Corps of Engineers if project construction involves discharge of dredged or fill materials into navigable waters. *See, e.g., Friends of the Earth v. Hintz*, 800 F.2d 822, 829-830 (9th Cir. 1986).

B. Events Leading to the Challenged Orders

1. Edison's Licensing Proposals

In 1994, Edison filed an application for a new license pursuant to FPA §§ 4(e) and 15, 16 U.S.C. §§ 797(e) and 808, for the continued operation and maintenance of the Mill Creek 2/3 Hydroelectric Project No. 1934. FERC Rec. Ex. 1. The project, first licensed in 1946, is located on Mill Creek, a tributary to the Santa Ana River Basin in San Bernardino County, California. The project lies within the San Bernardino National Forest and consists of two independent water conveyance and generation systems, the Mill 2 development ("Mill 2") and the Mill 3 development ("Mill 3"). The project operates in run-of-river mode, *i.e.*, an equivalent amount of water flows both into and out of the project areas. Licensing Order at P 5 (Pet. Rec. Ex. 20 at 2). The project serves two main purposes: hydroelectric power generation and conveyance of water for water supply. *Id.* at P 6 (Pet. Rec. Ex. 20 at 2).

Edison proposed to continue operating the Mill Creek 2/3 Project in run-of-river mode and to provide leakage flows estimated to be between 0.5 and 2 cfs at

the dam and sandbox,³ subject to compliance with Edison’s existing agreements with the water rights holders. Pet. Rec. Ex. 13 at 35. Due to an earthquake that destroyed the Mill 2 flowlines and diversions, Edison proposed to discontinue permanently use of the Mill 2 flowline and diversion structures and to implement a facility removal and site restoration plan for the Mill 2 facilities. Edison also proposed to develop and implement a plan to prepare, plant, and establish riparian vegetation on a 0.75 acre parcel near the Mill 3 diversion dam and to monitor the effectiveness of the vegetation plantings. Under Edison’s proposal, the project will generate an average of 12,654,000 kilowatt-hours (“kWh”) of electricity annually. Licensing Order at P 4 (Pet. Rec. Ex. 20 at 2); Final EA at 202 (Pet. Rec. Ex. 13 at 107).

On May 7, 2002, pursuant to ESA § 7, the Commission informed the FWS that it had concluded that the relicensing of Mill Creek 2/3 Project, with its recommended measures, is ‘not likely to adversely affect’” the southwestern willow flycatcher. Pet. Rec. Ex. 10 at 1. Therefore, the Commission determined that formal consultation was not required and asked the FWS to inform it if the FWS did not agree with the Commission’s assessment. *Id.* On August 27, 2002, the FWS concurred with the Commission’s determination. Pet. Rec. Ex. 12 at 1.

³ A sandbox is a settling pond that allows sediment and silt to drop out of the water before entering the flowline. Licensing Order at P 9 n. 6 (Pet. Rec. Ex. 20 at 3).

Moreover, on April 1, 2003, the FWS informed the Commission that, despite Petitioners' request for the FWS to initiate formal consultation with the Commission regarding the southwestern willow flycatcher's presence within the Mill Creek 3 bypassed reach, the FWS concluded that it did "not have sufficient information to reassess our determination." Pet. Rec. Ex. 18 at 2.

2. FERC's Environmental Assessments

On May 7, 2002, the Commission staff issued for comment a draft Environmental Assessment ("EA") that evaluated the potential environmental impacts of relicensing the project. Petitioners, Edison, the Intervenor Water Agencies, and other parties commented on the draft environmental assessment. Pet. Rec. Ex. 11 (Petitioners' Comments); FERC Rec. Ex. 8 at 189-197 (Edison's Comments); and FERC Rec. Ex. 9 at 198-210 (Intervenor Water Agencies' Comments). The final environmental assessment was issued on September 24, 2002, and it analyzed site-specific and cumulative environmental impacts of relicensing the Mill Creek 2/3 Project. Pet. Rec. Ex. 13 and FERC Rec. Ex. 12 at 251-260.

C. The Licensing and Licensing Rehearing Orders

In the challenged orders, as explained further *infra*, the Commission concluded that operating the project in the manner required by the license, subject to license terms and conditions developed in consultation with other federal and

state resource agencies, will protect and enhance fish and wildlife resources, water quality, recreational resources, and cultural resources.

1. Need for Project Power

The Commission evaluated whether, and under what conditions, to relicense the Mill Creek 2/3 Project. It found that the power from the project is useful in meeting Edison's needs as well as in meeting a portion of the local and regional need for power. Licensing Order at PP 49-52 (Pet. Rec. Ex. 20 at 16); Final EA at 7-9 (Pet. Rec. Ex. 13 at 19-21).

2. FPA § 10(j) Recommendations

The Commission reviewed extensive and detailed evidence presented by Petitioners, Edison and the Intervenor Water Agencies. The Commission found that higher minimum flows “would be inconsistent with [the FPA § 10(a)(1)] comprehensive plan standard because they would significantly reduce generation while failing to improve habitat conditions in the bypassed reach. Further, while acknowledging that Petitioners had “presented considerable information suggesting that [in the 19th century] continuous flow and riparian vegetation existed in Mill Creek,” the Commission concluded that such evidence was “not conclusive” because it was “fairly qualitative and not well-documented with regard to specific locations.” Rehearing Order at P 26 (Pet. Rec. Ex. 27 at 10). Moreover, the Commission emphasized that while historical information was informative, the

environmental baseline for review is current conditions. *Id.* at PP 30-31 (Pet. Rec. Ex. 27 at 13-14). Thus, recognizing that under existing conditions, surface flows in Mill Creek are intermittent and often cease somewhere within the bypass reach during low water years and as no trout fishery currently exists within Mill Creek’s bypass reach, the Commission ruled that the minimum flow recommendations may be inconsistent with the comprehensive planning standard of FPA § 10(a), including the equal consideration provision of FPA § 4(e), and instead recommended a continuation of existing leakage flows. Licensing Order at P 27 (Pet. Rec. Ex. 20 at 10).

The Commission found that the proposed plan to monitor leakage flows “will adequately and equitably protect fish and wildlife resources.” Licensing Order at P 35 (Pet. Rec. Ex. 20 at 12). The Commission also ruled that “other measures such as removal of the Mill 2 facilities and the establishment of a riparian vegetation community will mitigate damage to and enhance fish and wildlife resources.” *Id.*⁴

⁴ In the 1990s, the Mill 2 flowlines and diversions (Mountain Home Creek Diversion and the Mill 2 River Pick-up) and some associated facilities were destroyed or damaged by an earthquake or floods. The Mill 2 flowline and diversions are inoperable and have not been used since 1992. Consequently, Edison proposed to permanently discontinue use of the Mill 2 flowline and diversion structures. Licensing Order at PP 12-13 (Pet. Rec. Ex. 20 at 4).

3. Threatened and Endangered Species

The Commission, with the concurrence of the FWS, ruled that the project, with various Commission staff-recommended mitigative measures, “would not be likely to adversely affect” the southwestern willow flycatcher. Although Petitioners requested that the FWS initiate consultation with the Commission for the southwestern willow flycatcher, the Commission agreed with the FWS’s subsequent determination that the parties had not provided new information “that would necessitate initiating further consultation under the ESA.” Licensing Order at P 18 (Pet. Rec. Ex. 20 at 6).

Moreover, the Commission found that “[t]he declaration provided by [P]etitioners lacks supporting documentation” regarding the presence of southwestern willow flycatchers in the bypassed reach, and was inadequate because it provides “no dates or locations of observations.” Licensing Rehearing Order at P 80 (Pet. Rec. Ex. 27 at 34).

4. State and Federal Comprehensive Plans

The Commission also found, consistent with FPA § 10(a)(2), 16 U.S.C. § 803(a)(2), that there were “no inconsistencies” with the 39 federal and state comprehensive plans that were filed by the federal and state resource agencies. Licensing Order at P 41 (Pet. Rec. Ex. 20 at 14). Specifically, as relevant here, the Commission found that the U.S. Department of Agriculture, Forest Service, had

not filed the *San Bernardino National Forest Land and Resource Management Plan* (1988) (“San Bernardino Forest Plan”) with “a request for adoption by the Commission as a comprehensive plan.” Licensing Rehearing Order at P 56 (Pet. Rec. Ex. 27 at 24). Nonetheless, the Commission found that the proposed licensing action would be consistent with the San Bernardino Forest Plan. *Id.* at PP 56-58 (Pet. Rec. Ex. 27 at 24-25).

The petition for review followed.

SUMMARY OF ARGUMENT

I.

The Commission fully complied with its statutory obligations under FPA §§ 4(e) and 10(a)(1), 16 U.S.C. §§ 797(e), 803(a)(1). The Commission thoroughly considered the competing evidence and balanced the power and non-power values. The Commission analyzed Petitioners’ evidence, which they argued demonstrated that their recommended minimum flow would create a habitat for rainbow trout and southwestern willow flycatchers, species that the Commission found do not presently exist in the bypass reach. The Commission compared this evidence against countervailing evidence showing a need for power generation and water supply in Southern California, an increase in energy demand in Southern California, and the value of enhancement measures imposed in the license. Based on substantial evidence, the Commission reasonably ruled that the project, on

balance, was best adapted to a comprehensive plan for developing a waterway for beneficial public purposes.

II.

The Commission fully complied with its statutory obligations under FPA § 10(a)(2), 16 U.S.C. § 803(a)(2). The Commission considered the San Bernardino National Forest Land and Resource Management Plan and the Santa Ana Basin Plan. Neither Plan was filed as a comprehensive plan under FPA § 10(a)(2); nonetheless, the Commission reasonably found, based on substantial evidence in the record, that the proposed licensing action was consistent with the Plans.

III.

The Commission fully complied with its statutory obligations under ESA §§ 7(a)(1) and 7(a)(2), 16 U.S.C. §§ 1536(a)(1) and (a)(2). The Commission prepared its biological assessment and determined that the project was not likely to jeopardize the southwestern willow flycatcher. The U.S. Fish and Wildlife Service concurred with this finding. Moreover, both the Commission and the FWS questioned the weight of Petitioners' evidence and found it deficient to support a conclusive finding that southwestern willow flycatchers are present in the Mill Creek 3 bypassed reach.

IV.

Finally, the Commission fully complied with its statutory obligations under the Clean Water Act § 401(a), 33 U.S.C. § 1341(a), when it ruled that Edison did not need to file a license amendment to describe the earthen berm with greater specificity. Moreover, the Commission properly ruled that Edison was responsible for obtaining any water permits, including, if necessary, a dredge-and-fill permit under CWA § 404(a), 33 U.S.C. § 1344, from the U.S. Army Corps of Engineers.

ARGUMENT

I. STANDARD OF REVIEW.

Judicial review of the Commission's hydroelectric licensing decisions is limited to determining whether the Commission's action was arbitrary and capricious, and whether the factual findings underlying the decision were supported by substantial evidence. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d at 1194; *Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985); *see also* FPA § 313(b), 16 U.S.C. § 825l(b). Likewise, agency decisions under the ESA are reviewed under the arbitrary and capricious standard. *Ariz. Cattle Growers' Assoc. v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1235-36 (9th Cir. 2001). Under that standard, the court is not empowered to substitute its judgment for that of the agency. Rather, as long as the agency decision is based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action as arbitrary and capricious. *Id.* at 1236.

Moreover, FERC's factual determinations cannot be set aside if they were based upon substantial evidence. *See, e.g., Steamboaters v. FERC*, 759 F.2d at 1388. "[S]ubstantial evidence constitutes more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation,

we must uphold [FERC's] findings.” *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003), citing *Eichler v. S.E.C.*, 757 F.2d 1066, 1069 (9th Cir. 1985).

II. THE COMMISSION’S DECISION NOT TO IMPOSE PETITIONERS’ RECOMMENDED MINIMUM FLOW CONDITIONS WAS REASONABLE, SATISFIED ALL STATUTORY REQUIREMENTS, AND WAS BASED ON SUBSTANTIAL EVIDENCE.

A. The Commission Reasonably Declined To Impose The Recommended Minimum Flow Conditions After Developing An Extensive Record And Giving Equal Consideration To The Competing Evidence Of Edison, the Intervenor Water Agencies and Petitioners.

Hydropower projects serve many different (and competing) purposes, including power production, recreation, flood protection, and protection and enhancement of fish and wildlife resources. *See National Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1482-1483 (D.C. Cir. 1990). The Commission must give equal consideration to developmental and non-development values. FPA § 4(e), 16 U.S.C. § 797(e). The Commission must also balance all these competing interests in approving a hydroelectric project that “will be best adapted to a comprehensive plan for improving or developing” the affected waterway. FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). *See American Rivers*, 201 F.3d at 1206-1207.

1. Minimum Flow Recommendations

The issue that garnered the most controversy in the proceeding below, and which Petitioners raise on appeal here, concerns the Commission's determination to adopt License Article 407, which allows Edison to continue to provide leakage within a range of 0.5 to 2 cubic feet per second, rather than adopt Petitioners' suggested higher minimum flow. Below, Petitioners recommended a 7 cfs minimum flow release. Pet. Rec. Ex. 3 at 5 ("the Licensee shall . . . maintain a continuous instream flow in the Mill Creek 3 bypassed reach of 7 cfs"); Pet. Rec. Ex. 5 at 3 ("We estimate that the release from the Mill 3 diversion should be 7 cfs. . .").⁵

On brief, Petitioners argue that License Article 407 "gives 'all of the weight' to hydropower in the operation of Mill 3. . . ." Br. at 13. This argument essentially amounts to a complaint that adoption of Petitioners' minimum flow recommendation would represent a more justifiable balance of power and non-power interests.

⁵ Petitioners' Brief states that they "proposed a minimum flow schedule of 6 c.f.s." Br. at 26. Various federal and state resource agencies also made minimum flow recommendations pursuant to FPA § 10(j), 16 U.S.C. § 803(j). The Forest Service recommended a flow of no less than 1 cfs to the Mill 3 bypassed reach. FERC Rec. Ex. 3 at 20. The FWS recommended a continuous year-round instream flow in the Mill 3 bypassed reach of 7 cfs. Pet. Rec. Ex. 6 at 9. The California Department of Fish and Game recommended a continuous minimum instream flow of 6 cfs. Pet. Rec. Ex. 2 at 3. *See also* Final EA at 168 (FERC Rec. Ex. 12 at 253).

The Commission, as Petitioners note, “reviewed and, particularly in the Rehearing Order, acknowledged Audubon’s evidence, while ultimately relying on competing evidence submitted.” *See Br.* at 27. In particular, the Commission staff issued draft and final environmental assessments, which examined the competing evidence regarding minimum flows and, specifically, reviewed whether the anticipated results of such increased flows (continuous flows throughout the Mill Creek 3 bypassed reach; substantial riparian vegetation corridor totaling 11 new acres or more; suitable conditions for rainbow trout fishery; and recreational use of the creek (*see id.* at 26)) would materialize.

The Commission agreed with its staff and ruled that the minimum flow recommendations were “inconsistent” with the comprehensive planning standard of FPA § 10(a), including the equal consideration provision of FPA § 4(e). Licensing Order at P 34 (Pet. Rec. Ex. 20 at 12); Final EA at 230 (Pet. Rec. Ex. 13 at 116). Thus, the Commission adopted License Article 407,⁶ which requires

⁶ License Article 407. Instream Flows. The licensee shall not take affirmative steps to prevent or reduce existing leakage flows into the bypassed reach from the Mill 3 diversion dam and sandbox. Should maintenance activities to those structures become necessary, the licensee should ensure that leakage flows are not diminished or, if that is not possible, then the licensee shall provide an alternate method for the release of flows to the bypass reach of the approximate magnitude of existing leakage, as determined by License Article 408.

monitoring of the existing leakage flows, and License Article 408,⁷ which monitors existing leakage from the Mill 3 diversion dam at a point downstream of the dam for a three-year period to establish a range of leakage. Licensing Order at P 24 n.14 and Ordering Paragraph (E), License Articles 407 and 408 (Pet. Rec. Ex. 20 at 8 and 27-28). License Articles 407 and 408 satisfy FPA §§ 4(e) and 10(a) statutory requirements and represent an appropriate balance of the various purposes of the Mill Creek 2/3 Project. Nothing more is required.

2. Substantial Evidence Supports The Commission’s Ruling That a 6 or 7 cfs Minimum Flow Would Not Produce Year-Round Flows In the Bypassed Reach.

Petitioners argue that the Commission’s evidence was “inadequ[ate]” to support License Article 407. Specifically, Petitioners contend that the Commission did not dispute that its recommended 6 cfs “would maintain continuous flow [throughout the bypassed reach] in average and wet years and most of the time in dry years.” Br. at 32. To the contrary, the Commission determined that the evidence showed year-round continuous flow throughout the entire bypassed reach to be questionable.

⁷ License Article 408. Streamflow Monitoring Plan. Within 6 months from the license issuance, the licensee shall file with the Commission, for approval, a plan and schedule to measure existing leakage from the Mill 3 diversion dam at a point downstream of the diversion dam for a 3-year period to establish a range of existing leakage. Further, the plan and schedule shall provide for the continued monitoring of existing leakage through the term of the license

The Mill 3 flowline has a maximum capacity of 24.4 cfs, which it diverts from Mill Creek at the Mill 3 diversion dam. Licensing Order at PP 7 and 8 (Pet. Rec. Ex. 20 at 3). *See* Final EA at 61 (Pet. Rec. Ex. 13 at 53). The 10-mile long Mill Creek Canyon includes 7 miles of bypassed reach. *See* Final EA at 61 (Pet. Rec. Ex. 13 at 53). Flows in excess of Mill Creek 3's maximum hydraulic capacity of 24.4 cfs spill over the diversion dam and into the Mill 3 bypassed reach. *Id.* at 20 (Pet. Rec. Ex. 13 at 32). Spillage occurs seasonally during high-flow events. Typically, flows are highest during February and March and they decrease during late spring, and are lowest during the late summer. Final EA at 44 (FERC Rec. Ex. 12 at 251).

Petitioners acknowledge that it, Edison and the Intervenor Water Agencies submitted “scientific evidence” and “voluminous evidence, including the exhibits attached to the license application and subsequent reports” regarding the minimum flow issue. Br. at 26-28. *See* Licensing Rehearing Order at PP 34-35 nn.35 and 36 (Pet. Rec. Ex. 27 at 14-15). *See also* Pet. Rec. Ex. 5 at 9-40 (draft fate-of-flow study); FERC Rec. Ex. 2 at 7-15 (Edison's fate-of-flow study); Roy Leidy, *et al.*, “*The Ecology of Mill Creek*,” at Chapter 4, “Hydrology of the Mill Creek Watershed,” (Nov. 27, 2001) (FERC Rec. Ex. 4 at 58-73) (description of the surface water and groundwater hydrology of Mill Creek). The Commission questioned how much flow would result in the bypassed reach with the

recommended 6 or 7 cfs minimum flow and reasoned that “[v]ariables 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.” Licensing Rehearing Order at P 35 (Pet. Rec. Ex. 27 at 14-15).

Nevertheless, the Commission ruled that Petitioners’ and Edison’s evidence was “not substantially different” on the fate of flow studies that predicted between 2 to 4 cfs would be lost from natural factors such as percolation and evapotranspiration⁸ and ruled that “[u]nder the circumstances, [Edison’s] and [P]etitioners’ estimates are in general agreement.” *Id.* See Final EA at 107 (Pet. Rec. Ex. 13 at 65) (Commission staff found “minimum flow releases of 6 and 7 cfs would not result in a substantial amount of surface water in Mill Creek due to evapotranspiration and percolation into alluvium [soil or sediment deposited by running water] in the streambed, and would not be expected to enhance long-term habitat conditions for rainbow trout over existing conditions”). Additionally, the Commission held that even considering Petitioners’ evidence, Edison’s evidence showed that “release of all available flow may not be enough to maintain flow

⁸ 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. Licensing Rehearing Order at P 33 n.34 (Pet. Rec. Ex. 27 at 14).

throughout the whole bypassed reach during the entire dry season of some years.” Licensing Rehearing Order at P 37 (Pet. Rec. Ex. 27 at 16). *See* Final EA at 107 (Pet. Rec. Ex. 13 at 65) (Commission staff’s finding that Edison showed that “even the release of the entire inflow at the diversion dam may not be enough to maintain flow in the Mill Creek bypass during the dry season”).⁹

Environmental limitations were not the sole impediment to the Commission’s adoption of Petitioners’ recommended minimum flow. In fact, the Commission reasoned that 6 cfs of flow would not always be available for release into the bypassed reach. In this regard, the Commission considered the records of two United States Geological Survey gages and found that although the gages indicated that flows exceeded 6 cfs the majority of the time, this flow could include “as much as 1.6 cfs of flow attributed to the powerhouse tailrace.” Licensing Rehearing Order at P 36 (Pet. Rec. Ex. 27 at 15).¹⁰

The Commission was not persuaded by Petitioners’ claim that, because “farms and mills” existed in what is now the bypassed reach in the late 19th century, historical activities indicate that “there was a continuous flow in that reach

⁹ Even Petitioners admit that “[s]ince a continuous surface flow has not occurred since 1899, Audubon acknowledged below, and does again, that the groundwater levels in the bypass reach vary widely but tend to be substantially below the root zone.” Br. at 36.

¹⁰ This 1.6 cfs figure derives from the Crafton Water Company’s groundwater well No. 4, located approximately one mile downstream of the Mill 3 diversion dam. Licensing Order at P 7 (Pet. Rec. Ex. 20 at 3).

of the creek in all seasons and at all places” and thus could be again with Petitioners’ recommended minimum flow. *Id.* at P 27 (Pet. Rec. Ex. 27 at 11-12). In fact, the Commission staff found that flow “has the potential to stop flowing at locations within the bypassed reach during very low-water years. . . .” Final EA at 107 (Pet. Rec. Ex. 13 at 65). The totality of this evidence demonstrates that the Commission relied on substantial evidence when it refuted Petitioners’ claim that its 6 or 7 cfs minimum flow would result in continuous flows in the bypassed reach.

3. Substantial Evidence Supports The Commission’s Ruling That A 6 or 7 cfs Minimum Flow Would Not Produce an 11-Acre Riparian Vegetation Corridor.

Petitioners, Edison and the Intervenor Water Agencies filed comments advocating their positions regarding minimum flow releases and the creation of a riparian vegetation corridor. Pet. Rec. Ex. 5 (Audubon’s comments); FERC Rec. Ex. 5 at 94-113, 118-124 (Intervenor Water Agencies’ comments); FERC Rec. Ex. 6 at 148-170 and FERC Rec. Ex. 10 at 212-214, 217-219 (Edison’s comments); FERC Rec. Ex. 4 at 45-49, 79-86 (Leidy, *et al.*, at 2-43 to 2-47, 6-1 to 6-8, discussing minimum flows and riparian vegetation habitat). Likewise, the Commission found that Petitioners had “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.” Licensing Rehearing Order at P 25 (Pet. Rec. Ex. 27 at 10). *See also id.* at P 27 (Pet. Rec. Ex. 27 at 11) (Commission staff’s review of evidence in the record that showed some historic discontinuous vegetative zones but not a continuous riparian corridor throughout the bypassed reach).

Although Petitioners recognize that the Commission’s analysis of their evidence relating to the establishment of an 11-acre riparian vegetation corridor “is relatively extensive in the Rehearing Order,” Br. at 33, and relies on “many documents that the [final environmental assessment] had included in the section, ‘Literature Cited,’” *id.* n.11, they nevertheless maintain the Commission’s rulings in this regard were not based on “substantial evidence,” *id.* at 25. Specifically, Petitioners challenge the Commission’s finding that “riparian vegetation in the losing reaches^[11] would probably not survive to maturity, as a result of scour^[12] and channel migration caused by periodic flooding.” *Id.* at 33-34, citing Licensing Rehearing Order at P 46 (Pet. Rec. Ex. 27 at 20). Likewise, even though Petitioners agree with the Commission that recharge rates “may vary widely depending on geological and other conditions at a given location,” Br. at 37, they

¹¹ A losing area exists where surface water (streamflow) is lost to groundwater; a gaining area exists where groundwater is added to surface water. Licensing Rehearing Order at P 26 n.24 (Pet. Rec. Ex. 27 at 11).

¹² Scour is the removal of sediment (soil and rocks) from streambeds and streambanks caused by moving water.

object to the Commission’s ruling that “a continuous flow schedule of 6 c.f.s. would not recharge the groundwater in a manner that would consistently result in perched conditions supportive of riparian vegetation.” *Id.* at 36, citing Licensing Rehearing Order at P 40 (Pet. Rec. Ex. 27 at 17).

a. Flooding And Creation of an Enduring Riparian Vegetation Habitat.

After reviewing the evidence and the findings from the draft and final environmental assessments, the Commission ruled that there was “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.” Licensing Rehearing Order at P 53 (Pet. Rec. Ex. 27 at 23). The Commission ruled that it “is far from certain that the recommended flow release would create the established and enduring riparian areas that [P]etitioners predict.” *Id.* at P 45 (Pet. Rec. Ex. 27 at 20). In fact, the Commission found that “[r]egular flooding of the reach results in frequent channel migration, inhibiting the channel from deepening and stabilizing.” *Id.*¹³ Moreover, the Commission reasoned that “[i]n areas where deepening of the channel may occur, only transient and limited additional riparian

¹³ Commission staff found that the “[f]lash floods in this area are typically short lived, but very destructive because they can alter the channels and remove streamside vegetation.” Final EA at 44 (FERC Rec. Ex. 12 at 251). *See also* Leidy, *et al.*, at 3-4 to 3-8 (FERC Rec. Ex. 4 at 53-57) (discussion of geological characteristics of Mill Creek).

vegetation would be likely to result, since continuous surface water would be required to sustain vegetation during dry periods.” *Id.* See also, Leidy, *et al.*, at 6-4 (FERC Rec. Ex. 4 at 82) (discussion of flooding in Mill Creek). Accordingly, the Commission predicted 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.” Licensing Rehearing Order at P 45 (Pet. Rec. Ex. 27 at 20), citing, Final EA at 44 (FERC Rec. Ex. 12 at 251).

Furthermore, the Commission figured the physical characteristics (high-gradient stream channel) would significantly contribute to whether a riparian habitat would result. As such, the Commission doubted that “young riparian vegetation would survive to its maturation in the deep alluvium of the losing reaches.” Licensing Rehearing Order at P 46 (Pet. Rec. Ex. 27 at 20). The Commission also ruled that “[a]ny 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 (shrubs that grow naturally along stream banks where the soil is often quite wet) would die relatively quickly due to lack of water.” *Id.*, citing Leidy, *et al.*, at

4-18 to 4-19, 4-24, 6-4 (FERC Rec. Ex. 12 at 4 at 67-68, 73, 82) (discussion of flooding in Mill Creek).

The Petitioners challenge the Commission's final determination in this regard "that floods in 1862, 1903 and subsequent years caused channel migration, stranding, and eventually killed riparian vegetation in the abandoned channel." Br. at 34. The Commission ruled, in this regard, that even if the "project's diversion of water may have contributed to the effects of the floods that occurred after project operations began . . . 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 [P]etitioners are not advocating." Licensing Rehearing Order at P 46 (Pet. Rec. Ex. 27 at 20-21).

In short, the Commission reasonably ruled, based on substantial evidence, as follows:

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

Id. at P 48 (Pet. Rec. Ex. 27 at 21-22).

b. Recharge And Creation Of Enduring Riparian Areas.

At bottom, the Commission ruled that “[u]nder 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 substantial riparian habitat.” Licensing Rehearing Order at P 40 (Pet. Rec. Ex. 27 at 17-18). The Commission found that any direct connection of the surface water with the groundwater table along the losing reaches of the Mill Creek has been “short-lived and unsustainable other than during brief periods of high subsurface recharge due to floods and general basin recharge from precipitation.” *Id. See also* Leidy, *et al.*, at 4-17 to 4-24 (FERC Rec. Ex. 4 at 66-73) (discussion of groundwater recharge). Additionally, the Commission concluded that “[s]ignificant streambed sealing and layering help to limit the amount of surface water recharge that would reach the groundwater table.” Licensing Rehearing Order at P 40 (Pet. Rec. Ex. 27 at 17-18).

In contrast to Petitioners’ conclusions, the Commission found that “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.” *Id.* at P 42 and n.52 (Pet. Rec. Ex. 27 at 19). Further, Petitioners’ own expert conceded that it was doubtful that a minimum flow of 6 or 7 cfs would produce the extent of riparian vegetation and habitat that

petitioners claim existed in this stretch of Mill Creek before the project was constructed when he stated:

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.

Licensing Rehearing Order at P 30 (Pet. Rec. Ex. 27 at 13), citing Robins, J., *Final Report on the Potential for Riparian Vegetation Reestablishment in the Mill Creek bypassed reach: The effect of surface flow re-perennialization and groundwater recharge on a suite of species*, at 15 (January 31, 2001) (Pet. Rec. Ex. 5 at 90). The Commission further confirmed the reasonableness of its rulings regarding the creation of an 11-acre riparian vegetation habitat when it determined that “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.” Licensing Rehearing Order at P 27 (Pet. Rec. Ex. 27 at 11). *See also* Leidy, *et al.*, at 2-43 to 2-47 (FERC Rec. Ex. 4 at 45-49) (discussion of riparian vegetation).

Petitioners also challenge the Commission’s rejection of its evidence “about restoration efforts at other alluvial creeks” Br. at 37. The Commission explained that the fact 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 stream.” Licensing Rehearing Order at P 48 n.59 (Pet. Rec. Ex. 27 at 21-22). Moreover, Edison presented evidence demonstrating that Petitioners relied on studies from “shallow-gradient alluvial river basins in Arizona and Egypt” that were based on “assumptions [that] cannot be extrapolated to Mill Creek.” FERC Rec. Ex. 10 at 212-213, 223-237.

c. License Article 413 – A Riparian Enhancement Measure.

In recognition of its obligation to balance environmental considerations, the Commission included License Article 413, which requires Edison to establish 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. Licensing Order, Ordering Paragraph E, License Article 413 (Pet. Rec. Ex. 20 at 29). The Commission included Article 413 “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.” Licensing Rehearing Order at P 88 (Pet. Rec. Ex. 27 at 37). Petitioners agree that this measure will enhance wildlife habitat. Br. at 13 (“[Edison’s] proposal to irrigate a 0.75 acre upland parcel will enhance wildlife habitat. Audubon agrees”).

4. Substantial Evidence Supports The Commission’s Ruling That A 6 or 7 cfs Minimum Flow Would Not Produce A Sustainable Rainbow Trout Habitat.

In this case, the parties also submitted significant fisheries evidence, which the Commission analyzed in the draft and final environmental assessments as well as in the licensing orders. Leidy, *et al.*, at 5-8 to 5-12 (FERC Rec. Ex. 4 at 74-78) (discussion of current and past aquatic resources in Mill Creek); Final EA at 85-87, 106-111 (Pet. Rec. Ex. 13 at 61-69); Licensing Order at PP 28-35 (Pet. Rec. Ex. 20 at 10-12); Licensing Rehearing Order at PP 28, 31, 49-51 (Pet. Rec. Ex. 27 at 12-13, 22-23). Petitioners make two related arguments in this regard. First, Petitioners argue that the Commission did not “allocate any controllable flow to fish, wildlife, and recreation in the bypass reach.” Br. at 13. Petitioners also argue that the Commission’s finding that a minimum flow of 6 cfs “would not be sufficient to enhance long-term habitat conditions for rainbow trout over existing conditions” is not supported by substantial evidence. *Id.* at 25. Both claims are without merit.

The Commission examined the evidence that demonstrated that the recommended flows would “be unlikely to create the environment [P]etitioners envision.” Licensing Rehearing Order at P 58 (Pet. Rec. Ex. 27 at 25). First, the Commission found, and Petitioners do not dispute, that “no trout fishery currently exists within the Mill Creek bypassed reach.” Licensing Order at P 27 (Pet. Rec.

Ex. 20 at 10). The Commission explained in this regard that “most of Mill Creek is considered unsuitable for rainbow trout because of its high gradient, lack of riparian vegetation, and channel instability.” *Id.* at n.19 (Pet. Rec. Ex. 20 at 10). Moreover, the final environmental assessment included evidence that: (1) the minimum flows “may temporarily and slightly enhance habitat conditions for rainbow trout in Mill Creek,” but they also “could result in fish stranding in warm, isolated pools as flows subside and water percolates into the alluvium,” Final EA at 107 (Pet. Rec. Ex. 13 at 65); and (2) “the existing leakage downstream of the diversion dam has proved sufficient to sustain small populations of non-native rainbow trout associated with off-channel cienegas” *id.* at 106-107 (Pet. Rec. Ex. 13 at 64-65).¹⁴

Thus, the Commission evaluated and agreed with its staff’s conclusion “that the recommended flows of 6 and 7 cfs, respectively, would not be sufficient to enhance long-term habitat conditions for rainbow trout over existing conditions and that flows in excess of 20 cfs would be needed to maintain temperatures within the tolerance ranges for rainbow trout.” Licensing Rehearing Order at P 10 (Pet. Rec. Ex. 27 at 4). On rehearing, the Commission reasonably declined to discuss

¹⁴ 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. Licensing Rehearing Order at P 10 n.10 (Pet. Rec. Ex. 27 at 4).

whether “flows of at least 20 cfs would be needed to create a coldwater condition, as the [final] environmental assessment concluded,” because “the [P]etitioners and the agencies recommended flows of only 6 or 7 cfs.” *Id.* at P 48 n.58 (Pet. Rec. Ex. 27 at 21).

The Commission’s rulings in this regard were validated by California Fish and Game’s “agree[ment] there would be lack of suitable habitat and flow conditions for rainbow trout in the bypassed reach.” Licensing Rehearing Order at P 10 n.11 (Pet. Rec. Ex. 27 at 5). *See* FERC Rec. Ex. 7 at 187 (“Your comments regarding the lack of suitable habitat and flow conditions for rainbow trout in the Mill Creek bypass reach are valid”). Moreover, the evidence showed that despite repeated attempts by the California Fish and Game to stock rainbow trout in Mill Creek upstream of the Mill 3 diversion and create a fish habitat, such attempts were unsuccessful. Licensing Order at P 27 n.19 (Pet. Rec. Ex. 20 at 10). Similarly, Edison pointed out that, “*the undiverted reach of Mill Creek (above the Mill Creek 3 diversion) does not even now support a fishery, in spite of many years of stocking there. . . .*” FERC Rec. Ex. 10 at 212 (Edison’s responsive comments) (emphasis in original). *See* Leidy, *et al.*, at 5-10 to 5-12 (FERC Rec. Ex. 4 at 76-78) (discussion of current aquatic resources in Mill Creek). Nevertheless, recognizing the issue, the Commission concluded that the leakage prescribed by License Article 407 “would be sufficient to maintain the existing small populations

of stocked rainbow in the cienegas of the bypassed reach and in the Mountain Home Creek.” Licensing Order at P 28 (Pet. Rec. Ex. 20 at 10), citing Final EA at 106, 234 (Pet. Rec. Ex. 13 at 64, 120).

5. Impact of Minimum Flow on Generation.

Contrary to Petitioners’ argument (Br. at 13), the Commission did not place all emphasis on foregone generation or otherwise abandon its Federal Power Act obligation to balance developmental and environmental values. In determining whether a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, the Commission considers, as it did here, a number of public interests factors, including the economic benefit of the project power. Licensing Order at P 60 (Pet. Rec. Ex. 20 at 18). The basic purpose of the Commission’s economic analysis is to provide a general estimate of the potential power benefit and costs of a project, and reasonable alternatives to the project power. *Id. See Mead Corp.*, 72 FERC ¶ 61,027 (1995).

The Commission found the Mill Creek 2/3 Project, if licensed in accordance with Edison’s proposal, would generate about 12,650,000 kilowatt-hours of power annually at a cost of about 29.36 mills/kWh, or about \$371,570 per year.

Licensing Order at P 61 (Pet. Rec. Ex. 20 at 19). The Commission determined the annual value of project power would be \$506,160 or 40.00 mills/kWh. *Id.* In addition, the Commission staff found, and Petitioners do not refute, that a 6 cfs

minimum flow would reduce annual generation by 6,010,000 kilowatt-hours and decrease the net annual benefit of the project by \$194,540, and a 7 cfs flow would reduce annual generation by 7,149,000 kWh and decrease the net annual benefit of the project by \$240,100. *Id.* at P 28 (Pet. Rec. Ex. 20 at 10). Further, the Commission staff concluded, and Petitioners conceded on rehearing, Rehearing Request at 5 (Pet. Rec. Ex. 21 at 5), that the “[m]inimum flow proposed in the range of 6 to 7 cfs would eliminate forty to nearly fifty percent of project generation benefits at a time when California is regularly experiencing power supply shortages.” Licensing Rehearing Order at P 52 (Pet. Rec. Ex. 27 at 23). *See* Final EA at A-11 (Pet. Rec. Ex. 13 at 142).

The Commission weighed the potential loss of forty to fifty percent of generation against the speculative development of at most 11-acres of riparian vegetation habitat. The Commission determined, on balance, that “[t]he 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.” Licensing Rehearing Order at P 52 (Pet. Rec. Ex. 27 at 23).

Furthermore, Petitioners’ argument in this regard ignores that one of the project’s main purposes is conveyance of water for water supply. Licensing Order at P 6 (Pet. Rec. Ex. 20 at 2-3) (explaining water rights and management in the

region). *See National Wildlife Fed'n v. FERC*, 912 F.2d at 1483 (finding that the Commission is entitled to consider water supply benefits in conducting its FPA § 4(e) “equal consideration” analysis). Moreover, Edison presented estimates that annual energy requirements would grow 2.6 to 2.8 percent between 2001 and 2010, in the area of the project. Final EA at 7 (Pet. Rec. Ex. 13 at 19); Licensing Order at P 51 (Pet. Rec. Ex. 20 at 16).¹⁵

Finally, as this Court has recognized, “equal consideration,” within the meaning of FPA § 4(e), 16 U.S.C. § 797(e), is not the same as “equal treatment,” and equal consideration does not dictate FERC’s acceptance of environmental recommendations. *See California v. FERC*, 966 F.2d at 1550. Likewise, the Commission is not “necessarily required to give these sets of competing values equal weight in every situation.” *National Wildlife Fed'n v. FERC*, 912 F.2d at 1480. Similarly, the Federal Power Act’s “equal consideration amendments were aimed primarily at increasing [the Commission’s] sensitivity to environmental concerns . . . [however, they] do not give environmental factors preemptive force .

¹⁵ Petitioners’ final argument that the Commission “has almost universally required minimum flow releases,” Br. at 14, is also without merit. The Commission decided that the minimum flow recommendations were inconsistent with the purposes of the Federal Power Act. The Commission’s decision not to adopt Petitioners’ recommended minimum flow was reasonable and based on substantial evidence. *See Conservation Law Found. v. FERC*, 216 F.3d 41, 45 (D.C. Cir. 2000) (The Court upheld the Commission’s decision not to order minimum flows).

...” *Centralia v. FERC*, 213 F.3d 742, 748 (D.C. Cir. 2000). FERC is still charged with determining the public interest. *Id.*.

Here, given the need for power generation and water supply in Southern California, the anticipated increase in energy demand in Southern California, and the environmental enhancement measures imposed in the license,¹⁶ the Commission fully satisfied its “equal consideration” obligation under the statute by balancing competing purposes and values and reaching a decision that was based on substantial evidence. *See California v. FERC*, 966 F.2d at 1550.

B. The Environmental Baseline For Review Is Existing Conditions.

On brief, Petitioners maintain that historical evidence pre-dating the project’s licensing counter the Commission’s findings. *See Br.* at 34-36 (discussing the 1907 *Barton Land* case and floods occurring in 1862, 1903, and 1916).

¹⁶ The Commission issued a license to Edison only upon the licensee’s commitment to: (1) continue to provide leakage flows from the diversion area; (2) develop and implement a streamflow monitoring plan to measure leakage flows; (3) develop and implement a site restoration plan for the Mill 2 facilities; (4) develop and implement a plan to establish riparian vegetation on a 0.75 acre parcel located near the Mill 3 diversion dam and monitor the effectiveness of the vegetation; and (5) develop and implement plans for the protection of federally-listed species. Licensing Order at P 62 (Pet. Rec. Ex. 20 at 19). Thus, if Edison operates the project in the manner required by the license, in compliance with the required environmental enhancement measures, the license “will protect and enhance fish and wildlife resources, water quality, recreational resources, and cultural resources.” *Id.*

The Commission reasonably determined that Petitioners’ “historic information is of limited use in determining appropriate flow conditions for the new license” because, as Petitioners’ witness recognized, “[m]ajor 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.” Licensing Rehearing Order at P 30 (Pet. Rec. Ex. 27 at 12), citing Robins, Final Report at 15 (Pet. Rec. Ex. 5 at 90). This Court has recognized that the Commission’s environmental baseline for relicensing a project is existing conditions. *See American Rivers v. FERC*, 201 F.3d at 1195-99. Moreover, the Commission reasonably concluded that it does “not seek to restore pre-project conditions, which, in this case, had changed in the early 1900s, well before the project received its license in 1946.” Licensing Rehearing Order at P 30 (Pet. Rec. Ex. 27 at 12). *See American Rivers*, 201 F.3d at 1197 (“[t]o the extent a hypothetical pre-project or no-project environment can be recreated, evaluation of such an environment against current conditions at best serves to describe the current cumulative effect on natural resources of these historical changes”).

C. The Commission Properly Evaluated The Conflicting Evidence And Denied Petitioners’ Request For A Trial-Type Evidentiary Hearing

Petitioners admit that the Commission “reviewed” and “acknowledged Audubon’s evidence,” Br. at 27, and conducted a “relatively extensive” analysis,

id. at 33, regarding the evidence. Despite the Commission’s comprehensive review and analysis, however, Petitioners challenge the Commission’s denial of its request to hold a trial-type evidentiary hearing before an Administrative Law Judge and the Commission’s purported failure to “respond” to its request “that [the Commission] explain why the relied-on evidence is both probative and superior to any contrary evidence with respect to a given impact.” *Id.* at 30. Petitioners contend that the Commission did not dispute that Audubon’s experts “are qualified, used valid scientific methods, and accurately reported their results; or that the submitted evidence is relevant and probative to these factual issues.” *Id.* at 27-28. Thus, Petitioners maintain that the Commission did not “properly resolve conflicts between evidence regarding impacts of a minimum flow schedule.” *Id.* at 28.

This Court has ruled, however, that neither the Federal Power Act nor the Administrative Procedure Act requires the Commission to hold a trial-type hearing in a hydroelectric licensing case where, as here, a party has had “the opportunity to participate in the licensing proceedings [before the Commission and where, as here], in issuing the license, the Commission carefully considered [the party’s] submissions and responded to each of its comments.” *Sierra Assoc. for Environment v. FERC*, 744 F.2d 661, 663 (9th Cir. 1984). *See also Bear Lake*, 342 F.3d at 1076-1077. As has been demonstrated, in this case, rather than

inadequately evaluating the evidence or ignoring evidence, the Commission took comments and evidence from Petitioners and all other interested parties.

Petitioners had many opportunities, of which they availed themselves, to present evidence to the Commission. In fact, the Commission carefully considered Petitioners' submissions and responded to each of their comments based on the substantial record assembled in this proceeding. *See* Licensing Rehearing Order at PP 32, 50 and 53 (Pet. Rec. Ex. 27 at 14, 22, and 23); *see also id.* at P 52 (Pet. Rec. Ex. 27 at 23) (finding that Petitioners failed to make their case for higher minimum flows “[e]ven under the most favorable view of [P]etitioners’ evidence”).

To the extent Petitioners seek to attack the Commission’s method of evaluating the conflicting evidence, this Court has indicated that it will defer to the agency in such circumstances. *See Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993) (explaining that “[w]e are in no position to resolve this dispute because we would have to decide that the views of Council’s experts have more merit than those of the [Forest Service’s] experts We refer to agency expertise on questions of methodology unless the agency has completely failed to address some factor, consideration of which was essential to a truly informed decision”) (internal quotations omitted). Similarly, in *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992), this Court pointed out that although a party “has demonstrated that some scientist dispute[d] the Service’s

analyses and conclusions, such a showing is not a sufficient basis for us to conclude that the Service's action was arbitrary or capricious. If it were, agencies could act only upon achieving a degree of certainty that is ultimately illusory." This deference is consistent with the Supreme Court's mandate that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989).

III. THE COMMISSION FULLY COMPLIED WITH FPA § 10(A)(2) IN ITS CONSIDERATION OF COMPREHENSIVE PLANS.

FPA § 10(a)(2), 16 U.S.C. § 803(a)(2), requires the Commission to consider the extent to which a project is consistent with federal and state comprehensive plans for improving, developing, and conserving waterways affected by the project. Federal and state agencies filed 39 plans that addressed various resources in California. Licensing Order at P 41 (Pet. Rec. Ex. 20 at 14). The Commission did not find any inconsistencies. *Id.*

A. The Commission Considered Whether The Project Is Consistent With The San Bernardino Forest Plan.

Petitioners argue that the Commission did not "ensure" that the project was consistent with all aspects of the U.S. Department of Agriculture, Forest Service's San Bernardino Forest Plan. Br. at 14-18. Specifically, Petitioners contend that

the Commission ignored “specific requirements” and that “many of these requirements (including the incorporated water quality standards) require flow for accomplishment).” *Id.* at 18.

Petitioners’ arguments are without merit. As the Commission explained, it requires comprehensive plans to be filed with it, which the Forest Service did not do. Licensing Rehearing Order at P 56 (Pet. Rec. Ex. 27 at 24). *See also* FERC Rec. Ex. 3 at 1 (“The [San Bernardino] Forest Plan has not been filed with the Commission pursuant to FPA § 10(a)(2)(A)(i)”). Moreover, the Commission explained that the management requirements of forest plans indicate “how the Forest Service,” not the Commission, “intends to manage a forest” and that the requirements are not binding on the Commission unless the Forest Service requires compliance. Licensing Rehearing Order at P 57 (Pet. Rec. Ex. 27 at 25). Despite being an active participant in the proceeding below,¹⁷ the Forest Service did not file the San Bernardino Forest Plan with the Commission with a request that the Commission adopt it as a comprehensive plan. *Id.* The Forest Service also did not direct that “greater flow releases for any other purposes” occur or that Edison “be subject to the general requirements of the [San Bernardino] Forest Plan.” *Id.*

Under these circumstances, it was reasonable for the Commission to

¹⁷ The Forest Service cooperated in the preparation of the draft and final environmental assessments. *See* Licensing Order at P 3 n.4 (Pet. Rec. Ex. 20 at 2). *See also* FERC Rec. Ex. 3 at 16-27 (Forest Service’s comments).

conclude that “the proposed action would be consistent with the [San Bernardino] Forest Plan.” *Id.* at PP 56-58 (Pet. Rec. Ex. 27 at 24-25), citing Final EA at 237 (Pet. Rec. Ex. 13 at 123).¹⁸

B. The Commission Considered Whether The Project Is Consistent With The Basin Plan.

Petitioners argue that the Commission did not analyze whether “dam leakage is consistent” with any standards they identified from the Santa Ana Basin Plan (“Basin Plan”). Br. at 19. Petitioners also complain that License Article 407, addressing leakage flows, is inconsistent with recommendations made (and subsequently waived) by the State Water Resources Control Board. *Id.* at 19-22. Consequently, Petitioners contend that the Commission acted in an “arbitrary manner by failing to make any inquiry” to the State Water Resource Control Board during the pendency of Petitioners’ rehearing request. *Id.* at 22.

As an initial matter, the Commission acknowledged that its obligations under the Clean Water Act are defined by section 401(a), 33 U.S.C. § 1341(a),

¹⁸ *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549 (2d Cir. 1992), cited by Petitioners (Br. at 16), supports the Commission’s position that, because the Forest Service did not request that the San Bernardino Forest Plan be adopted as a comprehensive plan, the Commission was not obligated to review the San Bernardino Forest Plan under FPA § 10(a)(2). *See Friends*, 968 F.2d at 1554 (“The Commission is required to give due consideration to all recommendations from relevant agencies. . . .”). The Forest Service acknowledged that its goals “could be accomplished with leakage” and did not ask the Commission to analyze the project’s relationship to each management requirement of the San Bernardino Forest Plan. Licensing Rehearing Order at P 57 and n.68 (Pet. Rec. Ex. 27 at 25).

which provides that no license may be granted unless state certification has been obtained or waived and that any certification shall become a condition of the license. Licensing Rehearing Order at P 66 (Pet. Rec. Ex. 27 at 29). The Commission pointed out, and Petitioners concede, Br. at 4, that the water quality certification was not timely issued and was therefore waived. *Id.* Therefore, the Commission had “no further obligations under the provisions of the Clean Water Act in this proceeding.” *Id.*

Nonetheless, the Commission analyzed and discussed water quality issues relating to the Mill Creek 2/3 Project extensively in the draft and final environmental assessments. *See* Final EA at 63-67, 78-79, 237, A-5 (Pet. Rec. Ex. 13 at 55-55D, 58-59, 123, 136). As the Commission recognized, its 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.” Licensing Rehearing Order at P 67 (Pet. Rec. Ex. 27 at 29). Moreover, the Commission staff also found that “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 objective in certain years without a substantial loss in power generation.” *Id.* The State Water Resources Control Board did not file comments on the draft EA responding to Commission staff’s analysis or objecting to Commission staff’s failure to recommend higher minimum flows, nor

did the State Water Resources Control Board seek rehearing of the Licensing Order. Under these circumstances, the Commission fulfilled its statutory responsibilities under FPA § 10(a)(2).

IV. THE COMMISSION FULLY COMPLIED WITH THE ENDANGERED SPECIES ACT IN ITS CONSIDERATION OF THE SOUTHWESTERN WILLOW FLYCATCHER.

Petitioners argue that the Commission did not comply with ESA § 7, 16 U.S.C. § 1536, to insure that the license is not likely to jeopardize the continued existence of the southwestern willow flycatcher, a federally endangered bird. Br. at 46-61. Specifically, Petitioners argue that the Commission “has a continuing duty to insure that a new license is not likely to jeopardize listed species.” *Id.* at 50. Petitioners claim that the FWS’s concurrence with the Commission’s determination that the project was not likely to adversely affect the southwestern willow flycatcher was conditional, and that once they presented Mr. Gerald Braden’s declarations, the Commission was obligated to reinstate a formal consultation. *Id.* at 50-58.

A. Endangered Species Act Requirements.

ESA § 7(a)(1) imposes a duty on federal agencies to use their authority to conserve listed species. 16 U.S.C. § 1536(a)(1). ESA § 7(a)(2) requires each federal agency to insure, in consultation with the FWS, as appropriate, that any “action authorized, funded, or carried out” by the federal agency is not likely to

jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat for any species. 16 U.S.C. § 1536(a)(2). It is the responsibility of the federal agency to determine whether its actions may affect listed species or their critical habitat and, if so, to enter into formal consultation concerning those actions. *See* 50 C.F.R. § 402.14(b)(1). The Commission undertook this process in the licensing proceeding at issue here.

B. Commission’s Compliance With The Endangered Species Act.

Initially, the Commission prepared its biological assessment (in this case, the draft and final environmental assessments)¹⁹ to determine whether ESA § 7(a)(2) applies, *i.e.*, whether the hydropower licensing is likely to jeopardize a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12. The Commission concluded that the project was not likely to jeopardize the southwestern willow flycatcher. Thus, the Commission was not required to initiate formal consultation under ESA § 7(a)(2), but it chose to initiate informal consultation. *See* Licensing Rehearing Order at P 81 (Pet. Rec. Ex. 27 at 34), citing 50 C.F.R. § 402.13(a) (“[t]he implementing regulations provide that if, during informal consultation it is determined by the federal agency, with written concurrence of the Secretary, that the proposed action is not likely to adversely affect listed species, the consultation

¹⁹ Licensing Rehearing Order at P 79 n.90 (Pet. Rec. Ex. 27 at 33-34); Final EA at 233 (Pet. Rec. Ex. 13 at 119) (“we consider this [final environmental assessment] to represent our biological assessment”).

process is terminated and no further action is necessary”). *See Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443 (9th Cir. 1996) (no need to consult with the FWS if the agency determines that the action will have “no effect” on the listed species). The Commission implemented informal consultation with the FWS, which ultimately concurred with the Commission’s findings. Licensing Order at P 17 (Pet. Rec. Ex. 20 at 5); Final EA at 33 (Pet. Exc. R. 13 at 45). Thus, the consultation process was concluded.

C. The Commission’s Findings Were Based on Substantial Evidence.

The Commission noted that its staff had analyzed the impact of the project on the southwestern willow flycatcher in the draft and final environmental assessments. Licensing Order at P 16-18 (Pet. Rec. Ex. 20 at 5-6); Final EA at 31-33, 121-124, 131, 139, 144, A-11 (Pet. Rec. Ex. 13 at 43-45, 70-73, 80, 88, 93, and 142). The Commission’s staff concluded that “removing the Mill 2 diversion and floodline, maintaining leakage flows in the Mill 3 bypassed reach, and establishing riparian woodland near the Mill 3 diversion could result in an overall improvement of habitat for plant and wildlife species . . . including [the] . . . southwestern willow flycatcher.” Final EA at 123 (Pet. Rec. Ex. 13 at 72). The FWS concurred with the Commission’s “not likely” finding. Pet. Rec. Ex. 12 at 1-2.

The Commission and the FWS also evaluated the two declarations Petitioners submitted, *see* Pet. Rec. Ex. 14 and 21, which, they claimed,

demonstrated that southwestern willow flycatchers were present in the Mill Creek 3 bypassed reach. Both agencies found the declarations to be unconvincing. The FWS, in an April 1, 2003 filing, concluded that it did not have sufficient information to reassess its prior determination and concurrence with the Commission's "not likely" finding. Pet. Rec. Ex. 18 at 2. The FWS also questioned the weight of Mr. Braden's observations when it explained that, because it is difficult or impossible to distinguish visually the southwestern willow flycatchers, Mr. Braden's failure to note whether his observations occurred during migration season, undermined his claims. *Id.*; Licensing Rehearing Order at P 77 (Pet. Rec. Ex. 27 at 33). Last, the FWS indicated that if southwestern willow flycatchers are confirmed within the Mill Creek 3 bypassed reach during nesting season, then it may be appropriate to reconsider consultation under ESA § 7. Pet. Rec. Ex. 18 at 2. The Commission observed this point, and noted that Petitioners did not submit any new evidence. Licensing Rehearing Order at P 78 (Pet. Rec. Ex. 27 at 33).

Similarly, the Commission found Mr. Braden's declarations to "lack[] supporting documentation" such as "direct observations of nesting behavior (such as territorial behavior or nest defense), evidence of nesting (such as locating active nest or young)," or the timing of the observation." Licensing Rehearing Order at P 80 (Pet. Rec. Ex. 27 at 34). On appeal, Petitioners attempt to bolster this

evidentiary deficiency by requesting that the Court allow it to adduce new evidence. However, for the reasons detailed in the Commission's opposition, filed on April 21, 2006, to the motion to adduce additional evidence, the request should be denied.²⁰ In short, the Commission concluded that Petitioners had not provided probative evidence that southwestern willow flycatchers are located in the Mill Creek 3 bypass or that the continued licensing of the project would adversely affect the southwestern willow flycatcher. The Commission's and the FWS's findings in this regard were reasonable, based on substantial evidence and should be upheld.

D. The Commission Adequately Considered Species Conservation.

Petitioners contend that the Commission did not fulfill its duty under the ESA to conserve the flycatchers in the project region or contribute to the conservation of the species. Br. at 60-61. The Commission concluded that Petitioners misread the statute and explained that ESA § 7(a)(1) "does not require the Commission to establish a program to conserve endangered species in the bypassed reach specifically," nor does ESA § 7(a)(1) "expand the authority conferred on an agency by its enabling act or provide any independent grounds for agency action not otherwise authorized or required." Licensing Rehearing Order at

²⁰ By Order filed May 25, 2006, this Court referred the motion and oppositions thereto to the panel assigned to consider the merits of the petition for review.

P 84 (Pet. Rec. Ex. 27 at 35-36). *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); *Sierra Club v. Babbitt*, 65 F.3d at 1510.

The Commission's rulings are consistent with this Court's ruling that federal agencies have discretion to determine what steps are necessary in the conservation efforts. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1416-18 (9th Cir.1990). As discussed above at 35-38, the Commission ultimately concluded that the project would "protect and enhance fish and wildlife resources, water quality, recreational resources, and cultural resources." Licensing Order at P 62 (Pet. Rec. Ex. 20 at 19). These circumstances demonstrate that the Commission complied with ESA § 7(a)(1) and properly took steps to conserve wildlife at the Mill Creek 2/3 Project.

E. The Commission Adequately Considered Species Critical Habitat.

Petitioners' companion argument is that the Commission was required to reinitiate the consultation process when, while their rehearing request was pending before the Commission, the FWS's designated "11.9 miles of Mill Creek, including the bypass reach, as critical habitat" for the southwestern willow flycatcher. Br. at 50 and 58-60. This argument was not properly preserved for judicial review because Petitioners never presented it to the Commission for its consideration. *See* FPA § 313(b), 16 U.S.C. § 825l(b) ("No objection to the other of the Commission

shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so”). *See also High Country Resources v. FERC*, 255 F.3d 741, 745 (9th Cir. 2001); *accord California v. FERC*, 306 F.3d 1121, 1125 (9th Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

In any event, ESA § 7(a)(2) gives agencies discretion to determine whether reinitiation is appropriate. 50 C.F.R. § 402.16. Further, despite making the critical habitat designation, the FWS has not requested that the Commission reinitiate consultation with it concerning the presence of southwestern willow flycatchers at the Mill Creek 2/3 Project. Rather, the FWS only posited that future consultation might be appropriate to consider the project’s impacts on southwestern willow flycatchers should they later be found to be present in the Mill Creek 3 bypassed reach. *See Env’tl. Prot. Info. Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). Thus, there was no requirement for FERC to reinitiate consultation under the ESA’s implementing regulations. *Id.* at 1076, 1079-1083 (reinitiation of consultation requires the FWS to issue a new Biological Opinion and the petitioning party must show that the FWS retained sufficient discretionary involvement or control over the agency action).

V. THE COMMISSION PROPERLY CONSIDERED THE EARTHEN BERM ISSUES AT THE PROJECT.

Petitioners argue that the “omission of the earthen berm was a material defect in the license application” and that the Commission erred by not considering the impacts of maintenance of the berm. Br. at 41-44.²¹ Petitioners also argue that Edison did not “timely consult with the U.S. Army Corps of Engineers under CWA § 404(a)” concerning the earthen berm. *Id.* at 45-46.

These arguments lack merit. The Commission responded to Petitioners’ rehearing request, which raised the earthen berm issue in general terms in a single footnote, *see* Pet. Rec. Ex. 21 at 12 n.12, by conducting an investigation of the site and, following the inspection, directing Edison to file detailed information about the structure, including its purpose, association with the project, construction and maintenance. *See* Licensing Rehearing Order at PP 16-21 (Pet. Rec. Ex. 27 at 7-8). *See also* FERC Rec. Ex. 15 at 275-277 (Commission’s October 31, 2003 letter to Edison). Edison responded to the Commission’s directive. Pet. Rec. Ex. 23 and FERC Rec. Ex. 16 at 278-282 (Edison’s responses). The Commission staff analyzed the submissions and ultimately approved the amended description of the

²¹ Edison and the final environmental assessment described the earthen berm as a soft plug. Licensing Rehearing Order at P 18 (Pet. Rec. Ex. 27 at 7). *See* Final EA at 23, 214 (Pet. Rec. Ex. 13 at 35, FERC Rec. Ex. 12 at 259).

project in an order not at issue in the instant appeal. *See Southern California Edison Co.*, 115 FERC ¶ 62,195 (2006).

Finally, the Commission ruled that the issuance of a dredge-and-fill permit under CWA § 404(a), 33 U.S.C. § 1344(a), was a matter for the U.S. Army Corps of Engineers. Licensing Rehearing Order at P 20 (Pet. Rec. Ex. 27 at 8), citing *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987). *Accord Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 992, 995 (9th Cir. 1993) (FERC and U.S. Army Corps of Engineer processes are separate and distinct); *California Trout v. Schaefer*, 58 F.3d 469, 473-474 (9th Cir. 1995) (same). The Commission determined that “neither issuance of the license nor [Commission] staff approval of the revised exhibits and amendment of the project description is dependent on the prior issuance” of a dredge-and-fill permit. Nonetheless, the Commission indicated that it was Edison’s responsibility to obtain “any permits that may be required for activities related to the issuance of the license.” Licensing Rehearing Order at P 20 (Pet. Rec. Ex. 27 at 8). Likewise, as it is undisputed that the State Water Resources Control Board waived the CWA § 401 water quality certification, *see supra* page 47, the Petitioners should not be afforded an opportunity on appeal to raise the State Water Resources Control Board’s minimum flow recommendations. Accordingly, the Commission properly evaluated the earthen berm issues at the project.

CONCLUSION

For the reasons stated, the petition for review should be denied and the Commission's orders should be affirmed in all respects.

STATEMENT OF RELATED CASE

Respondent FERC is not aware of any related case pending in this or any court.

Respectfully submitted,

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