

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

Sacramento Municipal Utility District

Project No. 2101-165

ORDER GRANTING MOTIONS TO INTERVENE IN PART  
AND DENYING REHEARING

(Issued May 21, 2020)

1. On January 6, 2020, Commission staff granted the Sacramento Municipal Utility District's (SMUD) request for an extension of time to file a plan required by U.S. Forest Service section 4(e) condition no. 50 for the Upper American River Hydroelectric Project No. 2101 (Upper American River Project).<sup>1</sup> On February 5, 2020, American Whitewater, American River Recreation Association, California Outdoors, California Sportfishing Protection Alliance, Foothill Conservancy, Friends of the River, Hilde Schweitzer, the Planning and Conservation League, and Theresa Simsiman (collectively, Petitioners) moved to intervene<sup>2</sup> and filed a joint request for rehearing of the January 6 Order (Rehearing Request).<sup>3</sup>
2. For the reasons discussed below, we grant the Petitioners' motions to intervene, except for the Planning and Conservation League, and we deny the Rehearing Request.

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<sup>1</sup> *Sacramento Municipal Utility District*, Project No. P-2101-084 (Jan. 6, 2020) (January 6 Order).

<sup>2</sup> Although the motions to intervene were contained in the same document, each entity requests to intervene individually. *See* February 5, 2020 Request for Rehearing at 14 (Rehearing Request).

<sup>3</sup> All entities joining in the Rehearing Request, except for the Planning and Conservation League, are parties to a January 2007 Relicensing Settlement Agreement for SMUD's Upper American River Project, filed with the Commission on February 1, 2007 (Relicensing Agreement). Pursuant to section 4.12.1 of the Relicensing Agreement, all settling parties are members of a Consultation Group used to develop implementation plans and adaptive management under the new license.

## I. Background

3. On July 23, 2014, the Commission issued a new license to SMUD to continue operating and maintaining the Upper American River Project.<sup>4</sup> The project consists of seven developments located on the Rubicon River, Silver Creek, and South Fork American River in El Dorado and Sacramento Counties in central California. The project occupies, in part, federal lands within the Eldorado National Forest, managed by the U.S. Forest Service (Forest Service), and federal lands administered by the U.S. Bureau of Land Management (BLM). Relevant to this order is the most downstream development, the Slab Creek/White Rock development, which includes the Slab Creek dam and the Slab Creek reservoir on the South Fork American River.

4. The License Order included mandatory conditions filed by the Forest Service pursuant to section 4(e) of the Federal Power Act.<sup>5</sup> Forest Service condition no. 50 requires SMUD to provide recreational stream flows in the South Fork American River below the Slab Creek Dam based on the forecasted water year type, and to monitor all boating use on days when providing the flows.<sup>6</sup> In order to ensure that the appropriate recreational flows are provided, the condition requires SMUD to monitor boating use for the first five years of the license, and to develop, in cooperation with the Forest Service, BLM, the California State Water Resources Control Board (California Board), and the Consultation Group, a Whitewater Boating Recreation Plan at the end of year five, to describe whitewater recreation use and impacts and establish triggers to determine if any facilities modifications are needed.<sup>7</sup> Condition no. 50 also requires the preparation of a Recreation Management Plan approved by Forest Service and BLM within two years of

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<sup>4</sup> *Sacramento Municipal Utility District*, 148 FERC ¶ 62,070 (2014) (License Order).

<sup>5</sup> Section 4(e) of the Federal Power Act provides that the Commission can issue a license for a project located within a federal reservation only if it finds that “the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired[.]” 16 U.S.C. § 797(e) (2018). Section 4(e) further requires that Commission licenses for projects located within federal reservations include all conditions that “the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation[.]” *Id.*

<sup>6</sup> License Order, 148 FERC ¶ 62,070 at Appendix B, condition no. 50.

<sup>7</sup> The California Board’s water quality certification included a similar mandatory condition requiring SMUD to prepare a Whitewater Boating Recreation Plan following year five of license issuance, in consultation with the Forest Service, California Board, BLM, and members of the boating community. *Id.* at Appendix A, condition no. 4.A.

license issuance, to address whitewater recreation needs for the river below the Slab Creek Dam (i.e., in Slab Run).<sup>8</sup>

5. On July 14, 2016, SMUD filed a request to extend the due date for the Recreation Management Plan to five years after license issuance, rather than the two years required by the license. To support its request, SMUD stated that it was unable to provide recreation flows in 2015 due to the critically dry year, and only released recreation flows in 2016. Due to the lack of monitoring data collected, SMUD requested approval to file the Recreation Management Plan by November 23, 2019 “to coincide with the Whitewater Boating Recreation Plan.”<sup>9</sup> In its request, SMUD stated that it had received approval from the Consultation Group and attached a letter from the Forest Service, in which the Forest Service stated that it did not object to the request.<sup>10</sup> On July 27, 2016, Commission staff granted SMUD’s request and extended the due date for filing the plan to July 23, 2019.<sup>11</sup>

6. On December 17, 2019, SMUD requested a five-year extension of time to complete the plans. In its request, SMUD stated that in 2016, the Forest Service approved combining the plans into a single “Slab Creek Whitewater Boating Recreation Plan” and matching the due dates. SMUD explained that the single plan is to be developed using monitoring data acquired during recreational streamflow releases below Slab Creek dam. SMUD explained that it released the requisite flows in 2016, 2018, and 2019. However, high runoff in 2017 precluded SMUD from controlling spill greater than 1,500 cubic feet per second during March, April, and May, resulting in no recreational streamflow releases

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<sup>8</sup> *Id.* at Appendix B, condition no. 50. The condition lists the elements to be included in the Recreation Management Plan: use levels and projected future use levels; carrying capacity; sanitation and garbage; user conflicts; resource effects along the river, including effects to private land; necessary put-ins, take-outs, and parking for whitewater activities; emergency resource protection measures; public safety; signage needs; demand for commercial services; and on-river boat patrol. There is no corresponding water quality certification condition for the Recreation Management Plan.

<sup>9</sup> SMUD July 14, 2016 Request for an Extension of Time.

<sup>10</sup> SMUD attached to its July 2016 request a May 20, 2016 letter to Forest Service requesting the Service’s approval to extend the due date for the Recreation Management Plan to July 23, 2019, which included an attached flow chart illustrating the proposed modified planning process. The flow chart indicated that SMUD proposed to file the elements of the Recreation Management Plan and the Whitewater Boating Recreation Plan by July 2019.

<sup>11</sup> *Sacramento Municipal Utility District*, Docket No. P-2101-084, at P 4 (July 27, 2016) (delegated order) (July 2016 Order).

that year. SMUD also asserted that usage may have been impacted in 2018 due to a complication with opening a boating take-out. As a result, SMUD was unable to collect complete data regarding recreational streamflow releases during 2017 and 2018. To support its request, SMUD stated that it had discussed the need for an extension with the Consultation Group, the California Board, and the Forest Service and had unanimous support.<sup>12</sup>

7. Staff's January 6 Order found that SMUD's request provided adequate justification for the extension of time to file the Slab Run Whitewater Recreation Plan (combined Whitewater Boating Recreation Plan and a Recreation Management Plan for the Slab Run),<sup>13</sup> and granted the request to extend the due date to December 24, 2024.

8. On February 5, 2020, Petitioners moved to intervene and filed a joint Rehearing Request. Petitioners request that the Commission modify the January 6 Order to limit the extension only to filing of the Whitewater Boating Recreation Plan and to apply a non-extendable six-month extension to the Recreation Management Plan. In support, Petitioners argue that in 2016 the Forest Service did not approve combining the plans into a single plan, that support for the extension was not unanimous, and that there is insufficient justification to extend the deadline for filing the Recreation Management Plan.

9. On February 20, 2020, SMUD filed an answer to the Rehearing Request urging the Commission to deny the motion to intervene filed by the Planning and Conservation League and deny the Petitioner's Rehearing Request. However, the Commission's rules do not permit answers to requests for rehearing,<sup>14</sup> therefore, we reject SMUD's pleading.

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<sup>12</sup> SMUD's December 17, 2019 request included Forest Service's July 25, 2019 letter supporting a five-year filing extension (i.e., July 23, 2024) to file the Whitewater Boating Recreation Plan based on SMUD's proposal to continue gathering monitoring data. The December 17 filing also included California Board's December 13, 2019 letter concurring that additional data on boating use is necessary and agreeing to extend the deadline to file a plan as required by water quality certification condition no. 4.A.

<sup>13</sup> SMUD's December 17, 2019 request refers to the combined plan as the "Slab Creek Whitewater Boating Recreation Plan." For consistency, this order instead uses the nomenclature adopted in staff's January 6 Order, which refers to the combined plan as the Slab Run Whitewater Recreation Plan. *See* January 6 Order at P 3.

<sup>14</sup> 18 C.F.R. § 385.213(a)(2) (2019).

## II. Discussion

### A. Motions to Intervene

10. Petitioners individually request to intervene, asserting that intervention is necessary for the adequate representation of Petitioners' interests, and that each individual Petitioner has a direct and substantial interest in the outcome of this proceeding.<sup>15</sup>

11. The Commission issues notices and entertains intervention requests in post-licensing proceedings (1) that entail a material change in the plan of project development or in the terms and conditions of the license, or (2) that would adversely affect the would-be intervenor's rights in a manner not contemplated by the license, or (3) that are filed by an agency or entity dealing with matters on which it was to be consulted.<sup>16</sup> Questions of timing are usually administrative matters that do not address the merits of the project in question.<sup>17</sup> However, the Commission has, in limited circumstances, permitted intervention in post-licensing proceedings in which it would not normally do so.<sup>18</sup> Specifically, the Commission may entertain interventions by an agency or entity given a specific consultation role with respect to the license requirement at issue. In this case, the Forest Service 4(e) condition no. 50 requires the licensee to consult with the Consultation Group, as defined by the Relicensing Agreement, and the agencies with respect to necessary measures to provide recreational streamflows for the South Fork American River below Slab Creek dam.<sup>19</sup> Therefore, because Petitioners—except for the Planning

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<sup>15</sup> Rehearing Request at 2.

<sup>16</sup> See, e.g., *Public Utility District No. 1 of Okanogan County, Washington*, 162 FERC ¶ 61,040, at P 5 (2018); *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at PP 6-7 (2004); *Kings River Conservation District*, 36 FERC ¶ 61,365 (1986); *Wisconsin Valley Improvement Co.*, 88 FERC ¶ 61,054, at 61,136 (1999) (*Wisconsin Valley*); *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035, at 61,099 (1987).

<sup>17</sup> *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, at P 12 (2019); see also *Eagle Crest Energy Co.*, 168 FERC ¶ 61,186, at P 19 (2019) (noting that the Commission does not treat requests for extension of compliance deadlines as material changes).

<sup>18</sup> See, e.g., *Wisconsin Valley*, 88 FERC ¶ 61,054 at 61,136 (“[T]he timing of a compliance filing is an administrative matter between the licensee and the Commission. The exception is where the license article itself states that an entity must be consulted with respect to any request for the extension of a deadline established therein.”).

<sup>19</sup> We note that the Relicensing Agreement specifically contemplates that extensions of time may be necessary to fulfill license obligations and that the parties to the Agreement are to be consulted on such extension requests. Relicensing Agreement,

and Conservation League—are members of the Consultation Group under the Relicensing Agreement, the motions to intervene are granted. Because none of the limited circumstances in which the Commission permits interventions in post-licensing proceedings apply to the Planning and Conservation League, its motion to intervene is denied.<sup>20</sup>

**B. Extension of Time to File Slab Run Whitewater Recreation Plan**

12. Petitioners allege that Commission staff’s finding that the Forest Service approved combining the Recreation Management Plan and Whitewater Management Plan into a single Slab Run Whitewater Recreation Plan was not based on substantial evidence.<sup>21</sup> Specifically, Petitioners state that the July 2016 Order does not discuss Forest Service approval to combine the plans and that the Commission should limit the January 6 Order to an extension of time for only filing the Whitewater Boating Recreation Plan and impose a non-extendable six-month extension to file the Recreation Management Plan.

13. As discussed above, Forest Service 4(e) condition no. 50 requires SMUD to develop both a Whitewater Boating Recreation Plan and a Recreation Management Plan for Slab Run. Both plans address the whitewater recreation use and impacts, as well as the need for facility modifications, development of sites, and implementation of measures to address the use and impacts. SMUD’s December 17, 2019 request for an extension of time summarized the process and efforts taken to date to comply with the 4(e) condition, including the 2016 extension of time. SMUD stated that in 2016 the Forest Service approved combining the plans and matching the due dates. However, Petitioners argue that neither the July 14, 2016 request nor the July 2016 Order discusses the approval to combine the plans. We recognize that the July 2016 Order does not explicitly discuss the combining of the plans; however, at that time the only requirement was to file the Recreation Management Plan within two years of license issuance. As indicated in its July 14, 2016 request, SMUD intended to file both the Recreation Management Plan and

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section 7.7.1.1. Under the Agreement, if the licensee has good cause to seek an extension of time, it may file a request with the Commission, pursuant to the Commissioner’s regulations (18 C.F.R. § 385.2008 (2019)) and give notice to the settling parties. And if a party disputes the extension of time request, it can oppose the request, as the Petitioners did here.

<sup>20</sup> Rule 713 of the Commission’s regulations specifies that only parties to a proceeding may file a request for rehearing. 18 C.F.R. § 385.713(b) (2019). Because the Planning and Conservation League’s motion to intervene is denied, it is not a party to the proceeding and cannot seek rehearing.

<sup>21</sup> Rehearing Request at 17.

the Whitewater Boating Recreation Plan by July 2019.<sup>22</sup> And although the July 2016 Order approved the extension of time for filing the Recreation Management Plan, there was no need to discuss an extension of time for the Whitewater Boating Recreation Plan at that time, as it was not due for three more years. Therefore, the July 2016 Order appropriately approved an extension of time to file the Recreation Management Plan.

14. Regardless of whether the plans were properly combined, Petitioners argue that the extension of time request lacked adequate justification to file the Recreation Management Plan.<sup>23</sup> Specifically, Petitioners contend that SMUD's request did not include adequate documentation of consultation supporting its request.<sup>24</sup> They also claim that there are different data requirements for the two plans and that there is sufficient boating data available to inform development of the Recreation Management Plan, given that the License Order does not require use of data to develop that plan. They accordingly argue that issuance of that plan should not be further delayed to allow for the more extensive data collection required for development of the Whitewater Boating Recreation Plan.<sup>25</sup>

15. We disagree. In the underlying order, staff reviewed the record of consultation and found that the documentation provided by SMUD was adequate to support its request. In its request, SMUD states that the Consultation Group, including the California Board and Forest Service staff, unanimously supported an extension of the plan schedule.<sup>26</sup> SMUD supported this contention by including letters of concurrence from the Forest Service and the California Board.<sup>27</sup> These letters confirm the agencies' approval of SMUD's request and acknowledge that the extension of time is necessary to allow for the collection of additional empirical data to inform the development of the

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<sup>22</sup> Petitioners argue that the reference to combining the plans in the diagram attached to SMUD's July 14, 2016 extension of time request does not constitute evidence that Forest Service formally approved combining the plans. Rehearing Request at 18. While we agree that the diagram alone is insufficient to confirm Forest Service's approval to combine the plans, the licensee sent the diagram to the Forest Service to notify it of the licensee's modified plan to comply with the license condition. If the Forest Service disagreed with such an approach, it could have said so.

<sup>23</sup> Petitioners Request for Rehearing at 23.

<sup>24</sup> *Id.* at 19-22.

<sup>25</sup> *Id.* at 23-24.

<sup>26</sup> SMUD's December 17 Request for Extension of Time at 2.

<sup>27</sup> *Id.* at 5-8.

Slab Run Whitewater Recreation Plan. The Forest Service's response explicitly states that "SMUD's proposal will allow for up to five years of additional data collection to inform the development of recreation streamflow release triggers, and address additional elements specified in the License, such as user levels and conflicts, carrying capacity, and other items related to these recreation activities."<sup>28</sup> The letter indicates that the Forest Service agreed to extend the deadline for filing the Slab Run Whitewater Recreation Plan because additional data collection is needed to inform the development of *both* plans.<sup>29</sup> Contrary to Petitioners' claims, even if sufficient data is available to develop part, but not all, of the Slab Run Whitewater Recreation Plan, Commission staff appropriately relied upon the licensee's and the agencies' conclusions that additional monitoring data is necessary.

16. Further, neither the Relicensing Agreement nor the License Order requires SMUD to obtain concurrence from the members of the Consultation Group for an extension of time request, other than the requisite approval from agencies with conditioning authority. Section 7.7.1.1 of the Relicensing Agreement provides that should the need arise for SMUD to seek an extension of time to fulfill any of its obligations arising under the Relicensing Agreement it may file with the Commission an extension request, and the Commission's standard for reviewing any such request shall apply.<sup>30</sup> Likewise, although the Forest Service 4(e) condition no. 50 requires SMUD to prepare a Whitewater Boating Recreation Plan in cooperation with the Consultation Group, the approval authority for any modification to this plan lies solely with the Forest Service.<sup>31</sup> With regard to the Recreation Management Plan, 4(e) condition no. 50 states only that such a plan must be approved by Forest Service and BLM; the Consultation Group is not mentioned.<sup>32</sup>

17. As discussed above, Commission staff considered the implications of extending the due date for elements of both plans and found that SMUD had exhibited good cause for doing so. Given the need for additional empirical evidence to develop the Slab Run Whitewater Recreation Plan and the Forest Service's support for the extension of time, Commission staff determined that SMUD had provided adequate justification and appropriately granted the extension. In addition, based on the California Board's

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<sup>28</sup> *Id.* at 5.

<sup>29</sup> *See supra* note 8 discussing the elements of the Recreation Management Plan.

<sup>30</sup> Relicensing Agreement, section 7.7.1.1. *See supra* note 19. The Commission's standard when considering requests for extension of time is whether the requesting entity has shown that good cause exists for the extension. 18 C.F.R. § 385.2008.

<sup>31</sup> License Order, 148 FERC ¶ 62,070 at Appendix B, condition no. 50.

<sup>32</sup> *Id.*



December 13, 2019 letter agreeing to extend the deadline, we clarify that this order also extends the deadline to comply with water quality condition no. 4.A. until December 24, 2024.

The Commission orders:

(A) The Petitioners' motions to intervene are granted with respect to all Petitioners except the Planning and Conservation League.

(B) Sacramento Municipal Utility District's February 20, 2020 Answer is rejected.

(C) The Petitioners' request for rehearing is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.