

156 FERC ¶ 61,171  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Alabama Power Company

Project No. 2146-197

ORDER DENYING REHEARING

(Issued September 12, 2016)

1. On April 21, 2016, the Commission issued an order on rehearing and clarification regarding the new license for Alabama Power Company's (Alabama Power) Coosa River Project No. 2146 (Project).<sup>1</sup> On May 17, 2016, American Rivers and the Alabama Rivers Alliance (collectively, Conservation Groups) jointly filed a request for rehearing of the April 21 Order. For the reasons discussed below, we deny Conservation Groups' rehearing request.

**I. Background**

2. In July 2005, Alabama Power filed a relicense application, proposing to consolidate three of its projects under one license: the Coosa River Project No. 2146, which includes the Weiss, H. Neely Henry, Logan Martin, Lay, and Bouldin developments; the Mitchell Dam Project No. 82; and the Jordan Dam Project No. 618.<sup>2</sup>

3. On June 20, 2013, the Commission issued Alabama Power a new 30-year license for the continued operation and maintenance of the Project.<sup>3</sup> The order included, among other things, the mandatory conditions of the Alabama Department of Environmental

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<sup>1</sup> *Alabama Power Co*, 155 FERC ¶ 61,080 (2016) (April 21 Order).

<sup>2</sup> A more detailed Project description and procedural history appears in the April 21 Order, 155 FERC ¶ 61,080 at PP 2-18.

<sup>3</sup> *Alabama Power Co.*, 143 FERC ¶ 61,249 (2013) (License Order).

Management's (Alabama DEM) water quality certification<sup>4</sup> and the U.S. Fish and Wildlife Service's (FWS) incidental take terms and conditions.<sup>5</sup> The order also included licensee-proposed and staff-recommended enhancement measures. The Commission concluded that continued operation of the Coosa River Project, with the mandatory conditions and the licensee-proposed and staff-recommended enhancement measures, would not constitute a major federal action significantly affecting the environment and that no environmental impact statement was required.<sup>6</sup>

4. Timely requests for rehearing of the License Order were filed by Alabama Power, Conservation Groups, the Georgia Environmental Protection Division, and the Atlanta Regional Commission. As pertinent here, the License Order required Alabama Power to implement aeration measures to achieve a minimum dissolved oxygen level of 4.0 milligrams/liter (mg/L) at each development for the protection of aquatic resources. Conservation Groups argued that the License Order's dissolved oxygen standard was inadequate and that the Commission violated the Federal Power Act (FPA), the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act. Additionally, Alabama Power argued that the Commission erred in its interpretation of the water quality certification's dissolved oxygen standard.

5. The April 21 Order granted rehearing in part, denied rehearing in part, and clarified and revised the License Order's dissolved oxygen standards in Articles 405 and 407. On May 17, 2016, the Conservation Groups filed a timely request for rehearing of the April 21 Order, arguing that the Commission erred by revising Articles 405 and 407 in violation of NEPA, ESA, and FPA sections 10(a) and 313(b).<sup>7</sup>

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<sup>4</sup> The water quality certification contains conditions for each of the Coosa River Project's seven developments, pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2012). *See* Alabama Power's August 24, 2005 filing (containing Alabama DEM's water quality certifications for each development).

<sup>5</sup> *See* FWS' June 10, 2012 filing at 89-90. The incidental take statement, issued pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (2012), included 11 reasonable and prudent measures to minimize the take of mussels, snails, blue shiner fish, and the red-cockaded woodpecker, along with 16 incidental take terms and conditions to implement the measures.

<sup>6</sup> License Order, 143 FERC ¶ 61,249 at PP 198, 218.

<sup>7</sup> The Conservation Groups state that if clarifications in the April 21 Order are the basis for granting a new license to Alabama Power, then the Conservation Groups

## II. Discussion

### A. The Clarification and Revision of Article 407 Complies with NEPA, ESA, and FPA Sections 10(a) and 313(b)

6. Article 407 of the Project's license requires Alabama Power to file a dissolved oxygen enhancement plan for the Coosa River Project. The purpose of the plan is to maintain dissolved oxygen concentrations in the Weiss bypassed reach (measured at a point 1,200 feet downstream from the Weiss dam spillway), the Weiss tailrace, and the Neely Henry, Logan Martin, Lay, Mitchell, Jordan, and Bouldin tailwaters of no less than 4.0 mg/L at all times.<sup>8</sup> The 4.0 mg/L standard is consistent with Alabama DEM's water quality certification issued for the Project. The April 21 Order explained that the Commission erred in the License Order by interpreting Alabama DEM's requirement to maintain a dissolved oxygen concentration of 4.0 mg/L "at all times" to mean during periods of generation and non-generation.<sup>9</sup> The April 21 Order clarified that the Coosa River Project's water quality certification only requires Alabama Power "to meet a 4.0 mg/L standard when the [P]roject is discharging, i.e., during periods of generation and in its minimum flow releases from the Weiss and Jordan developments."<sup>10</sup> Accordingly, the Order revised Article 407 to require Alabama Power to maintain a dissolved oxygen concentration in the Project bypassed reaches and tailwaters "of no

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incorporate in full all of the arguments it raised in its rehearing request of the License Order. The April 21 Order did not grant a new license; it clarified and revised certain license articles. However, to the extent that Conservation Groups assert that the License Order violated the NEPA, ESA, and FPA sections 10(a) and 313(b), we summarily deny these arguments because they were fully addressed in the April 21 Order. *See* April 21 Order, 155 FERC ¶ 61,080 at PP 76-105, 119-28, 129-31.

<sup>8</sup> License Order, 143 FERC ¶ 61,249 at PP 73, 105, Ordering Paragraph (F).

<sup>9</sup> April 21 Order, 155 FERC ¶ 61,080 at P 26.

<sup>10</sup> April 21 Order, 155 FERC ¶ 61,080 at P 27. The Order explained that in an appeal of Alabama DEM's water quality certificate for the Coosa River Project, Alabama DEM's Environmental Management Commission (which hears administrative appeals of Alabama DEM actions) ruled that the water quality certification "requires 4.0 mg/L to be maintained from existing hydroelectric generation impoundments ... only when the operator is discharging water (either to generate electricity or through the spillway); the limitation does not apply when water is not discharged." *Id.* P 26, quoting Alabama DEM's Environmental Management Commission February 24, 2006 Order at 38-39 (included in Alabama Power's July 22, 2013 Rehearing Request at Attachment 1).

less than 4.0 mg/L at all times when the [P]roject is discharging (i.e., during periods of generation and in its minimum flow releases from the Weiss and Jordan developments) as directed by the water certification conditions in Appendix A of the license.”<sup>11</sup>

7. On rehearing, the Conservation Groups argue that NEPA requires the Commission to prepare an environmental impact statement to evaluate the effects of not requiring Alabama Power to meet a dissolved oxygen standard during periods of non-generation, which they contend would result in significant impacts to the environment.<sup>12</sup> Conservation Groups also contend that, in clarifying and revising Article 407, the Commission violated the ESA because lower dissolved oxygen levels will put further stress on listed species and aquatic habitat during periods of non-generation.<sup>13</sup>

8. We find Conservation Groups’ arguments without merit. Although Article 407 of the License Order required Alabama Power to meet a 4.0 mg/L standard during periods of generation and non-generation, the Project’s Final Environmental Assessment analyzed the effects of the 4.0 mg/L standard during periods of generation, not during periods of non-generation, and found that this standard would adequately protect water quality.<sup>14</sup> Likewise, Commission staff sent FWS a Biological Assessment, prepared pursuant to the ESA, that analyzed the effects of the 4.0 mg/L standard during periods of generation.<sup>15</sup> In its subsequent Biological Opinion, FWS concluded that licensing the Project as proposed with staff’s recommended environmental measures is not likely to

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<sup>11</sup> April 21 Order, 155 FERC ¶ 61,080 at P 56, Ordering Paragraph (H) (the purpose of the required Dissolved Oxygen Enhancement Plan is to ensure a 4.0-mg/L dissolved oxygen standard only in project discharges (i.e., when the project is generating or releasing minimum flows)).

<sup>12</sup> Conservation Groups’ Rehearing Request at 2.

<sup>13</sup> *Id.* at 4, 18.

<sup>14</sup> Final Environmental Assessment at 86-87, 222-23.

<sup>15</sup> The Final Environmental Assessment served as the Biological Assessment. Additionally, in response to comments, Commission staff sent FWS a revised Biological Assessment.

jeopardize the continued existence of any species, nor is it likely to destroy or adversely modify any critical habitat.<sup>16</sup>

9. In addition, the April 21 Order analyzed the effects of requiring Alabama Power to maintain a dissolved oxygen level of 4.0 mg/L only during periods of generation, and looked at whether the Commission should require Alabama Power to maintain a specified level of dissolved oxygen during periods of non-generation to further protect aquatic resources. The Commission found that the measures, if any, needed to achieve a 4.0 mg/L minimum dissolved oxygen level during non-generation periods would largely depend upon how well Alabama Power can improve dissolved oxygen levels during periods of generation. The Commission concluded that the water quality certification's requirement for Alabama Power to maintain a minimum dissolved oxygen level of 4.0 mg/L when the Project is discharging, along with the other required dissolved oxygen and aquatic resource protections and water quality monitoring, will sufficiently protect aquatic resources, including federally listed species.<sup>17</sup> Neither FWS nor Alabama DEM found it necessary to impose any additional measures.<sup>18</sup>

10. Conservation Groups also argue that the clarification and revision of Article 407 violates FPA section 10(a) because it is not best adapted to a comprehensive plan for adequate protection, mitigation, and enhancement of fish and wildlife. In addition, they allege that the clarification and revision violates FPA section 313(b) because it is not supported by substantial evidence.<sup>19</sup> Conservation Groups fail to support or cite to specific inadequacies to bolster this claim.<sup>20</sup> The License Order and the April 21 Order

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<sup>16</sup> FWS' June 10, 2012 filing at 89-90. *See id.* at 75 (stating that FWS recognizes that Alabama DEM's water quality certification "does not address non-discharge periods (periods when the project is not generating)." (internal quotations omitted)).

<sup>17</sup> April 21 Order, 155 FERC ¶ 61,080 at P 55. The April 21 Order noted that the Commission retains the authority to revisit whether the dissolved oxygen standard is sufficient in the future, particularly if results from water quality and aquatic resource monitoring show that a dissolved oxygen level above 4.0 mg/L is needed to protect listed species. *Id.* P 56.

<sup>18</sup> *Id.* P 55.

<sup>19</sup> Conservation Groups' Rehearing Request at 4, 18.

<sup>20</sup> Conservation Groups have an obligation to clearly articulate and substantiate the basis of its requested action (in this case why the April 21 Order failed to comply with the FPA) and not simply make an unsupported claim. *ISO New England Inc.*, 119 FERC ¶ 61,161, at P 16 (2007) (citing *Pub. Serv. Elec. and Gas v. FERC*, 485 F.3d 1164, 1171

(continued ...)

found that the Project is best adapted to a comprehensive plan of development, and we find no cause to change that determination here.<sup>21</sup>

**B. The Clarification and Revision of Article 405 Required No Additional Analysis Under NEPA, ESA, and FPA Sections 10(a) and 313(b)**

11. Article 405 requires Alabama Power to continue providing existing minimum flow releases and scheduled recreational flow releases. In the License Order, the Commission stated that Alabama Power could modify the recreational releases from Jordan Dam (either lower flow or shorter duration), if the releases would cause dissolved oxygen levels in the Jordan Dam tailrace to fall below 5.0 mg/L with operating aeration systems.<sup>22</sup> On rehearing, the Commission acknowledged that including a 5.0 mg/L dissolved oxygen standard at the Jordan Dam tailrace for recreation releases “was a mistake, as the correct standard is 4.0 mg/L.”<sup>23</sup> Accordingly, the Commission revised Article 405 to state that, if the dissolved oxygen levels in the Jordan Dam tailrace fall below 4.0 mg/L (rather than 5.0 mg/L) with operating aeration systems, then Alabama Power could modify the recreational releases from Jordan Dam.<sup>24</sup>

12. We disagree with Conservation Groups’ argument that the April 21 Order improperly clarified and revised Article 405 in violation of NEPA, ESA, and FPA sections 10(a) and 313(b) when it adjusted the dissolved oxygen standard in the Jordan Dam tailrace downward from 5.0 mg/L to 4.0 mg/L. The clarification and revision to Article 405 was merely a correction and not a revision of the actual standard and required no additional analysis under NEPA, ESA, or FPA sections 10(a) and 313(b). Commission staff evaluated the effects of a 4.0 mg/L dissolved oxygen standard at the Jordan Dam tailrace in the Final Environmental Assessment.<sup>25</sup>

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(D.C. Cir. 2007) (“it is not ‘the court’s duty to identify, articulate, and substantiate a claim’” in response to “petitioners’ one-sentence cry of protest.”)).

<sup>21</sup> License Order, 143 FERC ¶ 61,249 at PP 260-63 and April 21 Order, 155 FERC ¶ 61,080 at PP 119-23.

<sup>22</sup> License Order, 143 FERC ¶ 61,249 at Ordering Paragraph (F).

<sup>23</sup> April 21 Order, 155 FERC ¶ 61,080 at n.25.

<sup>24</sup> *Id.* and Ordering Paragraph (F).

<sup>25</sup> *See* Final Environmental Assessment at 66 and 155.

The Commission orders:

American Rivers' and the Alabama Rivers Alliance's rehearing request is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.