157 FERC ¶ 61,100
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Alabama Power Company Project No. 349-185

ORDER ON REHEARING AND CLARIFICATION

(Issued November 15, 2016)

1. In an order issued on December 17, 2015, the Commission issued a new license to Alabama Power Company (Alabama Power) under sections 4(e) and 15 of the Federal Power Act (FPA) for the continued operation and maintenance of the Martin Dam Hydroelectric Project No. 349 (Martin Dam Project or project).[1] American Rivers, the Alabama Rivers Alliance, the Georgia Environmental Protection Division, and the Atlanta Regional Commission sought rehearing. For the reasons discussed below, we deny rehearing and provide clarification.

I. Background

A. Alabama-Coosa-Tallapoosa River Basin Projects

2. The Martin Dam Project is located on the Tallapoosa River, which is part of the Alabama-Coosa-Tallapoosa (ACT) River Basin. The Tallapoosa River forms in the Appalachian Mountains in Georgia, and extends southwesterly through eastern Alabama to its confluence with the Coosa River to create the Alabama River. On the Tallapoosa River, Alabama Power also operates the R.L Harris Hydroelectric Project No. 2628 upstream of the project, and the Yates and Thurlow Hydroelectric Project No. 2407 (Yates and Thurlow Project) immediately downstream.

3. On the Coosa River, Alabama Power operates the Coosa River Project No. 2146 (Coosa River Project), which includes seven developments: Weiss, H. Neely Henry,

[1] *Alabama Power Co.*, 153 FERC ¶ 61,298 (2015) (License Order). The project is located in Tallapoosa, Elmore, and Coosa Counties, Alabama.

Logan Martin, Lay, Mitchell, Jordan, and Bouldin. The Commission issued a new license for the Coosa River Project in 2013.[2]

4. The U.S. Army Corps of Engineers (Army Corps or Corps) operates six other dams upstream and downstream of Alabama Power's projects. Upstream of the Coosa River Project, in Georgia, the Corps operates its Allatoona and Carters projects on the Etowah and Coosawattee Rivers, respectively.[3] Downstream of the Alabama Power projects, in Alabama, the Corps operates three dams on the Alabama River: the Robert F. Henry Lock and Dam, Millers Ferry Lock and Dam, and Claiborne Lock and Dam. The Army Corps recently updated its Master Water Control Manual (Master Manual) to guide operations of federal projects in the ACT River Basin, including the Allatoona and Carters projects, and four Alabama Power developments (Weiss, H. Neely Henry, Logan Martin, and Harris).

B. The Martin Dam Project License Order and Rehearing Requests

5. In the December 17, 2015 order (License Order), the Commission issued Alabama Power a new 30-year license for the Martin Dam Project. Of relevance here, the License Order adopted, with modifications, Alabama Power's proposals to: (1) use the Alabama Drought Response Operating Proposal (Drought Response Proposal)[4] when assessing the project's drought operations (Article 405); (2) revise the project's reservoir guide curves to allow for winter elevation levels to increase by three feet (Article 402); (3) continue to operate the project's existing aeration systems, and conduct water quality monitoring, to ensure that a minimum dissolved oxygen (DO) level of 4.0 milligrams per liter (mg/L) is met during generation periods (Article 406); and (4) minimize the risk of both upstream

[2] *Alabama Power Co.*, 143 FERC ¶ 61,249 (2013), *order on reh'g and clarification*, 155 FERC ¶ 61,080, *order on reh'g*, 156 FERC ¶ 61,171 (2016).

[3] The Carters dam and reservoir, and the immediately downstream Carters Reregulation dam and reservoir, are located on the Coosawattee River in northwest Georgia, more than 70 miles upstream of the Coosa River Project. Downstream of the Carters project, the Coosawattee River is joined by the Conasauga River to form the Oostanaula River. Allatoona dam and reservoir are located on the Etowah River in northwest Georgia about 80 miles upstream of the Coosa River Project. Downstream of the Allatoona project, the Etowah River joins the Oostanaula River to form the Coosa River.

[4] Alabama Power Company, August 13, 2013 Comments on the Draft Environmental Impact Statement for the Martin Project, at 18 (draft EIS comments).

and downstream flooding by operating the project in accordance with updated flood control guidelines (Article 404).

6. On January 15, 2016, Alabama Rivers Alliance and American Rivers (collectively Conservation Groups) filed a timely request for rehearing of the License Order, contending that the Commission violated the National Environmental Policy Act (NEPA),[5] the Endangered Species Act (ESA),[6] and the FPA. Specifically, Conservation Groups allege that the final Environmental Impact Statement (EIS)[7] failed to adequately consider: (1) project impacts on drought flows, water quality, and recreation; (2) climate change; and (3) alternatives. Conservation Groups also allege that the Commission violated the ESA by failing to consult with the U.S. Fish and Wildlife Service (FWS) and consider whether an Incidental Take Statement was necessary. Conservation Groups argue that these deficiencies show that the new license fails to meet the FPA's comprehensive development and substantial evidence standard.

7. On January 19, 2016, the Georgia Environmental Protection Division and the Atlanta Regional Commission (collectively Water Users) filed timely requests for rehearing.[8] Water Users allege that the Commission violated NEPA by failing to fully consider Alabama Power's drought operations under the Drought Response Proposal. Water Users also characterize as arbitrary and capricious the Commission's decision to limit consultation in, and the scope of, license Article 405, *Drought Management*. Finally, Water Users request that the Commission modify the license's flood measures based on a December 2015 flood event.

8. On August 9, 2016, Alabama Power filed additional information in response to the parties' requests for rehearing.

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[5] 42 U.S.C. § 4321 *et seq*. (2012).

[6] 16 U.S.C. § 1531 *et. seq.* (2012).

[7] Commission staff issued the final EIS on April 2, 2015. *Final Environmental Impact Statement for the Martin Dam Hydroelectric Project No. 349-173* (final EIS).

[8] The Atlanta Regional Commission and Georgia Environmental Protection Division (Georgia EPD) adopt and incorporate by reference the other's request for rehearing. References in this order to Georgia EPD's request for rehearing include the Atlanta Regional Commission's rehearing request, and vice versa.

II. Procedural Matters

9. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.[9] Accordingly, we dismiss Alabama Power's August 9, 2016 filing as an answer to petitioners' requests for rehearing.

10. Under section 313 of the FPA, a party that has been "aggrieved" by a Commission order may file a request for rehearing and subsequently a petition for judicial review.[10] A party is aggrieved if it can show that it has both Article III and prudential standing to challenge a Commission order.[11] Specifically, a party must demonstrate that:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[12]

11. Water Users' rehearing request focuses on the alleged impacts of the Martin Dam Project's flood and drought operations on the Army Corps' Allatoona and Carters projects in Georgia, and in turn, water availability in the metropolitan Atlanta area.[13] They do not contend that project operations will immediately result in operational changes at the Allatoona and Carters projects. Rather, Water Users allege that the Martin Dam Project will prevent the Army Corps from reallocating its existing flood storage at Allatoona Lake to supply future, unspecified water and electricity demands resulting

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[9] 18 C.F.R. § 385.713(d)(1) (2016).

[10] *See* 16 U.S.C. §§ 825*l*(a)-(b) (2012).

[11] *See Green Island Power Authority v. FERC*, 577 F.3d 148, 158 (2d Cir. 2009).

[12] *Alabama Power Co.*, 155 FERC ¶ 61,080 at P 138 (citing *Green Island Power Authority v. FERC*, 577 F.3d at 159).

[13] The Cobb County-Marietta and Cartersville water systems withdraw from both the Allatoona and Carters reservoirs to serve the northern suburbs of Atlanta, and this use was considered in the updated Master Manual. Army Corps 2014 *Final Environmental Impact Statement for the ACT Master Water Control Manual Update*, at 4-32 (Army Corps final EIS), http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACT-Master-Water-Control-Manual-Update/ACT-Document-Library/.

from anticipated population growth over the next 30 years.[14] Water Users are also concerned that, in times of drought, Alabama Power will, as it has in the past, ask that the Army Corps make greater releases from Lake Allatoona to increase flows into the Coosa River.[15] Water Users contend that, if the Corps acquiesces, the project will ultimately infringe on Georgia's water supply needs.[16]

12. Water Users do not have an actual or imminent injury-in-fact. Water Users have not shown that the Army Corps would be unable to accommodate their future requests. Nor have they established that population growth requires additional water withdrawals from Allatoona reservoir. In fact, even as populations have grown, water withdrawals have "decreased dramatically since 2007 due largely to the implementation of aggressive conservation measures."[17] Water Users have thus failed to demonstrate a substantial probability of harm related to potential water needs in the future.[18]

13. Water Users have also failed to show that the project's drought operations have a substantial probability of harming Water Users' future water supply requests.[19] In 2007, in response to Alabama Power's proposal that it be allowed to temporarily modify flows during extended drought conditions and that the Army Corps make additional releases from its upstream reservoirs, the Corps stated that it "would not approve the request to alter releases from [Corps] reservoirs by any amount in tandem with the [Alabama Power] reduction," and "would continue its current independent operation."[20] Water

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[14] Atlanta Regional Commission Rehearing Request at 4.

[15] *Id.* at 6-7.

[16] *Id.* at 4.

[17] *Id.* at Attachment B, Georgia EPD Analysis, 14.

[18] *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (A party's "burden of proof" with respect to standing "is to show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could redress that injury."); *Ctr. for Law & Educ. v. Dep't of Educ*., 396 F.3d 1152, 1161 (D.C. Cir. 2005) ("Here, Lindsey has hypothesized that the final agency rules have increased the risk to her interests, but she has offered this Court no actual demonstration of increased risk.").

[19] *Alabama Power Co*., 155 FERC ¶ 61,080 at P 139.

[20] Army Corps 2007 *Environmental Assessment and Finding of No Significant Impact for Alabama Power Company Proposal for a Temporary Modified Minimum Flow Agreement in the Alabama River for Drought Water Management Operation in the*

(continued ...)

Users have thus failed to take their alleged harm "out of the category of the hypothetical" and establish an actual injury.[21]

14. Even if Water Users had established an injury, they have not satisfied the traceability requirement. Water Users claim that Alabama Power's project operations necessarily foreclose the Army Corps from modifying Allatoona and Carters project operations to accommodate Water Users' future, unspecified needs. But the Allatoona and Carters projects are not operated for, or in response to, any downstream project in the ACT River Basin, including the Martin Dam Project.[22] The relationship between the project and Water Users' abstract harm is thus too attenuated for Water Users' hypothetical injury to be caused by Martin Dam, let alone remedied by their requested relief.

15. Accordingly, we dismiss Water Users' requests for rehearing because they have failed to establish that they have been aggrieved by the License Order. But even if Water Users' requests were not dismissed on procedural grounds, we would nonetheless deny them on the merits, as discussed below.

III. Discussion

A. The Yates and Thurlow Project

16. The Martin Dam Project discharges directly into the Yates reservoir (the upper reservoir of the Yates and Thurlow Project) and Yates dam discharges directly into the

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Alabama-Coosa-Tallapoosa River Basin, at EA-38 (Army Corps 2007 EA and FONSI), http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/act/docs/APC_FlowReductionRequest-%20EA-FONSI.pdf. The project's final EIS incorporates analysis from the 2007 EA and FONSI, and the 2014 final EIS for the ACT Basin Master Manual regarding the effects of other actions occurring in the ACT basin. Final EIS at 32-33, 74-75.

[21] *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) (citing *Village of Elk Grove Village v. Evans*, 997 F.2d 328 (7th Cir. 1993)).

[22] *See Alabama Power Co.*, 155 FERC ¶ 61,080 at P 139 (finding that the Drought Response Proposal does not dictate flows from, or reservoir elevations for, the Corps Reservoirs).

Thurlow reservoir.[23] Because the Yates and Thurlow reservoirs have limited storage capacity, and Lake Martin is the largest reservoir in the basin, holding over 1.6 million acre-feet of water, flows downstream of the Yates and Thurlow Project largely reflect the releases from the Martin Dam Project. Although the Martin Dam Project license does not require minimum flows, the project's releases help meet a 1,200 cubic feet per second (cfs) minimum flow requirement from the Thurlow development.[24]

17. Conservation Groups argue that the Commission failed to analyze the Martin Dam Project's flows through the Yates and Thurlow Project, alleging that the final EIS segmented the Martin Dam Project from the Yates and Thurlow Project,[25] and that the final EIS failed to consider direct and indirect impacts on downstream flows.[26] We disagree.

18. The Council on Environmental Quality (CEQ) regulations require that connected, cumulative, and certain similar actions pending before an agency at the same time be considered in a single EIS.[27] But the Conservation Groups do not identify any proposed major federal action at the Yates and Thurlow Project, and, indeed, none were pending when the Commission considered the new license for the Martin Dam Project.[28]

19. Conservation Groups cite to the federal district court's opinion in *Macht v. Skinner*[29] to support their contention that the Yates and Thurlow and the Martin Dam Projects are "simply illogical when viewed in isolation" and thus may not be segmented

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[23] Martin dam is located at RM 60.6, Yates dam is located at RM 52.7 (7.8 miles downstream from the project), and Thurlow dam is located at RM 49.7 (3 miles downstream from Yates dam).

[24] License Order, 153 FERC ¶ 61,298 at P 19.

[25] Conservation Groups' Rehearing Request at 65-66.

[26] *Id.* at 48-49

[27] 40 C.F.R. § 1508.25 (2016).

[28] *See Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (noting that "NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed.").

[29] *Macht v. Skinner*, 715 F. Supp. 1131, 1135 (D.D.C. 1989).

in an environmental analysis.[30] But *Macht* does not aid the Conservation Group's segmentation claims. The *Macht* court held that a stand-alone, state-funded rail segment was not sufficiently federalized to be considered a "major federal action" for purposes of NEPA, even if the project required a permit from the Army Corps and the state indicated it hoped to obtain federal funds to extend the state project in the future.

20. Moreover, in this case, the final EIS conducted the very analysis that Conservation Groups request. Commission staff accounted for the Martin Dam Project's contribution to the minimum flow requirement at Thurlow dam, and analyzed the potential impacts of Alabama Power's proposed operational changes on downstream flows.[31] The EIS subsequently detailed the direct, indirect, and cumulative impacts of project flows on aquatic resources from below Thurlow dam for over thirty miles to near the mouth of the Tallapoosa River, during high and low flow conditions.[32] The final EIS explained that any adverse impacts downstream of Martin dam would be minor and that Alabama Power's proposed drought measures, i.e. the three foot winter pool elevation increase and the Drought Response Proposal, would help manage the cumulative effects of low flows on the Tallapoosa and Alabama Rivers.[33]

B. Drought Management

21. Alabama Power operates its projects on the Coosa and Tallapoosa Rivers for power production and other purposes, including navigation on the Alabama River. In accordance with a 1972 agreement with the Army Corps, Alabama Power provides a combined minimum 7-day average flow of at least 4,640 cubic feet per second (cfs) from its projects on the Tallapoosa and Coosa Rivers into the Alabama River. Alabama Power has operated its Jordan and Bouldin developments on the Coosa River and the Thurlow development on the Tallapoosa River to meet this target.[34]

22. To minimize the impact of a regional drought on this navigation target and other resources, Alabama Power submitted a Drought Response Proposal in the relicensing

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[30] Conservation Groups' Rehearing Request at 65.

[31] *See, e.g.*, final EIS at 19, 25, 47 (describing flows downstream of Martin dam, including flows downstream of the Thurlow development).

[32] *Id.* at 47-48, 54-55, 69-72, 81-87, 118, 122, 125-127, 174-76, 185-187.

[33] *Id.* at 90, 170, 176, 187.

[34] *Alabama Power Company*, 143 FERC ¶ 61,249, at P 17 (2013).

proceeding, as well as in the Coosa River Project's relicensing proceeding,[35] and Army Corps' revisions to its ACT Basin Master Manuals.[36] Under the Drought Response Proposal, drought is detected through rain and stream flow indicators. When the basin is entering a drought, Alabama Power will consult with the Alabama Department of Economic and Community Affairs' Office of Water Resources and other state and federal agencies[37] to determine whether drought intensity levels have been met.[38]

23. In the event drought response measures are triggered, Alabama Power will reduce flows from its reservoirs based on drought intensity conditions.[39] As the drought intensity level increases, the discharge requirements from the Jordan and Thurlow dams decrease.[40] The Drought Response Proposal also directs Alabama Power to seek reservoir elevation variances from the Army Corps and the Commission as needed to

[35] The Commission adopted the plan as it applied to the Coosa River in Article 403 of the Coosa River Project's license. *Alabama Power Co.*, 143 FERC ¶ 61,249 at 62,626.

[36] The updated Army Corps manuals provide operating criteria for Army Corps' projects within the entire ACT River Basin, as well as individual reservoir regulation manuals for certain Army Corps projects.

[37] Agencies to be included are: the Alabama Department of Conservation and Natural Resources (ADCNR), the Alabama Department of Environmental Management (ADEM), FWS, and Army Corps. Alabama Power draft EIS comments at Attachment B, 3 (Drought Response Proposal).

[38] Drought Response Proposal at 1.

[39] Drought intensity levels are measured by three factors: (1) the amount of inflow into the ACT River Basin; (2) ACT Basin-wide composite storage; and (3) stream flow at the Alabama and Georgia state line. *See* final EIS at 25. The reservoirs considered for the ACT Basin-wide composite storage trigger are R.L. Harris Lake, H. Neely Henry Lake, Logan Martin Lake, Lake Martin, and the Weiss Lake project. Army Corps final EIS at ES-16.

[40] For example, during extreme droughts (when all three drought triggers are present), flows can drop to as low as 1,600 cfs from Jordan dam on the Coosa River; to less than 350 cfs from Thurlow dam on the Tallapoosa River; and to as low as 2,000 cfs on the Alabama River. Drought Response Proposal at 5-7.

improve the likelihood of filling Alabama Power's reservoirs to full summer pool elevation.[41]

24. License Article 405 adopted Alabama Power's Drought Response Proposal as it applies to the project.[42] The Army Corps adopted, with modifications recommended by FWS, the Drought Response Proposal in its ACT Basin Water Control Manuals' Drought Contingency Plan. License Article 405 directs Alabama Power to report on and propose measures to resolve any inconsistences between the Drought Response Proposal adopted in Article 405 and the Army Corps' Drought Response Proposal, after consulting with resource agencies.[43] Article 405 also directs Alabama Power to notify the Commission within 10 days of modifying operations in response to drought conditions.

25. Alabama Power also proposed to increase Lake Martin's flood, operating, and drought curves by roughly three feet during the winter months. The higher winter pool elevations increase the likelihood of meeting summer reservoir elevation levels and reduce vulnerability to summer drought.[44] License Article 402 adopts this proposal and also permits temporary reservoir level modifications during emergencies beyond the control of the licensee, and upon mutual agreement among Alabama Power, the Army Corps, Alabama Department of Environmental Management (ADEM), and the Alabama Department of Conservation and Natural Resources (ADCNR).[45]

26. On rehearing, Water Users and Conservation Groups contend that the Commission did not adequately consider Martin Dam's drought operations under the Drought Response Proposal, including cumulative impacts on water supply at the Army Corps' Allatoona and Carters projects in Georgia, and Mobile Bay in Alabama.[46] In light of these alleged errors, the parties request additional environmental analysis, and Water Users request that the Commission require minimum flows from Martin Dam to protect their future water withdrawal requests at the Allatoona and Carters reservoirs.

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[41] Drought Response Proposal at 3-5, 7.

[42] License Order, 153 FERC ¶ 61,298 at PP 30, 72, 95, 96, 99.

[43] License Order, 153 FERC ¶ 61,298 at P 99.

[44] Final EIS at 73-74, 170.

[45] License Order, 153 FERC ¶ 61,298 at 62,876.

[46] Conservation Groups' Rehearing Request at 54-57; Georgia EPD Rehearing Request at 7-9.

27. Water Users also seek rehearing of the License Order's decision to only implement a portion of the Drought Response Proposal and eliminate Water Users from the Drought Response Proposal consultation process.

28. We reject the Conservation Groups' and Water Users' claims. Commission staff analyzed the project's impacts, including cumulative impacts, on downstream water resources in the Tallapoosa and Alabama Rivers.[47] The final EIS used historical stream flow, reservoir levels, project outflows, and modeling analyses to evaluate the frequency and effect of low flows on the Tallapoosa River, and the potential effects of droughts on project operations.

29. The analysis found that, under moderate and severe drought conditions, Lake Martin water levels would fall below the drought curve less than once every 10 years. And during severe droughts, minimum flow requirements and downstream navigational releases to the Alabama River may not be achieved.[48] The final EIS found that the coordinated implementation of the Drought Response Proposal between the Coosa River and Tallapoosa River Basins would minimize these impacts.[49] Alabama Power's proposed 3-foot-higher winter reservoir level would also provide additional water storage in Lake Martin to help limit reservoir level decreases during droughts. Together, the raised winter pool levels and Drought Response Proposal are expected to benefit aquatic resources, including paddlefish spawning downstream of Thurlow dam.[50]

30. As part of this analysis, the EIS also referenced the Army Corps 2007 EA and FONSI,[51] which assessed the potential environmental impacts of Alabama Power's request to the Corps for authorization to reduce flows from Alabama Power's Coosa and Tallapoosa River projects based on summer drought conditions.[52] The EA and FONSI

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[47] *See, e.g.*, final EIS at 33, 75, 77, 82, 82-87, 89-90.

[48] *Id.* at 72-73.

[49] *Id.* at 75.

[50] *See id.* at 74, 86-87.

[51] Final EIS at 75.

[52] *Id.* at 74-75 (citing Army Corps 2007 EA and FONSI). The Drought Response Proposal is based on the summer flow regime identified in the Corps 2007 environmental assessment. It provides for a 7-day average minimum flow at the Alabama River gage from a high of 4,640 cfs to a low of 3,700 cfs during the early summer period.

analyzed a number of alternatives and recommended adoption of Alabama Power's proposal to reduce minimum flows on the Alabama River at Montgomery during summer drought periods by 10 percent (from 4,640 to 4,176 cfs), and up to a maximum of 20 percent (from 4,640 to 3,712 cfs), with monitoring of certain resource parameters.[53] The Corps explained that this alternative would:

> Have the greatest potential to have the least overall adverse impacts to the affected environment, and to maintain the most flexible position for making water management decisions during the continuing current drought and future droughts. The described action [by not affecting flows from the Corps' upstream projects] would maintain sufficient water reserves in Lakes Allatoona and Carters to insure that minimum environmental flows can be maintained, assure reliability of water intake by the municipalities on those lakes, and at the same time allow increased future releases if warranted, due to continuing sustained drought conditions. It would also allow [Alabama Power] to safeguard its hydropower generation for the short term, maintain sufficient water flow for downstream water users to continue withdrawals from water intake structures and the discharge of wastewater while meeting State water quality standards, and not adversely impact listed threatened and endangered species in the affected waterways.[54]

31. Conservation Groups and Water Users contend that the Commission should have expanded this analysis to include the Allatoona and Carters reservoirs and Mobile Bay. But, as CEQ has explained, an agency's analysis should be proportional to the magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.[55] The magnitude of analysis sought by the Conservation Groups and Water Users is far greater than the project's actual downstream impacts.

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[53] Army Corps 2007 EA and FONSI at EA-38.

[54] *Id.* at EA-38 and EA-39.

[55] *See* CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis*, at 2-3 (June 24, 2005), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

32. Conservation Groups argue that the cumulative impacts analysis must expand to the Mobile Bay region, more than 400 miles downstream of the Martin Dam Project, because the Alabama River flows into Mobile Bay.[56] Although water released from Martin Dam will eventually flow to Mobile Bay, the impact of those flows will be attenuated by the roughly 419 miles to Mobile Bay, and, ultimately, will not be discernable due to the impacts from other rivers flowing to Mobile Bay and water flowing in and out of Mobile Bay from the Gulf of Mexico.[57] Moreover, measures that mitigate downstream impacts on the Tallapoosa and Alabama Rivers generally— such as the minimum flows for navigation and the environment to be maintained in the Alabama River, the Drought Response Proposal, and the minimum DO requirement during generation at Martin Dam—further guarantee that no discernable adverse project effects are conveyed down the Alabama River toward Mobile Bay.

33. The final EIS also properly excluded future water supply storage at the Corps' Allatoona project on the Etowah River and Carters project on the Oostanaula River, both of which are located hundreds of miles upstream of the Coosa River Project's Jordan Dam. Water Users assert Alabama Power has repeatedly sought greater flows from the Allatoona and Carters reservoirs for the Coosa River Project and Alabama Power has stated in court documents that operations at the Allatoona project "will impact Lake Martin elevations by placing greater demands on it for flow support" during drought conditions.[58] But Martin Dam does not have a direct or indirect impact upon the Allatoona and Carters reservoirs. The Drought Response Proposal manages cumulative downstream impacts; it does not dictate flows from, reservoir elevations for, or any other

[56] Conservation Groups' Rehearing Request at 54.

[57] *See* final EIS at 41, 49 (stating that the Martin Dam Project is located at RM 60.6 on the Tallapoosa River, and Claiborne Lock and Dam is located 240 miles downstream from the Tallapoosa River and 118 miles upstream of Mobile Bay); Army Corps EIS at ES-88 (noting that the ACT Basin contributes roughly fifty percent of the total flow to the Mobile River/Bay, and the balance is contributed by uncontrolled inflow from the Black Warrior-Tombigbee Basin).

[58] Atlanta Regional Commission Rehearing Request at 8-9. Water Users also argue that the final EIS responded to its earlier request for such analysis by stating that the Drought Response Proposal incorporated Georgia's water supply needs, but that the final EIS did not support this assertion. The Army Corps' Master Manual has factored in existing water supply storage agreements into its analysis; however, the Drought Response Proposal does not require any specific operational changes at Allatoona or Carters reservoirs. Army Corps final EIS at 4-32.

measure at the upstream Allatoona and Carters reservoirs.[59] And because Martin Dam operations do not adversely impact Allatoona and Carters reservoirs, Water Users' requested minimum flow is unnecessary.

34. Water Users next argue that Article 405 is arbitrary and capricious because it only requires the implementation of a portion of the Drought Response Proposal and not the entire plan, which also applies to the Coosa River Project. Water Users are mistaken. The Commission is without authority to place conditions in a license that pertain to another project or require actions of another licensee. The License Order thus included the Tallapoosa River portion of the Drought Response Proposal as it applies to the Martin Dam Project. Implementation of the Coosa River portion of the Drought Response Proposal is already required by the Coosa River Project license.[60]

35. On a related matter, Alabama Power recently notified the Commission that it had invoked the Drought Intensity Level 2 provisions of the Drought Response Proposal by reducing the combined releases to the Alabama River from the Coosa River Project's Bouldin development and below the Yates and Thurlow Project's Thurlow development from 4,640 cfs to 4,200 cfs.[61] However, as noted above, Article 405 only applies to the Martin Dam Project, and as such, does not direct or otherwise authorize operations or changes at the Thurlow development.[62] To avoid confusion, Article 405 of the License Order is revised to clarify that when notifying the Commission in writing after modifying operations in response to drought conditions, the notification must explain how operations at Martin Dam were modified in response to the Drought Response Proposal. Article 405 is also revised to clarify that the requirements of the article only apply to the Martin Dam Project, and to require that the Report on Consistency detail Martin Dam

[59] *See Alabama Power Co.*, 155 FERC ¶ 61,080 at P 139.

[60] *Alabama Power Co.*, 143 FERC ¶ 61,249 at 62,626.

[61] Alabama Power notified the Commission pursuant to Article 405 of the Martin Dam Project license and Article 403 of the Coosa River Project license. June 28, 2016 Letter from David Anderson (Alabama Power) to Kimberly Bose (Secretary, FERC).

[62] Changes to the flow requirements at the Thurlow development may only be made as directly permitted by the Yates and Thurlow Project license or, in the alternative, upon Commission approval for a temporary variance of the Yates and Thurlow Project license's flow requirements. If Alabama Power wishes the provisions of the Drought Response Proposal to apply to the Thurlow Project, it must file an application to amend the Thurlow Project license to incorporate the Drought Response Proposal.

operations under the Drought Response Proposal and consistency with the ACT Water Control Manual.

36. Next, parties argue that future drought operations are uncertain because Article 405 requires Alabama Power to resolve any inconsistencies between its Drought Response Proposal and the Army Corps' Drought Contingency Plan. As evidence that future changes will occur without further NEPA review, Water Users also point to language in the Drought Response Proposal that states that it is a "dynamic plan" that "may evolve or be expanded in the future as requirements within the basin may shift."[63] Conservation Groups contend that this uncertainty violates the NEPA requirement to take a "hard look" at environmental impacts before actions are taken.

37. We disagree. Consistent with the Commission's practice that licensees prepare management plans, Article 405 directs Alabama Power to submit a "Report on Consistency" between the Corps' and Alabama Power's basin-wide drought response procedures. To the extent any modifications are required by the Army Corps' Drought Contingency Plan, Article 405 requires modifications to be developed in consultation with federal and state resource agencies, for approval by the Commission. The Drought Response Proposal acknowledges that the plan could change, but that does not mean the Proposal can change without review. Indeed, the Proposal expressly states that any revisions "affect[ing] [Alabama Power's] federal hydropower license requirements will be filed with FERC for prior approval."[64]

38. Finally, Water Users allege that they were wrongly eliminated as consulting agencies under Article 405. Generally, the Commission does not require post-licensing consultations with entities other than those state and federal agencies having statutory or regulatory responsibilities with respect to affected resources. As explained, Alabama Power operations under the Drought Response Proposal do not impact Army Corps drought measures within Georgia.

39. In sum, the Commission conducted a detailed analysis of Alabama Power's Drought Response Proposal. The Proposal addresses operational issues in a wide variety of drought conditions and has been accepted by the relevant resources agencies.[65]

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[63] Georgia EPD Rehearing Request at 8.

[64] Drought Response Proposal at 1. Future license modifications, if any, are subject to NEPA.

[65] *Alabama Power Co.*, 153 FERC ¶ 61,298 at PP 72, 97.

Neither Water Users nor the Conservation Groups have provided a compelling reason to re-analyze or modify Martin Dam Project drought operations.

C. Dissolved Oxygen (DO)

40. DO is an important indicator of water quality and is required at an adequate concentration to sustain aquatic resources. Lake Martin thermally stratifies in the spring, creating a warm surface layer that is relatively rich in DO (known as the epilimnion), and a colder bottom layer where DO levels are lower (known as the hypolimnion).[66] The stratification ends in the fall, usually in late October or November, as air temperatures decrease and the reservoir goes through "turnover," during which the surface water mixes with water from lower reservoir levels.

41. Within hydropower project tailraces, DO is primarily influenced by the depth at which water is withdrawn from the reservoir for generation. Because Martin Dam's water intake structures draw water from the low DO hypolimnion during the summer and early fall, Alabama Power uses a draft tube aeration system to raise DO levels in project discharges.[67]

42. The final EIS evaluated the Martin Dam Project's impacts on aquatic resources, including the concentration of DO in the project tailwater during generation. The final EIS explained that the aeration system at Martin Dam, when operable, had successfully raised DO above ADEM standards in all generation discharges.[68] Staff found that the proposed reservoir elevation changes would not likely adversely impact downstream DO,

[66] DO levels drop in the hypolimnion in the summer and early fall as DO is gradually consumed by microbiota decomposing organic material.

[67] *Alabama Power Co.*, 104 FERC ¶ 61,216, at 61,757 (2003). Draft tubes are vertical cylinders located below aerators that allow the aeration system to draw water from below the surface to increase DO levels.

[68] As discussed in the License Order, DO concentrations were greater than 4 mg/L, 99.9 percent of the time from 2002 through 2005, and 100 percent of the time from 2006 through 2009. DO levels only dropped below 4.0 mg/L twice in the 2002-2005 time period and in both instances the turbine aeration system was not fully operable (once due to maintenance and the other during a flood). On average, DO concentrations were 5.91 mg/L from 2002 through 2005, and 5.72 mg/L from 2006 through 2009. License Order, 153 FERC ¶ 61,298 at P 111 (citing final EIS at 51-52).

and that the proposed winter pool level increase could result in higher DO discharges due to well aerated-spillage.[69]

43. In response to public comments, the final EIS stated that Alabama Power must release water continually to meet Thurlow dam's minimum flow requirement; therefore, "there is little nongeneration time to monitor."[70] However, as explained in the final EIS and the License Order, Martin dam is a peaking project and generates for several hours Monday through Saturday and little, if at all, on Sundays.[71] During nongeneration periods, Martin Dam does not discharge,[72] and, therefore, does not affect water quality in the downstream Yates reservoir.[73]

44. ADEM's Clean Water Act (CWA) section 401 water quality certification requires that Alabama Power maintain a minimum DO level of 4.0 mg/L downstream of the project during generation.[74] To ensure compliance with state water quality standards, the water quality certification required monitoring in the tailrace to begin one hour after generation, for the duration of the generation period, every summer and fall for three years.[75] License Article 406 also directed Alabama Power to develop a Water

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[69] Final EIS at 77.

[70] *Id.* at D-2.

[71] *Id.* at 14-15; License Order, 153 FERC ¶ 61,298 at P 17.

[72] Any leakage is *de minimis* and not expected to alter water quality downstream. *See* final EIS at 19.

[73] During nongeneration periods, the operation of the Yates development and tributary inflows control water quality in the Yates reservoir. License Order, 153 FERC ¶ 61,298, at P 112.

[74] Alabama's water quality criteria, based on the designated uses for the Martin Dam Project tailrace, state that "[i]n no event shall the [DO] level be less than 4 mg/L due to discharges from existing hydroelectric generation impoundments"). Ala. Admin. Code 335-6-10-.09(2)4 (public water supply), 335-6-10-.09(3)4 (swimming), and 335-6-10-.09(5)4 (fish and wildlife).

[75] One hour after generation begins, the monitors will record DO levels and temperature at 30 minute intervals during generation. If at the end of three years the monitoring results indicate that Alabama Power is not complying with a DO concentration of 4.0 mg/L, it must propose additional mitigation measures.

Quality Monitoring Plan consistent with these conditions.[76] The final EIS and License Order found that compliance with Alabama's mandatory certification conditions would provide adequate DO for downstream communities.[77]

1. DO Levels During Nongeneration

45. On rehearing, Conservation Groups contend that the Commission failed to assess baseline conditions because Alabama Power did not measure downstream DO levels during nongeneration periods.[78] Conservation Groups contend that Alabama requires a 5.0 mg/L nongeneration standard, but the certification is "silent when it comes to regulating dissolved oxygen during nongeneration."[79] Conservation Groups argue that this omission "cannot relieve the [Commission] of its responsibilities to examine water quality impacts under NEPA."[80] Conservation Groups contend that DO concentrations in the tailrace may be low because the Martin Dam Project operates as a peaking project and therefore does not continuously release water downstream.[81] Conservation Groups also assert that this additional monitoring is appropriate here because the nearby Coosa River

[76] Article 406 requires Alabama Power to develop the plan in consultation with U.S. Environmental Protection Agency (Region 4) (EPA), FWS, ADEM, and ADCNR.

[77] Final EIS at 79; License Order, 153 FERC ¶ 61,298 at P 113.

[78] Conservation Groups' Rehearing Request at 33, 40-41.

[79] *Id.* at 38.

[80] *Id.*

[81] To the extent Conservation Groups also allege that Thurlow dam releases low DO discharges in the free-flowing stretch of the Tallapoosa River below Thurlow dam, they are mistaken. Monitoring conducted during the Yates and Thurlow Project's license term confirms that the Yates dam's aeration system raises DO levels in discharges from Yates' stratified reservoir above ADEM's required DO discharge standard of 4.0 mg/L. May 19, 2006 Water Quality Assessment Report, Docket No. P-2407-100 filed pursuant to *Alabama Power Co.*, 106 FERC ¶ 62,014, at Ordering Paragraph C (2004); July 29, 1997 Water Quality Monitoring Plan, filed pursuant to *Alabama Power Co.*, 66 FERC ¶ 62,068 (1994) *as amended by* 69 FERC 62,166 (1994) *as modified by* August 29, 1995 Letter Order of J. Mark Robinson, Director, Division of Project Compliance and Administration, Office of Energy Projects.

Project is operated in a similar manner but does not meet minimum water quality standards during nongeneration.[82] We disagree.

46. CEQ regulations require that an EIS contain high-quality information, and if there is incomplete or unavailable relevant data, an EIS must disclose that fact.[83] This disclosure requirement, however, is only applicable to information relevant to a reasonably significant adverse impact that is essential to a reasoned choice among alternatives.[84] When other information in the record indicates that certain issues will not contribute to significant impacts on the environment, an agency is under no obligation to subject those issues to detailed study.[85]

47. There is no evidence indicating that the Martin Dam Project adversely impacts downstream water quality. Martin Dam's discharges are generally well above the 4.0 mg/L state DO standard, and periods of nongeneration at Martin Dam would not be expected to negatively impact downstream conditions.[86] The Martin Dam tailrace is not a riverine stretch that becomes dewatered the moment the project stops generating. The project discharges directly into the Yates reservoir, which has a surface area and storage capacity large enough to support aquatic life when flows are not coming from the Martin

[82] Conservation Groups' Rehearing Request at 43.

[83] 40 C.F.R. § 1502.22 (2016).

[84] *Id*.

[85] *See, e.g.*, 40 C.F.R. §§ 1501.7(a)(3), 1502.2(b) (2016) (directing agencies to focus on significant potential effects and eliminate from detailed study those issues that are not significant).

[86] License Order, 153 FERC ¶ 61,298, at PP 111-12. Apart from water released during periods of generation, the Martin Dam Project does not otherwise discharge potentially low DO from the hypolimnion, and there is no bypass reach that would allow it to do so.

Dam Project.[87] Moreover, water quality in the mainstem of the Yates reservoir is generally high and not impaired.[88]

48. These findings are consistent with observed downstream aquatic habitat, which also indicates the absence of any DO impairment issues. Site-specific field surveys within the Martin Dam tailrace identified several species of snails, mussels, and fish,[89] and survey results verified the presence of diverse lake fishery in Yates reservoir, which included: spotted bass, largemouth bass, striped bass, white bass, black crappie, bluegill, redear sunfish, channel catfish, and yellow perch.[90]

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[87] License Order, 153 FERC ¶ 61,298, at P 112. The Yates reservoir has a surface area of 2,000 acres and a gross storage capacity of 53,890 acre-feet. *Alabama Power Company*, 66 FERC ¶ 62,068, at Ordering Paragraph B(2) (1994).

[88] Final EIS at 90. Water quality monitoring data collected from 1993 to 2009 in the Martin Dam Project's tailrace indicate medium/high concentrations of DO (average of 6.77 mg/L) during generation, low levels of organic matter (as indicated by an average of 0.182 mg/L of oxygen used for organic matter decomposition over a 5- day period, commonly referred to as the "5-day biochemical oxygen demand"), and relatively low average concentrations of nitrogen (0.29 mg/L total Kjeldahl nitrogen; 0.19 mg/L nitrate; and 0.055 mg/L nitrite) and phosphorus (0.025 mg/L total phosphorus). *See* Alabama Power's June 8, 2011 Martin Dam Project License Application, Final Report for Study Plan 8 (Baseline Water Quality), Appendix F (Statistical Summary of Alabama Power Water Quality and Water Chemistry Data), at 22. Publically available ADEM water quality reports confirm these findings and show that the mainstem of the Yates reservoir meets ADEM standards. *See* Alabama Department of Environmental Management, *2014 Integrated Water Quality Monitoring and Assessment Report* (Apr. 2014), http://www.adem.state.al.us/programs/water/waterforms/2014AL-IWQMAR.pdf; *see also* Alabama Department of Environmental Management, *2005 Yates and Thurlow Reservoirs Report* (May 2011), http://adem.alabama.gov/programs/water/wqsurvey/table/2005YatesThurlowResReport.pdf. EPA also reports the overall status of Yates reservoir as "good," with no impairment. *See* U.S. Environmental Protection Agency, *Waterbody Quality Assessment Report; 2014 Waterbody Report for Tallapoosa River (Yates Lake)* (2014), https://iaspub.epa.gov/waters10/attains_waterbody.control?p_au_id=AL03150110-0406-103&p_cycle=2014.

[89] June 8, 2011 License Application, Exhibit E at 137-38. The cool water associated with the tailrace area often attracts striped bass exceeding 40 pounds.

[90] *Id.* at 137-138.

49. Conservation Groups have attempted to provide evidence of poor water quality in the Yates reservoir by submitting new information into the record.[91] Specifically, Conservation Groups reference ADEM's 2014 Integrated Water Quality Monitoring and Assessment Report required under section 303(d) of the CWA (ADEM 2014 Report).[92] This information shows water quality issues at the outlet of two tributary arms of the Yates reservoir, the Sougahatchee and Channahatchee Creeks. However, ADEM's 2014 Report also shows that the mainstem of the Yates reservoir is not impaired.[93] Thus, although water quality in these arms of the Yates reservoir is locally affected by tributary inflows, the water quality in the mainstem of Yates reservoir downstream of the Martin Dam Project remains good.[94]

50. Conservation Groups also reference low DO concentrations during nongeneration below the Coosa River Project developments as evidence that the Commission should have collected this data for the Martin Dam Project.[95] But in light of the significant differences between the two projects, conditions at the Coosa River Project cannot be used to justify monitoring at the Martin Dam Project. Martin Dam discharges high quality water from one of the largest storage reservoirs in the region into the relatively small Yates reservoir. In contrast, the Coosa River Project consists of seven developments, many of which discharge into a riverine stretch or a large transitional

[91] *See infra* P 55 n.107.

[92] Conservation Groups' Rehearing Request at 22, 39, and 46 (citing the TMDL for Sougahatchee Creek and Alabama Department of Environmental Management, *2014 Integrated Water Quality Monitoring and Assessment Report* (April 2014), http://www.adem.state.al.us/programs/water/waterforms/2014AL-IWQMAR.pdf).

[93] *See, e.g.,* ADEM, *2014 Integrated Water Quality Monitoring and Assessment Report* at 37.

[94] *Id*. Appendix D at 6.

[95] Conservation Groups' Rehearing Request at 43, 46.

area.[96] The Coosa River also contains higher nutrient levels, which can contribute to DO impairment, while overall water quality in the Tallapoosa River is good.[97]

51. In sum, the fact that direct measurement was possible does not mean that the Commission's analysis was inadequate.[98] Studies, mitigation measures, and past monitoring support the finding that the Martin Dam Project does not cause low DO during periods of nongeneration. Accordingly, no further data collection or analysis was necessary.[99]

2. DO Standard in the License Order

52. Conservation Groups next argue that the state's water quality certification is not adequate and the Commission should have required additional water quality protection measures. Conservation Groups argue that the certification's DO monitoring during

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[96] If DO is already low in the river system, then DO level declines in substantial transitional areas can be both symptomatic of and a contributor to dam-enhanced eutrophication and low DO problems. These conditions are absent below the Martin Dam Project. Not only is water quality good, but there is no transitional area. The Yates reservoir backs up to the Martin Dam Project tailrace as both have normal elevations of 345 feet mean sea level.

[97] *See supra* P 47. The Coosa River Project reservoirs are eutrophic, meaning these lakes have high nutrient levels due to nutrient runoff from upstream sources. *See* Coosa River Project EA at 54, 67, 105, 184. Excessive nutrients in eutrophic lakes cause increased algae growth, which release and consume DO during the day through photosynthesis and respiration, respectively, and at night consume DO through respiration. As algae die, bacteria use oxygen to consume the dead algae, causing DO levels to drop further. These conditions are absent in Alabama Power's project reservoirs on the Tallapoosa River. Final EIS at 49-50.

[98] *See Western Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1277 (10th Cir. 2013) (ruling that a qualitative analysis is not arbitrary because a more rigorous quantitative analysis was possible).

[99] *See* 40 C.F.R. § 1502.22(a) (2016) (explaining that agencies should fill informational gaps where "incomplete information relevant to reasonably foreseeable *significant* adverse impacts is essential to a reasoned choice among alternatives"); *see also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1144, n.7 (D.C. Cir. 1991) (finding that the Navy's refusal to conduct a requested recreation survey was reasonable based on other information in the record).

generation is not sufficient because water criteria cited in the certification state that "daily [DO] concentrations shall not be less than 5 mg/L at all times," and the Environmental Protection Agency (EPA) and ADEM have interpreted the DO standard below an existing hydropower project to be 4.0 mg/L when generating and 5.0 mg/L when not generating.[100] Conservation Groups also argue that the Commission should have required a 5.0 mg/L DO concentration standard at all times because it is recommended by EPA, ADCNR, experts, and scientific literature; and because ADEM regulations require that all new hydroelectric facilities meet a 5.0 mg/L DO standard when generating.[101]

53. While the Commission may impose additional, more protective requirements than the water quality certification pursuant to the FPA,[102] there is no evidence to support a finding that a 4.0 mg/L DO standard when generating for the Martin Dam Project is not sufficient. EPA recommends a minimum DO level of 4.0 mg/L to avoid acute mortality,[103] which is consistent with ADEM's 4.0 mg/L DO discharge standard. A minimum 4.0 mg/L DO discharge standard may not provide optimal conditions for aquatic life, but there is no evidence that either a continuous or higher DO standard is needed to protect downstream aquatic resources.[104]

D. Other Aquatic Resource Concerns

54. Conservation Groups contend the Commission violated NEPA by failing to discuss impaired project area waterbodies, including, as discussed briefly above, Sougahatchee Creek and Channahatchee Creek, which have high nutrient conditions; and

[100] Conservation Groups' Rehearing Request at 37-38.

[101] *Id.* at 44.

[102] *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008) ("FERC may require additional license conditions that do not conflict with or weaken the protections provided by the [certification].").

[103] *Alabama Power Co.*, 155 FERC ¶ 61,080, at P 38 & n.32 (2016) (citing U.S. Environmental Protection Agency 1986, *Quality Criteria for Water*, EPA 440/5-86-001, EPA, Office of Water Regulations and Standards, at pp. 253-63 (May 1, 1986)).

[104] Contrary to Conservation Groups' allegations, the Commission did not exclusively rely on ADEM's certification to assess Martin Dam's impacts during nongeneration. As discussed above, the Commission assessed whether the project peaking, including nongeneration periods, could adversely impact DO levels downstream.

Sugar Creek, a tributary to the upper part of Lake Martin, which is impaired due to mercury.[105]

55. Conservation Groups cite to ADEM's 2014 303(d) list, but ADEM listed these waters as impaired in 2012.[106] The draft EIS for the project was issued for public comment on June 6, 2013, and the final EIS was published on April 2, 2015. Conservation Groups never raised this issue in their comments on the Commission's environmental documents. The Commission rejects requests for rehearing that raise new issues that could have been previously presented, particularly when parties had the opportunity to comment on a draft environmental document.[107] We find no reason that Conversation Groups' argument could not have been raised prior to our issuance of the License Order. Accordingly, we dismiss this new argument on rehearing.

56. Nonetheless, even if this argument were not dismissed on procedural grounds, it would be denied on substantive grounds. Sugar Creek is impaired due to atmospheric mercury depositions, and Sougahatchee and Channahatchee Creeks are impaired due to enriched conditions caused by nutrient runoff in their watersheds.[108] Martin Dam Project operations do not adversely impact these tributaries, and regular high quality discharges from the project would actually improve water quality in the mainstem of the Yates reservoir.

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[105] Conservation Groups' Rehearing Request at 39.

[106] ADEM 2012 § 303(d) List, http://www.adem.state.al.us/programs/water/wquality/2012AL303dList.pdf.

[107] *See, e.g.*, *Dominion Transmission, Inc.*, 155 FERC ¶ 61,234, at P 10 (2016) ("As a rule, we reject requests for rehearing that raise a new issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances."); *Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025, at P 38 (2013) (explaining the Commission rejects requests for rehearing that raise a novel issue because 18 C.F.R. § 385.713(c)(3) precludes other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process).

[108] *See* ADEM, 2014 *Integrated Water Quality Monitoring and Assessment Report*, Appendix D (Alabama's 2014 § 303(d) List) at 6: ADEM Approved TMDLs in Alabama, http://www.adem.state.al.us/programs/water/approved TMDLs.htm. We note that if Martin Dam was the pollution source, then the mainstem of Yates Reservoir would have worse water quality (i.e., be more greatly enriched) than the tributary arms.

57. Conservation Groups next contend that the final EIS did not explain why downstream conditions do not provide suitable habitat to those mussels and fish most sensitive to low DO.[109] Immediately preceding the statement cited by Conservation Groups, the final EIS explains that the Martin Dam Project discharges into Yates reservoir, which is characterized as a lake habitat.[110] We clarify that riverine species most sensitive to DO are not present below Martin Dam in the Yates Reservoir.

58. Conservation Groups also cite requests for downstream temperature and turbidity monitoring, made early in the license proceeding before Alabama Power submitted its license application.[111] Conservation Groups renew this request at the rehearing stage, despite never raising it in their comments on the draft or final EIS. As discussed in the EIS, Alabama Power monitored temperature and turbidity in the tailrace from 1993 until 2009, and the results indicate that the project was in compliance with ADEM water quality standards.[112] Staff determined that the project's impacts to temperature and turbidity would be minimal,[113] and Conservation Groups raised no concerns with these findings. Accordingly, we deny rehearing on this issue.

E. Flood Storage

59. As discussed, Alabama Power proposed to raise its winter operating curves, including its flood control curve by three feet (i.e. from 481 feet to 484 feet).[114] Initially, Commission staff did not recommend any increase in winter lake elevations. In the draft

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[109] Conservation Groups' Rehearing Request at 35 (citing final EIS at 79).

[110] Final EIS at 79.

[111] Conservation Groups' Rehearing Request at 41 (citing World Wildlife Fund March 18, 2009 Final Study Plan Comments, 6-7). Alabama Power filed its license application on June 8, 2011. Final EIS at xv.

[112] Final EIS at 52.

[113] *Id.* at 39, 77-78

[114] Alabama Power's flood control curve establishes the highest seasonal reservoir elevation before flood control measures are triggered. The License Order also adopted Alabama Power's proposed "conditional fall extension," which will increase the flood control curve to 491 feet between September 1 and October 15, provided that certain hydrologic and operational conditions are met. License Order, 153 FERC ¶ 61,298 at P 27.

EIS, staff cited to Alabama Power's modeling results, which suggested a worst-case scenario that would increase the possibility of flooding and potential damage to structures and roads.[115]

60. Alabama Power subsequently performed a more refined analysis, which was based on actual, winter high flow events, rather than a single test storm, and took account of intervening downstream flows.[116] Out of the nine winter flooding events evaluated in Alabama Power's refined analysis, only two resulted in a higher peak stage. At a winter pool at 484 feet, the analysis showed an increase of 0.54 feet at approximately 50 miles downstream of the Martin Dam Project on the Tallapoosa River (the Montgomery Water Works gage at RM 12.9). In all cases, water levels remained within the river banks and would not impact additional structures or land.[117] The model indicated little potential for increased flooding from the three foot increase in the winter pool.

61. Separately, staff examined whether the higher winter pool elevations at the Martin Dam Project and at the Coosa River Project's H. Neely Henry Development could have a cumulatively significant impact on downstream floods. Staff determined that these changes would reduce winter flood storage, but would not be expected to increase flooding in the Alabama River.[118] Consequently, staff concluded that the higher winter pool elevation is not likely to significantly increase downstream flooding, and will provide net energy gains, improved paddlefish spawning conditions, and enhanced recreation.[119] The Commission agreed and authorized the three foot winter flood curve increase in Article 402 of the License Order.

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[115] *See* draft EIS at 167-170.

[116] Two-year flood events are more characteristic of floods occurring during the winter pool period (i.e. mid-November through February). The updated analysis examined every peak flow event at the Montgomery Water Works gage during the period of 1961 and 1973-2013. Of the 42 events identified, only 10 occurred during mid-November through February, and except for the 1961 event, which was not considered in the model due to data integrity issues, all events have return periods of 2 years or less. *See* final EIS at 65; Alabama Power, July 14, 2014 Response to Schedule A of Additional Information Request, at 1-2.

[117] Final EIS at 66.

[118] *Id.* at 89.

[119] License Order, 153 FERC ¶ 61,298 at P 80 (citing final EIS at 172).

62. Water Users allege on rehearing that the Commission violated NEPA by failing to examine the combined effects of the proposed project changes with other projects in the basin on flood control. In particular, Water Users allege that the Commission severely understated the magnitude of increased downstream flooding risk associated with the 3-foot increase in winter pool elevation. Water Users provide an analysis of a December 2015 flood event, which they contend shows that the winter 3-foot flood curve would have increased the Alabama River by 3.3 feet in Montgomery, Alabama. According to Water Users, the Martin Dam Project's reduced flood storage will shift the burden of providing flood control to the Coosa River Project, and in turn, the Army Corps' Allatoona and Carters reservoirs.

63. Water Users request that the Commission re-analyze the combined effects of the Martin Dam Project's and the Coosa River Project's operations on flooding, and subsequently revise the license to reflect Water Users' forecasted flood impacts in Montgomery, Alabama. Water Users also request that the license include an express provision allowing future revisions to the Lake Martin flood control curve during the 30 year license term.

64. Water Users' analysis of the December 2015 flood event does not warrant either a new analysis of project operations on flooding or modifications to the winter flood control curve authorized in the license. Water Users' analysis does not account for actual flood control operations required by the License Order and lacks sufficient detail to evaluate the downstream effect accurately. Their over-simplified methodology failed to account for actual storage increases as the reservoir rises or flood control measures.[120] Finally, Water Users did not consider multiple factors at the basin scale, such as tributary inflow and the distance between the project and the Alabama River, which dampen the downstream effects of reduced storage.

65. We find it unnecessary to modify the measures that increase the flood control curve from 481 feet to 484 feet. Water Users' new information does not provide any project-related effects not already considered by the Commission. The final EIS examined the cumulative impacts from the Martin Dam Project and the Coosa River

[120] Article 404 of the License Order requires that when Lake Martin is between elevation 484 and 486 feet, outflow must be increased to at least 12,400 cfs; between elevations 486 and 489 feet, outflow would be at least 13,200 cfs. These flood control measures would have been implemented 1 to 2 days earlier than modeled by Water Users, resulting in a lower peak flow than calculated by Water Users.

Project flood curve elevation changes on the Alabama River and found them to be minimal.[121]

66. Water Users' request to revise the license order to allow for future revisions to the Lake Martin flood control curve is also unnecessary. The Commission has already retained its authority to modify the "use, storage, and discharges from storage of waters affected by the license" for beneficial public purposes.[122]

F. Whitewater Rafting

67. Whitewater rafting occurs below the Martin Dam Project in a one-mile reach of the Tallapoosa River downstream of Thurlow dam. Variations in project discharges, and consequently in the downstream Thurlow dam discharges, provide Class II to Class IV rapids on the International Scale of River Difficulty.

68. Conservation Groups contend that the final EIS failed to sufficiently analyze project effects on whitewater rafting. Conservation Groups argue that the final EIS cites the Alabama whitewater paddling guide, but then fails to address the recreational concerns in that guide.[123] The guide indicates that safety risks will increase under high and low flow conditions, both of which will increase with the project's higher winter elevation levels. Conservation Groups argue that the final EIS should have done more to evaluate whitewater flows and provided the public with more information on whitewater flows as part of the project's *Public Education and Outreach Program Plan.*

69. We disagree. The final EIS examined the project's impact on whitewater flows below Thurlow dam, and as Conservation Groups indicate, disclosed these impacts, including the adverse impacts, on whitewater rafting. The final EIS concluded that

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[121] Final EIS at 89. Moreover, there is no indication that flood operations at the Coosa River Projects and the Martin Dam Project could impact the upstream Allatoona and Carters projects.

[122] Article 12 is reported at 54 FPC 1858 (1975) (Form L-5), as incorporated by reference in the Project No. 349 license, *Alabama Power Co.*, 153 FERC ¶ 61,298, Ordering Paragraph E. *See also Woodstone Lakes Development, LLC v. Southern Energy NY-Gen*, LLC, 95 FERC ¶ 61,152, *reh'g denied*, 95 FERC ¶ 61,451 (2001) (considering request that the Commission use this article to commence a proceeding aimed at limiting reservoir level fluctuations).

[123] Alabama Whitewater Guide, http://www.alabamawhitewater.com/guide/guide_files2/tallapoosa.htm.

higher winter pool levels would reduce the total number of days with ideal whitewater conditions, and estimated the number of days reduced for each alternative.[124] The final EIS also examined the effects of proposed operational changes on recreation access areas downstream of Thurlow dam.[125] While Conservation Groups contend that the final EIS "should have done more," such a claim does not establish a NEPA violation.[126]

70. Finally, Conservation Groups' belated request for mitigation measures, such as changes to the *Public Education and Outreach Program Plan*,[127] are dismissed because they were not previously raised.[128] In any event, Conservation Groups' proposal is unnecessary. Public safety issues related to releases from Thurlow dam are addressed through revisions to Alabama Power's Public Safety Plan for the Thurlow development;[129] the requirement in section 12.42 of the Commission's regulations for the licensee to install, operate, and maintain safety devices to warn the public of fluctuations in flow from the project;[130] and annual dam safety inspections conducted by Commission staff.[131] We also encourage recreational users to use Alabama Power's hotline (1-800-

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[124] Final EIS at 126-27. For example, under the preferred alternative during a normal water year, the number of days with flows providing ideal conditions (i.e. four whitewater features rated great or above) for whitewater boating (10,000 to 13,000 cfs) would decrease from 22 days per year to 10 days per year.

[125] *See id.* at 122-23.

[126] *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) ("Nevada points to a handful of alleged inadequacies in the Final EIS related to environmental impacts on cultural resources and flood plains as well as archaeological and historic impacts …. It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor.").

[127] Conservation Groups' Rehearing Request at 51.

[128] *See supra* P 55 n.107.

[129] *See* May 6, 2016 letter from Wayne King (Regional Engineer, FERC) to James Crew (Alabama Power), Project No. 2407.

[130] *See* 18 C.F.R. § 12.42 (2016); January 25, 2016 letter from Wayne King (Regional Engineer, FERC) to James Crew (Alabama Power), Project No. 2407.

[131] *See, e.g.*, May 12, 2016 letter from Shae Hoschek (Civil Engineer, FERC) to James Crew (Alabama Power), Project No. 2407.

Lakes11) and website (https://apcshorelines.com) to monitor flow conditions downstream of Thurlow dam.

G. Climate Change

71. Conservation Groups claim that the Commission erred in not discussing the effects of climate change on the project. Conservation Groups cite to the Second National Climate Assessment by the U.S. Global Change Research Program, which states that water availability will decrease in the Southeast United States, particularly during the summer, due to increased temperatures and longer time periods between rainfall events.[132] Conservation Groups argue that the Commission's failure to consider this information is inconsistent with other federal initiatives, including CEQ's then draft guidance directing agencies to consider what project impacts may be exacerbated by climate change and consider adjustments in response to expected changes.[133]

72. We dismiss Conservation Groups' arguments because they were not previously raised in this proceeding.[134] But we note that the final EIS considered the project in the context of the future state of the environment. The final EIS incorporated Army Corps analysis, which predicted that low basin inflows would contribute to lower median reservoir elevations, and that higher air temperatures would increase water temperatures throughout the basin.[135] These projections underscore the need for the measures imposed by the License Order. The higher winter curves improve the project's resilience to anticipated reservoir elevation losses at Lake Martin and the Drought Response Proposal establishes a framework for managing flows during drought periods. These measures enable Alabama Power to more effectively manage Martin Dam Project operations during the license term. And the license also includes reopener provisions that allow the Commission to alter license requirements in response to changed environmental

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[132] Conservation Groups' Rehearing Request at 57 (citing U.S. Global Change Research Program, *Global Climate Change Impacts in the United States*, at 111 (2009)).

[133] *Id.* at 59 (citing CEQ, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (2010)). CEQ finalized this guidance on August 1, 2016. CEQ, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emission and the Effects of Climate Change in National Environmental Policy Act Reviews* (2016).

[134] *See supra* P 55 n.107.

[135] *See* final EIS at 32-33, Army Corps final EIS at 6-251, 6-282, 6-284, 6-291, 6-292.

conditions.[136] These provisions give the Commission the ability to respond to the impacts of climate change and provide appropriate environmental safeguards during the license term.

H. Alternatives Analysis

73. Conservation Groups claim that the Commission violated NEPA by failing to consider an alternative that would provide predictable whitewater flows and DO levels at 5.0 mg/L below the Martin Dam Project at all times.

74. Under NEPA, the Commission must consider both the environmental impacts of a proposed action and alternatives to that action.[137] Part of the alternatives analysis includes review of measures available to mitigate adverse effects.[138] The Commission "need not consider an infinite range of alternatives, only reasonable or feasible ones."[139] "[F]or alternatives which were eliminated from detailed study, [the Commission must] *briefly discuss* the reasons for their having been eliminated."[140]

75. The Commission's identification and evaluation of alternatives satisfied NEPA's procedural requirements. The final EIS examined the no-action alternative, a staff-recommended alternative, and Alabama Power's proposed alternative in detail. For purposes of downstream flow, the staff-recommended alternative and proposed alternative were generally the same in that both recommended a 3-foot increase in the winter pool level and a conditional fall extension.[141]

76. The Commission also considered Conservation Groups' proposed alternatives, but eliminated them from further study. The final EIS examined operational changes

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[136] *See, e.g.*, Article 15 (fish and wildlife resources), reported at 54 FPC 1858 (1975) (Form L-5), as incorporated by reference in the Project No. 349 license, *Alabama Power Co.*, 153 FERC ¶ 61,298, Ordering Paragraph E.

[137] 42 U.S.C. §§ 4332(2)(C); 4332(2)(E) (2012).

[138] *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012, 1017 (D.C. Cir. 2016) (citing 40 C.F.R. §§ 1502.14(f), 1508.25(b)).

[139] *City of Carmel–By–The–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997) (citing 40 C.F.R. § 1502.14(a)-(c)).

[140] 40 C.F.R. § 1502.14(a) (emphasis added).

[141] Final EIS at 165-68.

with less of an impact on ideal whitewater recreation, including a 4-foot and 5-foot winter pool level increase, both with and without a conditional fall extension, in dry, normal, and wet conditions.[142] Although both the 4-foot and 5-foot winter pool level increases would provide better whitewater flows than the 3-foot winter pool level, those proposals were eliminated from further consideration due to the increased risk of downstream flooding.[143] The Commission also considered Conservation Groups' request for a DO level of 5.0 mg/L at all times, but, as discussed, determined that this standard was not needed to protect aquatic resources.[144]

I. The Federal Power Act

77. Conservation Groups contend that the license is not best adapted to a comprehensive plan of development, as required by Section 10(a)(1) of the FPA, because the License Order failed to explain how the Commission balanced developmental versus non-developmental interests. Conservation Groups also allege that the Commission violated the FPA because it failed to examine sufficient alternatives, failed to fully review all relevant comprehensive plans, and was not supported by substantial evidence.

78. These arguments are without merit. Section 10(a)(1) of the FPA requires that projects licensed by the Commission be best adapted to "a comprehensive plan for improving or developing a waterway," taking into account all beneficial uses of the waterway (e.g., waterpower development; protection, mitigation, and enhancement of fish and wildlife; irrigation; flood control; water supply; and recreation). It requires that the Commission develop a record based on substantial evidence in the proceeding on all aspects of the beneficial public uses relating to the comprehensive development of the waterway or waterways involved.[145]

79. That is what the Commission did here. An extensive record was developed containing information and analyses on relevant issues and resources, including: historic resources, erosion, recreation, socioeconomics, aquatic vegetation, fishery resources, lake

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[142] *Id.* at 125-26.

[143] On rehearing, Conservation Groups belatedly ask for other mitigation measures, including unspecified measures to communicate whitewater flows in the *Public Education and Outreach Program Plan*. Again, we will not consider these proposals as they were not raised during the licensing proceeding. *Supra* P 55.

[144] *Supra* P 58.

[145] *Alabama Power Co.*, 141 FERC ¶ 61,127, at P 20 (2012).

levels, drought and flood management, non-project water withdrawals, water quality, and the presence of any federally listed threatened and endangered species. Commission staff's draft and final EIS, and the License Order, reflect a thorough evaluation of the record as to the potential environmental effects on these resources of relicensing the project under various alternatives. Moreover, the license establishes a comprehensive set of operational and environmental measures that, together with the reservations of the Commission's authority to require changes to the project if future circumstances warrant, ensures that the project will be operated throughout the term of its license in a manner that appropriately balances developmental and non-developmental interests.

80. Conservation Groups also criticize the final EIS for failing to adequately describe the eleven comprehensive plans applicable to the Mobile Bay Watershed and for failing to find any inconsistencies between those plans and the requirements imposed by the License Order. This argument was not raised during the licensing proceeding and we will not consider it now.[146] However, we note that the Commission's obligation is to consider the extent to which the project is consistent with a federal or state comprehensive plan for improving, developing, or conserving the project waterway.[147] The Conservation Groups acknowledge that the Commission did so. There is no evidence – nor even an allegation from Conservation Groups – that the project conflicts with any comprehensive plan.

J. Threatened and Endangered Species

81. Conservation Groups renew their claim that the Commission violated the ESA by failing to formally consult with the FWS and erred in concluding that the Martin Dam Project will not jeopardize federally listed threatened and endangered species. According to Conservation Groups, the Commission improperly limited the geographical area to be considered, alleging that the project area should extend downstream to the Alabama River and the entire Mobile Bay Watershed. Conservation Groups also contend that the surveys of certain listed species in the action area were inadequate and that the Commission failed to consider whether an Incidental Take Statement was necessary.

82. We reject Conservation Groups' claims that the geographic scope of our ESA analysis must be consistent with the geographic scope of the cumulative impacts analysis set forth in the final EIS (i.e. the Alabama River), and include additional downstream areas advocated for by the Conversations Groups (i.e. the entire Mobile Bay

[146] *See supra* P 55 n.107.

[147] 16 U.S.C. § 803(a)(2) (2012).

Watershed).[148] Section 7 of the ESA requires federal agencies to determine whether any listed species are present in the "action area," which is defined as "areas to be affected directly or indirectly by the Federal action."[149] This is distinct from the broader analysis required by NEPA of cumulative impacts in a project's "region of influence."[150]

83. The final EIS explained that the action area for aquatic rare, threatened, and endangered species includes the Lake Martin reservoir, tailrace, and the Tallapoosa River from Thurlow dam downstream to RM 12.9 (47.7 miles downstream of the Martin Dam Project).[151] As shown by the analyses conducted by staff in the final EIS, project effects become attenuated with distance and with intervening flows from other tributaries, such that project effects become *de minimis* after RM 12.9.[152]

84. We also reject the contention that the Commission was required to formally consult with FWS.[153] Commission staff determined that the project has direct and indirect impacts on Lake Martin, the project tailrace, and the Tallapoosa River from Thurlow dam downstream to RM 12.9, and examined whether any listed aquatic species are known to occur in that action area. Fish and mussel surveys were conducted between July 2009 and June 2010. No listed species were found. Alabama Power also conducted surveys in the project boundary for terrestrial listed species of interest to Conservation Groups (i.e. Georgia Rockcress and little amphianthus) during June and July 2009.

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[148] Conservation Groups' Rehearing Request at 75.

[149] 50 C.F.R. § 402.02 (2016).

[150] *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054-55 (9th Cir. 2013) ("This definition [of an action area] only pertains to ESA section 7 analyses and should not be conflated with NEPA's broader term 'cumulative impact.'").

[151] Final EIS at 102.

[152] *See, e.g., id.* at 66 (explaining that Alabama Power's proposal to increase the winter flood control curve from 481-foot to 484-foot would cause little to no increase in peak water level elevations downstream of the project at the Montgomery Water Works gage at RM 12.9).

[153] Conservation Groups contend that the Commission was required to enter into formal consultation with FWS because the project may affect the Alabama moccasinshell, ovate clubshell, finelined pocketbook, southern clubshell, Gulf sturgeon, Alabama sturgeon, Georgia rockcress, and little amphianthus. Conservation Groups' Rehearing Request at 76.

No listed species were found and no suitable habitat was observed for the little amphianthus.[154]

85. On June 18, 2013, Commission staff advised FWS of its finding that the project would have "no effect" on the listed species of concern to Conservation Groups. On July 25, 2013, FWS stated that it concurred that the project is not likely to adversely affect those species.[155] At that point, no further action under the ESA was required.[156]

86. Conservation Groups argue that these determinations are invalid because Alabama Power's surveys were arbitrarily conducted. As explained in the final EIS, Alabama Power consulted with FWS and ADCNR to determine appropriate sampling locations within the action area and methods for the mussel and fish species surveyed.[157] FWS then indicated that it concurred with Commission staff's determination that no listed aquatic species were found and that no further action under the ESA was required. FWS is charged with implementing the ESA, and it is the recognized expert with regard to matters of listed species.[158] Accordingly, we are satisfied with Alabama Power's survey methods.

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[154] Final EIS at 104.

[155] FWS stated that Commission staff's determination regarding project effects for the Alabama moccasinshell, ovate clubshell, finelined pocketbook, southern clubshell, Gulf sturgeon, Alabama sturgeon, little amphianthus, and Georgia rockcress, should be revised to "not likely to adversely affect," instead of "no effect." However, a determination of no effect on listed species is solely within the Commission's discretion to make. *See Seneca Generation, LLC*, 153 FERC ¶ 61,234, at P 40 (2015).

[156] *See* 50 C.F.R. § 402.13(a) ("If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.").

[157] Final EIS at 104-05.

[158] *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006) ("Congress's recognition of this expertise [of NOAA Fisheries and the Fish and Wildlife Service] suggests that Congress intended the action agency to defer, at least to some extent, to the determinations of the consultant agency, a point the Supreme Court recognized in *Bennett v. Spear*, 520 U.S. 154, 169-70 [] (1997).").

Finally, Conservation Groups argue that section 7 of the ESA requires the Commission to separately analyze whether the project may result in a "taking" of threatened fish or wildlife, and requires an Incidental Take Statement under section 9 of the ESA, even if an agency makes a "no effects" determination.[159] Conservation Groups are incorrect. FWS only prepares an Incidental Take Statement after formal consultation in conjunction with a Biological Opinion.[160] When an agency determines that the proposed action will have "no effect" on any listed species, no further action is necessary under section 7 or section 9 of the ESA.[161]

The Commission orders:

(A) The request for rehearing filed January 14, 2016, by the Alabama Rivers Alliance and American Rivers is denied.

(B) The request for rehearing filed January 19, 2016, by the Atlanta Regional Commission is dismissed on procedural grounds, and in the alternative, denied on the merits.

(C) The request for rehearing filed January 19, 2016, by the Georgia Environmental Protection Division is dismissed on procedural grounds, and in the alternative, denied on the merits.

(D) Article 405 is revised to read as follows:

> Article 405. *Drought Management*. The licensee must implement the Tallapoosa River portion of Alabama Drought Response Operating Proposal (Drought Response Proposal), Version 3.3.3, dated July 12, 2013, as described in Attachment B to the licensee's August 13, 2013 comments to Commission staff's June 6, 2013 draft

[159] "Incidental takes" are defined as "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. § 402.02.

[160] 16 U.S.C. § 1536(b)(4).

[161] *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir.1994) ("[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered."), *cert. denied*, 514 U.S. 1082 (1995).

Environmental Impact Statement, as it applies to the Martin Dam Project. The licensee must notify the Commission in writing, as soon as possible, but no later than 10 days after modifying Martin Dam Project operations in response to drought conditions. The written notification must describe how operations at Martin Dam were modified in response to the Drought Response Proposal.

The licensee must review the U.S. Army Corps of Engineers' (Corps) final Master Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin (ACT Water Control Manual) for consistency with the Drought Response Proposal as it pertains to the Martin Dam Project, and file a report with the Commission, for Commission approval, describing its findings by December 17, 2016 (Report on Consistency). The Report on Consistency must discuss and evaluate any inconsistencies between the ACT Water Control Manual and the Drought Response Proposal as it pertains to the Martin Dam Project, and must include any proposed modifications for consistency between Martin Dam Project operations under the Drought Response Proposal and the Corps' manuals. The Report on Consistency must also include a description of how the Drought Response Proposal pertains to operations at the Martin Dam Project, including any required changes in Martin Dam Project flow releases and reservoir elevations, and how those operational changes are consistent or inconsistent with the ACT Water Control Manual.

Any proposed revisions to the Drought Response Proposal as its implementation is required by this article, including any revisions filed through the Report on Consistency, must be developed after consultation with the Corps, U.S. Fish and Wildlife Service, Alabama Office of Water Resources, Alabama Department of Environmental Management, and Alabama Department of Conservation and Natural Resources. The licensee must include with the proposed revised Drought Response Proposal documentation of consultation, copies of recommendations on the completed revised proposal after it has been prepared and provided to the entities above, and specific descriptions of how the entities' comments are accommodated by the revised Drought Response Proposal. The licensee must allow a minimum of 30 days for the entities to comment and to make recommendations before filing the revisions with the Commission for approval. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific reasons.

The Commission reserves the right to require changes to the Drought Response Proposal based on any information, including changes based on the Report on Consistency. Upon Commission approval, the licensee must implement the revised Drought Response Proposal, including any changes required by the Commission.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.