

141 FERC ¶ 61,127  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellingshoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Alabama Power Company

Project No. 2165-030

ORDER DENYING REHEARING AND CLARIFYING LICENSE

(Issued November 15, 2012)

1. On March 31, 2010, the Director of the Office of Energy Projects (OEP) issued a new license to Alabama Power Company (Alabama Power)<sup>1</sup> under sections 4(e) and 15 of the Federal Power Act (FPA)<sup>2</sup> for the continued operation and maintenance of the 211.485-megawatt (MW) Warrior River Hydroelectric Project No. 2165, located on the Black Warrior River and on the Sipsey Fork of the Black Warrior River, in Cullman, Walker, Winston, and Tuscaloosa Counties, Alabama. The Smith Lake Improvement Stakeholders Association (Lake Association) filed a timely request for rehearing of the order.<sup>3</sup> For the reasons discussed below, we deny rehearing, but clarify Article 404.<sup>4</sup>

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<sup>1</sup> *Alabama Power Company*, 130 FERC ¶ 62,271 (2010) (License Order).

<sup>2</sup> 16 U.S.C. §§ 797(e) and 808 (2006).

<sup>3</sup> The Lake Association describes itself as a local organization of property owners that are affected by the project. The Lake Association attached to its rehearing request ten exhibits (designated Exhibits 1.0 through 1.3, Exhibits 2.0 through 2.2, and Exhibits 3 through 5). With the exception of Exhibit 1, dated April 30, 2010, all of the exhibits were previously filed by the Lake Association and considered by Commission staff during the relicensing proceeding.

<sup>4</sup> The Lake Association's rehearing request includes (for informational purposes) petitions for reconsideration or rehearing that it submitted to the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the U.S. Army Corps of Engineers. Those filings

(continued...)

## **Background**

2. The Commission issued an original 50-year license for construction and operation of the Warrior River Project in 1957, with a term expiring August 31, 2007.<sup>5</sup>

3. The project consists of two hydroelectric developments: the Lewis Smith (Smith) development located on the Sipsey Fork of the Black Warrior River at River Mile (RM) 444, and the John Hollis Bankhead (Bankhead) development located 78.5 miles downstream (at RM 365.5) on the U.S. Army Corps of Engineers' (Corps) Bankhead Lock and Dam No. 17 on the Black Warrior River.<sup>6</sup>

4. The 157.5-MW Smith development consists of Smith Dam and Smith Lake, an intake structure, a powerhouse built into the dam and containing two generating units, and an emergency spillway. Smith Lake is a 21,200 acre reservoir and has 500 miles of shoreline.<sup>7</sup> Alabama Power's operation of this development is described below.

5. The 53.985-MW Bankhead development uses the Corps' lock and dam, which impounds a 78-mile-long reservoir with a surface area of 9,200 acres at a normal surface elevation of 255 feet mean sea level (msl).<sup>8</sup> Along the Bankhead reservoir's shoreline, there are several municipal and industrial water withdrawals, as well as Alabama Power's

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set forth issues and arguments pertaining to those agencies' statutory authorities and the conditions they submitted pursuant to those authorities and are not directed to the Commission.

<sup>5</sup> 18 FPC 327 (1957).

<sup>6</sup> The Smith development is partly within the Sipsey Fork Wild and Scenic River designated area and occupies 2,691.44 acres of federal lands within the Bankhead National Forest, administered by the U. S. Forest Service. The Bankhead development occupies 18.7 acres of federal lands administered by the Bureau of Land Management.

<sup>7</sup> Smith Lake is dendritic, consisting of several branches and many subbranches, and extends 35 miles upstream from the Smith dam.

<sup>8</sup> The headwaters of the Bankhead reservoir are a short distance downstream of the Smith development's dam and tailrace.

1,021-MW Gorgas Steam Plant, which is located at RM 399.<sup>9</sup> Alabama Power's hydroelectric facilities at the Bankhead development consist of a gated spillway, a powerhouse with one generating unit, and power tunnels, all of which are integral with the Corps' dam. Alabama Power's prior license required that Alabama Power operate the Bankhead reservoir so that fluctuations for power generation would be between elevation 255 and 252 feet msl.<sup>10</sup>

6. Alabama Power has operated the Warrior Project mainly for power generation to meet peak power demands, navigation, and flood control. As a peaking facility, water for generation is released from Smith dam five days per week for five to six hours per day, with seasonal variation in storage and generation. The Smith Lake power pool lies between elevations 488 (the bottom of the power pool) and 510 feet msl (top of the power pool) and provides about 394,300 acre-feet of power storage.

7. Storage space between elevations 510 and 522 feet msl is for flood control. The prior license established detailed operational requirements and release rates for flood control when reservoir elevations were above 510 feet msl (the top of the power pool). When reservoir elevations were below 510, Alabama Power operated the project to avoid raising the reservoir above 510 feet msl, to preserve the flood storage space. In addition, the prior license required Alabama Power to cooperate with the Corps in preparing an operating manual to prescribe the procedures for implementing the operational requirements during a flood event.<sup>11</sup> The result was a reservoir regulation manual, issued by the Corps in March 1965 (1965 Manual).<sup>12</sup>

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<sup>9</sup> Typically, from May through October, cold water releases from Smith dam are used by the Gorgas Steam Plant for once-through cooling. The Gorgas Steam Plant may divert up to 1,513 cubic feet per second of river flows for cooling, returning nearly all this flow to the river for downstream water users.

<sup>10</sup> Article 32 of the license, 18 FPC at 331.

<sup>11</sup> Article 33(iv) of the license, 18 FPC at 332.

<sup>12</sup> *Black Warrior-Tombigbee River Basin Reservoir Regulation Manual*, "Appendix A, Lewis M. Smith Reservoir (Alabama Power Company), March 1965," (1965 Manual). In 1975, a similar appendix to the basin manual was issued for the Bankhead development. "Appendix E, John Hollis Bankhead Reservoir, August 1975" (1975 Manual). The Corps filed these manuals on March 23, 2010.

8. The 1965 Manual (1) defines the occurrence or threatened occurrence of damaging flood conditions at downstream stations and when such conditions may be alleviated by operation of the Lewis Smith Dam and power plant in the interest of flood control, (2) describes conditions for the release of flood waters between 510 and 522 feet msl, and (3) describes conditions for releases for navigation. The manual also describes normal power operation:<sup>13</sup>

33. *Operation for Power.* Alabama Power Company will operate the plant to help meet load demands on its system in the State of Alabama. It will normally be operated as a peaking plant, with approximate seasonal variation in storage and generation as shown by the guide curves and rules for power operation, chart 8. Power operations will normally be scheduled by the Company on the basis of system demands and availability. Scheduling shall be such as to keep the pool at or below elevation 510 at all times when flooding is not occurring. Generation may be restricted during periods of downstream flooding, and will be increased for the emptying of flood control storage, within the limitations provided in Article 33 of the [project] License and as described under the plan of operation for flood control. . . .

9. The chart referred to in the above-quoted text (Chart 8: Guide Curves and Rules of Project Operation) “shows guide curves for power operation which indicate the *probable range* of drawdown [emphasis added].”<sup>14</sup> Unlike many cases involving guide curves, where the licensee would be required to operate within the band established by the curves, there was no requirement in the prior license to operate within the guide curves. The only operating requirements were for flood control and navigation. First, Alabama

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<sup>13</sup> 1965 Manual at A-14, Paragraph 33.

<sup>14</sup> 1965 Manual at A-11, Paragraph 30. Chart 8, attached to this order as Appendix A, shows the upper lake elevation guide curve is highest at 510 feet msl (generally from April through June), then it decreases in a linear fashion to a low of 496 feet msl (generally for December and January). Beginning in February, elevations increase linearly to 510 feet msl in April. The lower curve’s highest elevation is 506 feet msl (generally for April and May), and from there it decreases linearly to a low of 488 feet msl (generally for December and January). In January, it rises linearly, reaching elevation 506 in April.

The relicense order referred to the upper guide curve as a flood control guide curve and the lower one as a drought contingency guide curve.

Power had to follow specific operating procedures to release water from Smith reservoir for flood control if lake elevations rose above 510 feet msl.<sup>15</sup> Second, during periods of drought or when reservoir levels dropped below the lower guide curve, Alabama Power had to generate on a schedule that, at a minimum, released from Smith reservoir water sufficient to maintain its pro-rata share of the inflow requirements at Bankhead reservoir to maintain the downstream navigation channel, i.e., 245 cubic feet per second (cfs).<sup>16</sup> So long as Alabama Power met these two sets of requirements, it could operate the Smith development to “best suit system requirements to obtain maximum energy generation from water available”<sup>17</sup> and did not have to maintain specified lake elevations.

10. As a practical matter, Alabama Power often operated the project such that the Smith reservoir elevations fell outside (often below) the guide curves for several months of the year. On average,<sup>18</sup> during April and May, Smith Lake elevations were near the upper guide curve target elevation of 510 feet msl. In June, the lake level would begin decreasing gradually to approximately 505 feet msl around August 1 and 501 feet by September 1. Lake levels continued to drop in the fall months until they reached a winter pool elevation of 497 to 498 feet msl in December and January. Around the beginning of December, the lake began to refill, reaching full pool (i.e., 510 feet msl) around April 1. Thus, while lake elevations changed little on a daily basis, on a seasonal basis the changes were large.<sup>19</sup>

### **Relicense Proceeding**

11. In July 2005, Alabama Power filed its relicense application, proposing to continue to operate the project as a peaking facility as it had under its then-current license, using the existing guide curves.

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<sup>15</sup> See *id.*, Chart 8, Operating Instructions (2) and (3), and Article 33 of the license, 18 FPC at 331-332.

<sup>16</sup> See 1965 Manual, Chart 8, Operating Instruction (1), and P 45 at A-17.

<sup>17</sup> See 1965 Manual, Chart 8, Operating Instructions (4) and (5).

<sup>18</sup> Based on average elevations from 1962 to 2007. See Alabama Power’s October 3, 2008 additional information filing.

<sup>19</sup> During periods of drought or flooding, seasonal changes in lake elevations of up to 22 feet can occur.

12. The Lake Association intervened in the proceeding and objected to the licensee's proposal to continue operation as it had in the past. It argued that low lake levels were a detriment to private and public recreation at the lake, specifically boating, and hindered the fullest residential and commercial economic development of the Smith Lake shoreline.

13. The Lake Association proposed that Smith Lake elevations be kept higher and more stable throughout the year by requiring that the licensee maintain a higher lake elevation during the recreation season (Memorial Day through Labor Day), using a guide curve proposed by the Lake Association. Specifically, the Lake Association recommended that the Smith Lake elevation remain between 505 feet and 510 feet msl from Memorial Day to Labor Day, and that the lake level elevation not drop below 502 feet msl during the rest of the year.

14. Commission staff issued a draft environmental assessment (EA) in March 2008 and a final EA in March 2009.<sup>20</sup> The EA included an analysis of the Lake Association's recommendations for water levels in Smith Lake. It analyzed the costs to the licensee from peak generation losses and concluded that these costs outweighed the potential benefits of the Lake Association's proposal.<sup>21</sup> The EA also pointed out information submitted by the Lake Association demonstrating that the project already provides considerable benefits to recreation and property values around the lake and along the associated tributaries.<sup>22</sup>

15. On March 31, 2010, under delegated authority, OEP issued a new 30-year license to Alabama Power, effective March 1, 2010. The License Order declined to adopt the Lake Association's proposal and instead authorizes Alabama Power to continue operating the Smith Lake development as a peaking project and regulating lake levels based on the existing guide curves. In addition, Alabama Power must (1) release minimum flows downstream of Smith dam to maintain water quality and the downstream cold water trout fishery;<sup>23</sup> and (2) implement measures for drought management, fish habitat

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<sup>20</sup> Unless otherwise noted, all references in this order to the EA are to the final EA.

<sup>21</sup> EA at 136.

<sup>22</sup> EA at 135.

<sup>23</sup> The Alabama Department of Conservation and Natural Resources (Alabama DCNR) stocks about 3,500 rainbow trout in the project tailrace every 60 days throughout the year with additional stocking in the spring. Additionally, striped bass benefit from cold water flows downstream of the project.

enhancement, wildlife management, public recreation, erosion, and shoreline management.

16. On April 30, 2010, as discussed below, the Lake Association filed a request for rehearing, alleging that the License Order contained a number of errors and that OEP lacked authority to issue the license because the proceeding was contested.

## **Discussion**

### **A. Comprehensive Development and Substantial Evidence**

17. On rehearing, the Lake Association argues that the Warrior River license is not best adapted to a comprehensive plan of development, as required by section 10(a)(1) of the FPA. The Lake Association further argues that the License Order's comprehensive development findings are arbitrary and capricious because they are not supported by substantial evidence, as required by section 313(b) of the FPA.<sup>24</sup>

#### **1. Comprehensive Plan**

18. The Lake Association claims that the license order does not contain or constitute a "comprehensive plan," within the meaning of FPA section 10(a)(1) because it fails to specify desirable future conditions for the beneficial uses during the term of the new license.

19. As we explained in *Appalachian Power* where the identical argument was made,<sup>25</sup> section 10(a)(1) of the FPA<sup>26</sup> 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).

20. Section 10(a)(1) does not require the Commission to prepare a single comprehensive plan against which an application is measured. Nor does it require that the License Order itself constitute a comprehensive plan. Rather, it requires the

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<sup>24</sup> 16 U.S.C. § 313(b) (2006). The Lake Association also cites to sections 556, 557, and 702 of the Administrative Procedure Act, 5 U.S.C. §§ 555, 557, and 706 (2006).

<sup>25</sup> *Appalachian Power*, 132 FERC ¶ 61,236, at PP 14-16 (2010).

<sup>26</sup> 16 U.S.C. § 803(a)(1) (2006).

Commission to develop a record in the proceeding on all aspects of the beneficial public uses relating to the comprehensive development of the waterway or waterways involved,<sup>27</sup> and that is what the Commission did in the Warrior River relicensing proceeding.

21. An extensive record was developed, which contains information and analyses on relevant issues and resources, including: archaeological and historic resources, erosion, recreation, socioeconomics, aquatic vegetation, fishery resources (including fish spawning and rearing, as well as fish entrainment), lake levels, drought and flood management, non-project water withdrawals, water quality, and federally listed species. Commission staff's draft and final EA 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. For the above reasons, we deny rehearing on this issue.

## **2. Post-Licensing Studies and Sufficiency of Record**

22. Next, the Lake Association alleges that the License Order does not comply with section 10(a)(1) of the FPA because it fails to make actual findings for each resource area as to what future conditions will be over the next 30 years and instead improperly relies on post-licensing studies to monitor the licensee's compliance with various operating protocols.<sup>28</sup> Citing *Confederated Tribes and Bands of Yakima Indian Nations v. FERC*<sup>29</sup>

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<sup>27</sup> See *LaFlamme v. FERC*, 945 F.2d 1124, 1128 (9th. Cir. 1991) (affirming the Commission's determination that it had satisfied the FPA's requirements by considering the "comprehensive picture of the water system of which the project is a part, based in the record developed in each particular proceeding"). See also *City of Fort Smith, Arkansas*, 44 FERC ¶ 61,160, at 61,510 (1988), *aff'd*, *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990), where the Commission stated that section 10(a)(1) does not require it:

to undertake a study of all actual and potential uses of a waterway so as to develop an immutable master plan. Rather, comprehensive development is a concept that evolves over time, reflecting different eras' technical options, economic realities, and resource use priorities.

<sup>28</sup> In particular, the Lake Association contends that the Commission must make specific findings for the next 30 years regarding: (1) water quality; (2) shoreline erosion;

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in support of its position, it contends that section 10(a)(1), by requiring that the Commission explore all issues relevant to the public interest prior to relicensing, compels the Commission to forecast how the new license will impact specific project resources over the next 30 years.<sup>30</sup> It acknowledges that post-licensing monitoring and adaptive management are appropriate tools, but argues that they can be used only “as a means to assure license conditions are meeting previously established measureable objectives.”<sup>31</sup>

23. We deny rehearing on this issue. We addressed the identical argument in *Appalachian Power*.<sup>32</sup> There, we explained that *Yakima* does not require the Commission to have perfect information before it acts.<sup>33</sup> The test is whether, given uncertainty, the Commission’s action meets the standard for judicial review, which requires that the Commission’s decision be supported by substantial evidence.<sup>34</sup> As the court found in *United States Department of the Interior v. FERC*:<sup>35</sup>

*Yakima* at most imposes on the Commission the duty to consider and study the environmental issue before granting a license. *Yakima* does not require any heightened degree of certainty for environmental facts, nor does it imply that all environmental concerns must be definitively resolved before a license is issued. Read this way, *Yakima* simply endorses the unstartling principles that an agency must establish a record to support its decisions and that a reviewing court, without substituting its own judgment, must be certain that the agency has considered all factors required by the statute.

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(3) fisheries; (4) threatened and endangered species and their habitat; (5) recreation; and (6) socioeconomics.

<sup>29</sup> 746 F.2d 466 (9<sup>th</sup> Cir. 1984) (*Yakima*).

<sup>30</sup> Request for rehearing at 21.

<sup>31</sup> Request for rehearing at 20.

<sup>32</sup> *Appalachian Power*, 132 FERC ¶ 61,236, at PP 17-19 (2010).

<sup>33</sup> See, e.g., *Idaho Power Co.*, 108 FERC ¶ 61,129, at P 41 (2004), *reh’g denied*, 110 FERC ¶ 61,242 (2005), *aff’d Idaho Rivers United v. FERC*, 189 Fed. Appx. 629, 2006 U.S. App. Lexis 17566 (9<sup>th</sup> Cir. 2006).

<sup>34</sup> *Id.*

<sup>35</sup> 952 F.2d 538, 546 (D.C. Cir. 1992).

24. While the draft and final EAs included a cumulative effects analysis on water quality, fisheries, aquatic, and recreation resources, it is not possible, as the Lake Association argues we must do, to precisely identify and quantify how the new license will impact specific project resources over the next 30 years. Nevertheless, the license does contain measures – many of them specific – for dealing with project effects and implementing project purposes. In addition, the consultation procedures included in the management plans required by this license allow for adjustments to adapt to unforeseen conditions or new technology. Moreover, because our obligation under section 10(a)(1) of the FPA continues throughout the term of the license,<sup>36</sup> we reserve in our licenses the authority to reopen the license if conditions to address resources issues that may arise through the term of the license.<sup>37</sup>

25. The Lake Association alleges that the License Order does not comply with section 10(a)(1) of the FPA because in many instances staff relied on the filings of others and did not conduct its own independent investigation to verify the accuracy of those filings, fill in gaps in the record, or resolve inconsistencies between information submitted by the Lake Association and the licensee. For example, the Lake Association contends that “a difference in generation of 27 percent does not correspond to a decrease in revenue of 27 percent,” and “OEP staff did not respond to this evidence.”<sup>38</sup> It also alleges that Commission staff erred by failing to undertake its own analysis or request additional evidence from Alabama Power to resolve inconsistencies between the Lake Association’s modeling results and Alabama Power’s modeling, and it argues that Commission staff was required to investigate and identify all the water uses in the basin (to be reasonably certain that downstream water needs could be met), or to require that Alabama Power provide transparent water balance modeling to determine the effect of project operations and other factors on lake levels and to achieve the best balance between competing water uses.<sup>39</sup> In the Lake Association’s view, staff resolved any uncertainties presented by information gaps in favor of Alabama Power and its proposal to continue existing operations.

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<sup>36</sup> See, e.g., *S.D. Warren Co.*, 68 FERC ¶ 61,213, at 62,022 (1994).

<sup>37</sup> See *California v. FPC*, 345 F.2d 917, 925 (9<sup>th</sup> Cir. 1965). See also *Portland General Electric Co. v. FPC*, 328 F.2d 165, 175 (9<sup>th</sup> Cir. 1964).

<sup>38</sup> Request for rehearing at 23.

<sup>39</sup> Request for rehearing at 23-24.

26. We disagree. In conducting its analysis, staff considered all the information in the record of the proceeding. It is not, however, required or expected to resolve all inconsistencies between information that is submitted. With respect to the correlation between peak generation losses and resulting revenue losses, the EA, appropriately, does *not* claim there is direct correlation between the percent of generation losses and the percent of revenue losses. Using such an assumption would oversimplify how revenue losses should be calculated.<sup>40</sup> In any event, Commission staff did not need to calculate a precise dollar value for revenue losses to support its conclusion that the Lake Association's request for more stable lake elevations was not in the overall public interest. Its determination was based primarily on the reduction in generation and dependable capacity at the project's two developments, not the dollar value of those losses.

27. We do not agree that Commission staff erred by failing to undertake its own analysis or request additional evidence from Alabama Power to resolve inconsistencies between the Lake Association's modeling results and Alabama Power's modeling. As the Lake Association itself recognizes, (1) the differences in peak generation are likely due to significant differences in modeling assumptions, and (2) if similar assumptions were used, there would be a much better match between Alabama Power's and the Lake Association's results.<sup>41</sup> Nor is staff required under section 10(a)(1) to develop, or direct the license applicant to develop, a water balance model in order to determine if the project is best adapted to a comprehensive plan for improving or developing the waterway. As we have explained above, we do not have to have perfect information before we act. The test is whether the Commission's action is supported by substantial evidence. Contrary to the Lake Association's assertions, we believe that the record supports staff's decisions in the license order.<sup>42</sup>

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<sup>40</sup> The difference in revenue loss would be the difference in the value of peak generation versus non-peak generation. In addition, generation would be reduced at the project's two developments, Smith and Bankhead, further complicating how dollar losses could be calculated.

<sup>41</sup> Request for rehearing, Exhibit 1.1 at 22-23. Some of these differences are described in n.88, *infra*.

<sup>42</sup> For these same reasons, we disagree with the Lake Association's assertions that Commission staff erred when, for example, it did not investigate: (1) whether all the water in the river basin had been properly accounted for; (2) how Alabama Power's

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### 3. Specific Resource Issues

28. The Lake Association argues that the new license will not protect specific resources: water quality, downstream erosion, fisheries, threatened and endangered species, recreation, and socioeconomics. The Lake Association contends that treatment of these issues and the conditions in the license that relate to these issues do not comply with the comprehensive development standard of section 10(a)(1) of the FPA and that the record developed in the relicensing proceeding is insufficient to support a finding that the project, as licensed, is best adapted to the comprehensive development of the waterway. It alleges that the license requirements that address these issues are arbitrary and capricious because they are not supported by substantial evidence.<sup>43</sup> The Lake Association contends that in adopting these license conditions, the License Order erred in failing to rebut each piece of evidence it submitted in support of what it argues would be other, more comprehensive measures. The Lake Association claims that the License Order is deficient because it “does not make specific findings and rule on specific objections,”<sup>44</sup> and relies on incomplete or disputed evidence without adequate explanation.

29. As we explained in *Appalachian Power*,<sup>45</sup> the FPA recognizes the numerous beneficial public uses of the waterways and gives the Commission broad guidelines to apply in its hydroelectric licensing decisions. In deciding under what conditions to issue a license, our task is to fashion license conditions that will achieve what is in our judgment an optimal balance between and among the various developmental and

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proposal and reasonable alternatives would affect rates (and consult with the state public service commission on this issue); and (3) whether the Smith development could be retrofitted to improve efficiency and dependable capacity at alternative lake levels.

<sup>43</sup> As a corollary argument, the Lake Association contends that staff did not adequately define the purposes of the proposed relicensing action and that the License Order did not state a purpose for issuing the new license. The Lake Association argues that staff failed to consider any alternatives for the non-power purposes of flood control, water quality, and navigation. We address these arguments regarding alternatives in our discussion later in this order regarding the range of alternatives that must be addressed in the EA.

<sup>44</sup> Request for rehearing at 42.

<sup>45</sup> *Appalachian Power*, 132 FERC ¶ 61,236, at P 23 (2010).

environmental public interest uses of the affected waterway.<sup>46</sup> As explained above, the FPA does not require that the Commission have perfect information before taking a licensing action or that all environmental concerns be definitively resolved before issuing a license.<sup>47</sup>

30. As noted above, an extensive record was developed for this relicensing proceeding, including studies, analyses, and information on the resources potentially affected by the project. Commission staff's draft and final EAs reflect a thorough evaluation of the record as to the potential environmental effects on these resources of relicensing the project under various alternatives. There can be no doubt that OEP had enough information to proceed and that its decisions were supported by substantial evidence. The License Order considered all the germane factors, and the License Order and the EAs provided a reasoned explanation, supported by substantial evidence, of the order's decisions. In addition, the EA and order addressed the issues raised by the Lake Association. Contrary to the Lake Association's argument, there is no requirement that the Commission discuss in detail each piece of evidence in the record.

**a. Water Quality**

31. The Lake Association contends that the EA did not provide adequate information to determine whether the new license will mitigate project impacts to DO over the term of the license.

32. We disagree. The EA (at 35) found that DO levels in Smith Lake tailwaters often fail to meet state standards during the summer and early fall months as a result of turbine operations discharging water withdrawn from the deeper, anoxic waters near the dam. As a result, the EA (at 127) recommended, and the license requires, adoption of Alabama Power's proposal to design and install an aeration system in the turbines at the Smith development in order to meet the state standard of 4.0 milligrams per liter (mg/L) for DO during generation. Alabama Power must also develop a plan to monitor DO levels for at least three years after the aeration system is installed to ensure that state standards are being met.

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<sup>46</sup> Section 4(e) of the FPA, 16 U.S.C. § 797(e) (2006), provides that in issuing licenses, the Commission shall give equal consideration to the power and development purposes for which licenses are issued, as well as to energy conservation, fish and wildlife, recreation, and other environmental resources. However, equal consideration does not mean equal treatment. *See State of California v. FERC*, 966 F.2d 1541, 1550 (9<sup>th</sup> Cir. 1992).

<sup>47</sup> *See, e.g., Idaho Power Company*, 108 FERC ¶ 61,129, at P 41 (2004).

33. The Lake Association alleges that Commission staff did not gather specific information on, and perform an analysis of, the type of aeration devices that would be used in the turbines. Commission staff responded to this argument in the EA, explaining that turbine aeration devices are commonly employed at other hydropower projects licensed by the Commission, and they have been shown to improve DO levels in the receiving waters.<sup>48</sup> Alabama Power's preliminary testing of turbine aeration through the use of penstock drainage valves at the Smith development commonly showed DO levels well above 5.0 mg/l during tests conducted in July 2003.<sup>49</sup> Moreover, Alabama Power completed installation of the turbine aeration system at the Smith development in September 2011 and began monitoring on October 1, 2011. Monitoring for October and November 2011 showed that required DO levels were being met.<sup>50</sup> In addition, if monitoring shows that the turbine aeration system does not bring DO levels up to the state standard, then the licensee must develop structural or operational modifications to the project, which would have to be filed with the Commission for approval.

34. The Lake Association next takes exception to what it says is the requirement of the water quality certification issued for the project by the State of Alabama to monitor and maintain state DO standards only when the project is generating. The Lake Association is mistaken. In fact, condition 1 of the certification requires: "the operation of the individual developments, *including* the operation of the turbines, shall be managed such that no less than 4.0 mg/l [milligrams per liter] of [DO] *shall be maintained at all times* at the [specified] monitoring locations." (Emphasis added.) Moreover, to ensure this requirement is met, condition 3 of the certification requires Alabama Power to monitor DO concentrations from March through November for three years during periods of generation, as well as during periods when the project is not generating but is making the required 50-cfs minimum flow release.<sup>51</sup> As explained in the EA, monitoring DO during

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<sup>48</sup> EA at 193.

<sup>49</sup> EA at 47. Preliminary testing showed DO concentrations ranging from 8 to 9 mg/L in water released from the valve.

<sup>50</sup> See Alabama Power's February 27, 2012 Filing at 6.

<sup>51</sup> Following cessation of generation, Alabama Power begins minimum flow releases when the tailwater elevation recedes to elevation 256.2 msl (about 10 hours following the cessation of generation). See license Article 407, License Order, 130 FERC ¶ 62,271 at 64,713 (2010); EA at 59. Alabama Power has requested, and been granted, an extension until December 2012 to begin the 50-cfs minimum flow releases.

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periods of generation and during minimum flow releases will adequately characterize the generation and non-generation discharges from the Smith development and enable the Commission to determine the effectiveness of turbine aeration and the minimum flow discharge at maintaining 4.0 mg/l DO in the Smith tailrace and whether additional operational or structural measures are needed.<sup>52</sup>

35. For the above reasons, we deny rehearing on this issue.

**b. Erosion**

36. Alabama Power's proposed operation of Smith Lake will continue to cause some shoreline erosion and turbidity downstream of Smith Dam. Flows in the Smith development tailrace can increase from near zero to 10,000 cfs when the generating units come on line, creating a rapid change in water levels of up to 10 feet in a relatively short period of time. Flow changes of this magnitude have the potential to erode streambanks.<sup>53</sup> To mitigate these impacts, Article 417 of the license requires Alabama Power to implement erosion and sediment control measures downstream of Smith Dam, which include repairing two erosion sites and monitoring two other sites.

37. On rehearing, the Lake Association argues that Commission staff erred in not considering in detail the Lake Association's alternative, or other alternatives, for mitigating project impacts on erosion and in not explaining how staff determined the erosion potential of the Lake Association's alternative.

38. We disagree. As Commission staff explained, the EA "did not review alternatives for erosion control, such as more stable water levels, because even under the Lake Association's operation proposal, Smith Lake would continue to exhibit large changes in water levels on a regular basis."<sup>54</sup> The same would be true for the Smith development

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*Alabama Power Co.*, 138 FERC ¶ 62,165 (2012). On November 1, 2012, Alabama Power requested a further extension, until June 2013, to begin minimum flow releases. That request is pending.

<sup>52</sup> At the end of the monitoring period, Alabama Power must provide a final assessment of the project's effectiveness in maintaining the state's water quality standard for DO, and if the monitoring indicates that the standard is not being met, Alabama Power must implement structural or operational measures, if necessary, to ensure the DO requirement is being met.

<sup>53</sup> EA at 59.

<sup>54</sup> EA at 191.

tailrace. Moreover, staff is not required to search for alternatives that would fully mitigate for any project-related erosion impacts. Consideration of alternatives need not be exhaustive and need only provide sufficient information to permit a reasoned choice of alternatives.<sup>55</sup> Commission staff's consideration of erosion impacts in the EA was sufficient, and the erosion measures required by Article 417 will adequately mitigate for project impacts.

**c. Fisheries**

39. The Lake Association contends that the License Order erred because it did not make an explicit finding under section 10(a)(1) of the FPA<sup>56</sup> as to the precise impacts of the new license on fisheries and, although the license requires measures that will partially mitigate impacts to fisheries, it does not quantify the expected level of enhancement. The Lake Association also alleges that, given that the EA demonstrates ongoing, unmitigated impacts to fisheries under the new license, the License Order does not have a sufficient basis to determine that the project meets the public interest/comprehensive development standard of section 10(a)(1).

40. The Commission is not required, nor would it be possible, to precisely quantify the impacts to fisheries of the Warrior Project license and its required enhancement measures. As explained above, the FPA does not require the Commission to have perfect information before taking a licensing action, or finding all environmental concerns to be definitively resolved before issuing a license. Rather, our license articles often include requirements for periodic review and adjustment of the measures, if warranted,<sup>57</sup> and our

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<sup>55</sup> See section 102(2)(C)(iii) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)(iii) (2006); and *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976) (citing *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)).

<sup>56</sup> 16 U.S.C. § 803(a)(1) (2006). That section requires that any project for which the Commission issues a license shall be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes.

<sup>57</sup> Articles 412 (Fish Habitat Enhancement Plan) and 413 (Fish Stocking) require the license, in consultation with relevant agencies, to evaluate the effectiveness of the required measures every six years and to modify them, if warranted. See License Order, 130 FERC at 64,714-15.

standard license articles give us the means to ensure that the project continues to meet the public interest/comprehensive development standard of section 10(a)(1) through the license term.

41. The Lake Association also contends that staff erred in failing to consider alternatives for fish passage. We disagree. As explained in the EA, there is no immediate need for fish passage at the project, because there are no anadromous or catadromous fish species present in the project waters.<sup>58</sup> As for the non-migrating species present at the project, there is no evidence to indicate that a lack of fish passage is having an adverse effect or that providing such facilities would result in any significant enhancement of an otherwise healthy fish community. The license includes sufficient measures to protect fish, including providing a minimum flow of 50 cfs, and maintaining DO concentrations and water temperatures within acceptable limits. If in the future, the U.S. Department of the Interior prescribes fishways pursuant to section 18 of the FPA,<sup>59</sup> Article 410 reserves the Commission's authority to require such facilities. In addition, standard Article 15 of the license reserves the Commission's authority to require such facilities on its own motion.<sup>60</sup>

42. The Lake Association further contends that staff erred in not considering measures (such as ramping rates) to mitigate fishery impacts. In the EA, staff did consider ramping rates to mitigate project impacts to fisheries, but did not discuss them at length, because the fishery resource is a put-and-take trout fishery and such a significant change to project operations would involve reductions of fairly large amounts of water over extended periods of time, which would have a very high cost in lost generation revenues.<sup>61</sup> As we have explained, staff is not required to evaluate in great detail every alternative to a measure, but only those that it considers to be reasonable. Staff gave appropriate consideration to ramping rates.

43. For the above reasons, we deny rehearing on this issue.

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<sup>58</sup> EA at 128.

<sup>59</sup> 16 U.S.C. § 811 (2006).

<sup>60</sup> License Order, 130 FERC at 64,721. Standard Article 15 gives the Commission the authority, after notice and opportunity for hearing, to require the licensee to implement reasonable modifications to project facilities or operations for the conservation and development of fish and wildlife resources.

<sup>61</sup> EA at 58-60, and 195.

**d. Threatened and Endangered Species**

44. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA)<sup>62</sup> requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of designated critical habitat.

45. In the relicensing proceeding, Commission staff identified 13 threatened, endangered, or candidate species (a bird, two plants, an amphibian (flattened musk turtle), a reptile, a fish, and seven mussels) as occurring, or having the potential to occur, within the project boundary. In addition, FWS has designated 91 miles of Sipsey Fork and its tributaries as critical habitat (Sipsey Fork Unit 10) for five of the listed mussel species.<sup>63</sup> A portion of the Sipsey Fork Unit 10 is located within the project boundary near the upstream limits of Smith Lake.

46. In the March 2008 draft EA, Commission staff examined the potential effects of the Warrior Project, as proposed by Alabama Power with staff's additional recommended measures, on these species and concluded that relicensing the Warrior River Project, with staff's recommended measures, would not be likely to adversely affect any listed species or their critical habitat. On April 11, 2008, the FWS concurred with staff's finding and stated that the flattened musk turtle is the only listed species known to occur within the project boundary. With respect to the designated critical habitat for listed mussels, the FWS concluded that the project areas included in this designation "are currently unoccupied by any of the ... 5 mussel species."

47. By its filing of July 24, 2008, the FWS requested that the Commission re-evaluate any new information regarding the presence of threatened and endangered species or critical habitat within the project boundaries. Specifically, FWS asked Commission staff to consider a newly identified location for the listed Alabama streak-sorus fern and to re-examine the Sipsey Fork Unit 10 critical habitat for listed mussels.

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<sup>62</sup> 16 U.S.C. § 1536(a)(2) (2006).

<sup>63</sup> These species are the dark pigtoe, orange-nacre mucket, Alabama moccasinshell, triangular kidneyshell, and ovate clubshell.

48. In March 2009, staff issued the final EA. The EA determined that the Alabama streak-sorus fern<sup>64</sup> and the flattened musk turtle<sup>65</sup> are currently found in the project area. In addition, staff found that, within the Sipsey Fork Critical Habitat Unit 10, four of the listed mussel species are currently found in portions of the designated critical habitat.<sup>66</sup> The EA examined the effects of the Warrior Project on these species and concluded that relicensing the Warrior Project with staff's recommended measures would not be likely to adversely affect any of the listed species or any designated critical habitat.<sup>67</sup>

49. On April 21, 2009, the FWS filed a letter concurring with staff's determination. FWS stated that the Alabama streak-sorus fern and the flattened musk turtle are the only species known to occur within the project boundaries. The fern is found at several locations in Upper Sipsey Creek below elevation 522 feet msl (the reservoir's upper limit). The turtle is found in a portion of Brushy Creek and Sipsey Fork in low to moderate numbers, and the population appears "healthy and stable." As to listed mussels and their critical habitat, FWS concluded that the project areas included in this designation are currently unoccupied by any of the listed mussels.

50. On April 24, 2009, the Lake Association and American Rivers sent a letter to FWS, asking that it deny the Commission's request for concurrence with the Commission's preliminary determination that relicensing the Warrior Project would not be likely to adversely affect the flattened musk turtle.<sup>68</sup>

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<sup>64</sup> This species is a small evergreen fern that grows only on exposed rock surfaces and in crevices of Pottsville sandstone along a 4.25-mile reach of the Sipsey Fork upstream of the project, generally 6 feet above the ordinary high water mark.

<sup>65</sup> The flattened musk turtle is found in Smith Lake (the Sipsey Fork, Brushy Creek, Ryan Creek, and Rocky Creek arms) and upstream of Smith Lake within the Bankhead National Forest. Although recruitment is slightly lower in the Smith Lake population than in free flowing upstream reaches of the Sipsey Fork, the Smith Lake population was found to be readily using numerous locations in the Brushy Creek and Sipsey Fork branches of Smith Lake with suitable habitat (i.e., submerged rocky shelves and crevices) and to be in good to excellent condition. EA at 75-77.

<sup>66</sup> The four listed mussel species are the dark pigtoe, orange-nacre mucket, Alabama moccasinshell, and triangular kidneyshell. No extant populations of ovate clubshell are known to occur in the basin.

<sup>67</sup> EA at 69-81.

<sup>68</sup> The letter was filed with the Commission on April 29, 2009.

51. On October 8, 2009, the FWS reconfirmed its concurrence, stating that it would “continue to concur with FERC’s determination that the flattened musk turtle and Alabama streak-sorus fern will not be adversely affected by the proposed operation of the project, and that the proposed operation will not affect critical habitat for the mussels within the boundaries of the project.”<sup>69</sup>

52. On rehearing, the Lake Association argues that the Commission erred in finding that relicensing the project is not likely to adversely affect the listed species.<sup>70</sup> The Lake Association contends that the EA demonstrates that the Warrior Project, as licensed, will not protect threatened or endangered species or designated critical habitat and that we should have entered into formal consultation with FWS. It asserts that the analysis in the EA was flawed. Rather than finding, as the EA did, that the measures in the license would continue, or marginally enhance, baseline conditions for the species (i.e., marginal benefit), the Lake Association asserts that we must address whether the measures would contribute to the recovery of the species.<sup>71</sup>

53. We disagree. ESA and its implementing regulations require that we evaluate the potential environmental impacts of the proposed action on listed species. If we find that the proposed action is likely to adversely affect a listed species (i.e., jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the species’ critical habitat), then we must engage in formal consultation, and consider the factors proffered by the Association. If on the other hand we find, as we did here, that the proposed action is not likely to adversely affect the listed species, and if, as it did

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<sup>69</sup> See October 16, 2009 filing from the FWS. The letter further explained that FWS had complied with the requirements of ESA by using the best scientific information available.

<sup>70</sup> The Lake Association states that it “incorporate[s] by reference” the arguments made to the FWS in the Lake Association’s request for reconsideration. However, those arguments, which the Lake Association provided in Part II of its request for rehearing, set forth issues and arguments pertaining to the FWS’ statutory authorities and are not directed to the Commission.

<sup>71</sup> The Lake Association also contends that the EA failed to address project impacts on listed species downstream of Smith Dam. There is, however, no evidence that any listed species are present downstream of the Smith dam. The preferred habitat for the mussels is relatively shallow, flowing water over clean substrate, so they would be expected to primarily inhabit areas upstream (not downstream) of the reservoir. EA at 78.

here, FWS concurs with this finding, then no further action is necessary.<sup>72</sup> Contrary to the Lake Association's arguments, there is no requirement in the statute or the implementing regulations to undertake formal consultation under the circumstances in this case. We therefore deny rehearing on this issue.<sup>73</sup>

e. **Recreation**

54. The Lake Association contends that Commission staff did not analyze the significance of the project's continuing impacts on recreation (e.g., low lake levels that result in reduced boating access, stranded boat launches, dry swimming areas, and exposure of sandbars and other navigational hazards) and did not analyze alternative flow schedules and guide curves (the Lake Association's in particular) that might better mitigate the project's existing impacts on recreation.

55. We disagree. As explained in the EA,<sup>74</sup> Smith Lake and adjacent lands have 34 recreation facilities that provide boating, fishing, swimming, hiking, camping, and day-use areas.<sup>75</sup> Boat ramps are the most heavily used of these facilities at 80 percent capacity. There are 45 boat ramps on the lake and its nearby tributaries, two of which are operated by Alabama Power under its license. Thirteen of these boat ramps are usable at the winter pool elevation (December to February) of 496 feet msl. Because lake level

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<sup>72</sup> See joint regulations implementing the provisions of ESA, 50 C.F.R. § 402.13(a) (2011).

<sup>73</sup> The Lake Association also argues that the License Order erred in not responding to the Lake Association's evidence that its alternative (i.e., higher, more stable lake levels) "may better protect listed mussels than conditions under the new license." Request for rehearing at 33. However, as we have explained, the fact that there is substantial evidence to support a particular decision does not mean that other evidence in the record, which could support a different conclusion, is not valid or must be refuted. Contrary to the Lake Association's argument, there is no requirement that the Commission discuss in detail each piece of evidence in the record. We note, moreover, that the evidence the Lake Association presents on this issue is from its consultant, who admits that he is "not qualified to address whether the elevation changes are important to the mussels, especially since elevations rise significantly early in the spring... ." *Id.* at 33-34.

<sup>74</sup> EA at 82-85.

<sup>75</sup> Only one of these facilities, a boat launch with two boat ramps, is operated by Alabama Power under its license.

management will remain essentially unchanged under the new license, the project would not result in an adverse impact to recreation when compared to baseline conditions (i.e., operations under the prior license).<sup>76</sup> In fact, Alabama Power's new license will enhance public recreation because Alabama Power will install an additional boat ramp, which will provide additional low water boating access to the lake.<sup>77</sup>

56. The Lake Association argues that, while the EA recognized that only one third of the boat ramps (i.e., 13 of 45) are usable at a winter lake elevation of 496 feet msl, the EA erred by failing to recognize this reduction of boating opportunities as significant. The EA further erred by failing to identify the lake level at which a majority of the boat ramps become unusable, to respond specifically to the Lake Association's study that recreation use falls by 5 percent for each 1 foot drop in lake levels, and to deny or otherwise respond to Lake Association evidence on the impacts to recreation at lake levels of 495 feet msl.<sup>78</sup> Without this analysis, the Lake Association argues, the EA lacks adequate information on which to fashion license conditions that meet the FPA's comprehensive development standard.

57. We disagree. The Commission is not required to perform the detailed analyses that the Lake Association argues must be done, and we see no purpose that would be served with this additional information. While it is true that low lake levels can strand many of the privately owned boat docks around the reservoir, as explained above there are a number of boat ramps available to the public that provide access to the lake at all water levels. Moreover, as we have explained elsewhere in this order, the Commission is not required to have perfect information before taking a licensing action or finding all environmental concerns to be definitively resolved before issuing a license. In deciding whether, or under what conditions to issue a license, the Commission must provide a

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<sup>76</sup> See discussion of baseline in Section C. "Compliance with the National Environmental Policy Act (NEPA)," *infra*.

<sup>77</sup> EA at 95. In addition to the new boat ramp required by this license, there are plans by other entities, which are not requirements of this license, to install a boat launch at a Forest Service site to provide low water access and to reposition an existing boat ramp at a Winston County launch site so that it would provide lake access at all water levels. EA at 94-95.

<sup>78</sup> The Lake Association uses 2007 lake levels to illustrate its arguments. However, 2006 and 2007 were extreme drought years in which inflows to the project were inadequate to maintain downstream flow needs and maintain reservoir levels as specified in the guide curve, and thus are not representative flow years.

reasoned explanation, supported by substantial evidence, of the decisions in its order. Contrary to the Lake Association's argument, there is no requirement that the Commission discuss in detail each piece of evidence in the record.

58. Contrary to the Lake Association's allegations, the EA considered the Lake Association's proposal to maintain higher, more stable lake levels.<sup>79</sup> The EA described information submitted by the Lake Association regarding the recreational benefits of implementing the Lake Association's proposal.<sup>80</sup> The License Order explained that staff's analysis in the EA had considered the developmental and non-developmental uses of the Black Warrior River and the multi-purposes served by the Warrior Project and balanced the need for power, flood control, navigation and commerce, water quality, aquatic resources, and recreation.<sup>81</sup> The EA and License Order concluded that the project currently provides considerable benefits to recreation around the lake, and that these benefits would continue under the new license.<sup>82</sup> Implementing the operation recommended by the Lake Association could increase private and commercial development around the lake and lengthen the recreation boating season, but this would be costly in terms of lost peak generation.

59. Although adherence to the Lake Association's proposed guide curve would have little or no effect on *total* annual generation, the *timing* of generation would change significantly. Less generation would occur in the peak season months (June through September) when energy is most needed and valued highest. Greater generation would

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<sup>79</sup> As explained above (at P 13), the Lake Association recommended that Smith Lake elevations remain between 505 and 510 feet msl from Memorial Day to Labor Day, and that the lake level elevation not drop below 502 feet during the rest of the year.

<sup>80</sup> See "Economic Analysis of Non-Power Values of Smith Lake," filed by the Lake Association February 11, 2008. These benefits included: (1) an increase in recreation use by extending the recreation season September through December; (2) a year-round operational season for marina owners and local businesses; (3) double the annual visitation days at Smith Lake; (4) an increase in local property values from \$342 to \$547 million; (5) an increase in the property tax base and property tax revenues by \$1.8 million; (6) an increase in annual local expenditures by \$34 million; and (7) benefits to marina owners and local businesses by extending the recreation season. The EA concluded, correctly, that such quantitative information is speculative.

<sup>81</sup> EA at 136.

<sup>82</sup> EA at 120; License Order, 130 FERC ¶ 62,271 at P 67.

occur in the non-peak season (October through May) when energy has less value.<sup>83</sup> By the Lake Association's own calculations, the Smith development would lose 13 percent of its peak generation, an estimate that we think is low.<sup>84</sup> Alabama Power, on the other hand, estimates its peak generation losses at 27 percent (a loss of 18,619 megawatt hours (MWh) for the 4-month period).<sup>85</sup> Neither of these calculations addresses additional peak generation losses that would occur at the project's downstream Bankhead development under the Lake Association's proposal.<sup>86</sup>

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<sup>83</sup> EA at 133.

<sup>84</sup> EA at 135. The Lake Association estimates peak generation losses by comparing generation under its model to project operation that assumes Alabama Power would operate with strict adherence to the guide curves. However, although lake levels have generally followed the operating curves, considerable variations have occurred due to the combination of inflows, both seasonally and annually, and water use demands associated with providing downstream flows and power generation. These variations are particularly evident during drought years, as has been experienced in the southeast during the last few years of operation.

The Lake Association acknowledges that the differences in peak generation are likely due to significant differences in modeling assumptions, and that if similar assumptions were used there would be a much better match between Alabama Power's and the Lake Association's results. In addition to the difference described above, the entities used different simulation periods for the two models. The Lake Association modeled 1940 through 2007, while Alabama Power modeled 1929 through 2008. *See* request for rehearing, Exhibit 1.1 at 22-23.

<sup>85</sup> EA at 135.

<sup>86</sup> The Lake Association did not provide an estimate of generation losses for the Bankhead development. Alabama Power estimated that generation at the Bankhead development during the peak period (June through September) would be reduced by 11 percent (a 4,249 MWh loss for the 4-month period) under the Lake Association's proposal. When combined with the estimated 18,619 MWh loss from the Smith development, generation from the Smith and Bankhead developments during the 4-month peak period would be reduced by 22,868 MWh, for an average loss of approximately 22 percent for both developments. *See* Alabama Power's October 3, 2008 additional information filing.

60. In sum, the reduction in peak generation at the project's two developments likely would be greater than the Lake Association's estimate of 13 percent. In addition, although not quantified, there would be reduction in the dependable capacity at the projects' two developments. Alabama Power would need to replace lost generation and lost capacity to avoid regional reductions in dependable capacity. Finally, the peak generation and dependable capacity losses would be from a renewable source, which is an increasingly valuable component in the region's energy mix.

61. For these reasons, the License Order correctly concluded that the costs of the Lake Association alternative outweigh the potential benefits of a longer recreation boating season on Smith Lake and that the Lake Association's proposal therefore was not in the overall public interest.<sup>87</sup>

62. For the above reasons, we deny rehearing on this issue.<sup>88</sup>

**f. Socioeconomics**

63. On rehearing, the Lake Association contends that the EA and the new license did not make a specific finding regarding the impact of project operations on socioeconomics in the region. It objects to Commission staff's finding in the EA that Alabama Power's continued operation under the new license will not have a significant adverse impact on socioeconomics. The Lake Association contends that existing lake level operations "adversely affect recreation, which in turn reduces tourism and property values, and thereby adversely affect [Winston] County's economy," and argues that the EA largely ignored evidence that the Lake Association's consultant submitted regarding the potential

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<sup>87</sup> The EA and License Order also concluded that aquatic, terrestrial, and developmental resources within the project reservoir and downstream of the project would be adequately protected under the new license. EA at 123; License Order, 130 FERC ¶ 62,271 at P 66.

<sup>88</sup> In the EA's analysis of recreation at the project, Commission staff estimated the current amount of recreational use. Based on available survey information, staff calculated recreation use within the Smith development to be 243,428 recreation trips in 2000; 250,577 in 2005; and 260,523 in 2010. See EA, Table 3-5 at 84. The Lake Association contends that in light of information that Alabama Power provided, indicating annual daytime visitation of 490,232 and annual nighttime visitation of 88,242 in 2008, staff underestimated current recreation use by half. We take note of this omission of 2008 data, which Alabama Power did not file until March 25, 2009, after the March 2, 2009 issuance of the final EA. However, the updated information does not change our overall findings and conclusions regarding recreation.

economic benefits to property values and commercial and residential development along Smith Lake that would result from improved recreation under the Lake Association's alternative operating regime.<sup>89</sup>

64. We deny rehearing on this issue. The EA discussed the socioeconomic impacts of Alabama Power's proposed operating regime and the Lake Association's alternative. Contrary to the Lake Association's contention that the EA ignored evidence it presented, the EA described information submitted by the Lake Association regarding the socioeconomic benefits of the Lake Association alternative for lake levels.<sup>90</sup> The EA also acknowledged the potential effects of maintaining current operations, noting that draw downs of Smith Lake result in reduced recreational opportunities and benefits. However, the EA also recognized that recreational use of the lakes would be maintained by continued operation of the project reservoirs under the existing guide curve.<sup>91</sup>

65. As explained above, the Commission is not required, nor would it be possible, to precisely quantify the project's impacts on socioeconomics. Nor must we have perfect information before taking a licensing action or finding all environmental concerns to be definitively resolved before issuing a license. In addition, as explained in more detail below, in considering whether a proposed action could result in significant adverse impacts (and thus would require preparation of an Environmental Impact Statement under the National Environmental Policy Act), we measure the potential environmental impacts of the proposed action as compared to baseline conditions, which in this case would be the project as currently licensed.

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<sup>89</sup> Request for rehearing at 36-37.

<sup>90</sup> EA at 109-113 and 132-35. The EA cited the Lake Association's data that recreational use and associated expenditures resulted in an average loss of \$34 million to the local economy between 1999 and 2007 due to the current Smith Lake level fluctuations as compared to lake levels under the Lake Association's proposal. The EA also noted that, according to the Lake Association's consultant: 8,800 properties are located on the Smith Lake shoreline primarily because of the value of Smith Lake; additional lakefront developments are under construction at Smith Lake; and between 1995 and 2007, aggregate shoreline property values increased 169 percent, and private development around Smith Lake more than doubled (increased by 115 percent).

<sup>91</sup> EA at 124.

**g. Bankhead National Forest**

66. The project occupies almost 2,700 acres of the Bankhead National Forest. Section 4(e) of the FPA<sup>92</sup> provides that the Commission may issue a license for a project located within any reservation<sup>93</sup> (i.e., the Bankhead National Forest), only if it finds that the license will not interfere or be inconsistent with the purposes for which such reservation was created or acquired. FPA section 4(e) also requires that the Commission include in licenses for projects located within a federal reservation any conditions that the Secretary of the department under whose supervision the reservation falls deems necessary for the adequate protection and utilization of such reservation.

67. In the License Order, Commission staff reviewed relevant documents and concluded that “[t]here is no evidence in this proceeding to indicate that relicensing the Warrior Project would interfere with the purposes of the Bankhead National Forest.”<sup>94</sup> The Forest Service submitted conditions under section 4(e) for inclusion in the license, for the protection and utilization of the Bankhead National Forest.<sup>95</sup>

68. On rehearing, the Lake Association contends that the project will interfere with the purposes for which the Bankhead National Forest was established. It contends that the forest was created to protect watersheds of navigable streams and to conserve the

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<sup>92</sup> 16 U.S.C. § 797(e) (2006).

<sup>93</sup> Section 3(2) of the FPA defines reservations as including national forests, 16 U.S.C. § 794(2) (2006).

<sup>94</sup> License Order, 130 FERC ¶ 62,271 at P 29.

<sup>95</sup> See Forest Service filings of March 10, 2005, May 4, 2007, and July 3, 2007. The conditions require Alabama Power to provide \$4,952,000 in funds to the Forest Service, as well as additional services valued at \$2,625,000. The funds would be distributed over the term of the license, and would be used for the following: (1) data collections and studies associated with conducting resource surveys, fish inventories, and ecological monitoring of Forest Service lands and the Sipsey River National Wild and Scenic River Corridor; (2) public education; (3) shoreline management activities; (4) clean-up of informal recreation sites; (5) annual study reports on cultural resources and for the Forest Service to manage cultural resources; (6) encroachment processing; (7) the upgrade and improvement of recreation resources at the existing Houston, Corinth, and Clear Creek Recreation Areas; and (8) the modification of culverts at road crossings in the Bankhead National Forest.

navigability of navigable rivers<sup>96</sup> and argues that the new license will interfere with these purposes because it could potentially have adverse impacts on several resources, including water quality and erosion.

69. We deny rehearing on this issue. The Organic Administration Act of 1897 provides that all national forests are established and administered only for water flows and timber production.<sup>97</sup> The Lake Association has presented no evidence that the Warrior Project will interfere with these purposes. Moreover, the Forest Service has provided conditions that it deems necessary for the adequate protection and utilization of the reservation.<sup>98</sup>

#### **h. Navigation**

70. Smith Lake provides navigation flows for the Black Warrior and Tombigbee rivers. The Black Warrior-Tombigbee Waterway is one of the busiest commercial

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<sup>96</sup> The Bankhead National Forest was originally created as the Alabama National Forest by Presidential Proclamation on January 15, 1918 (*see* Proclamation 1423, 40 Stat. 1740), and subsequently renamed the Black Warrior River National Forest by presidential proclamation on June 19, 1936 (*see* Proclamation 2178, 49 Stat. 3526), before being named the William B. Bankhead National Forest by Act of Congress on June 6, 1942 (56 Stat. 327). The Lake Association cites to the 1918 Presidential Proclamation as establishing the purposes for which the forest was created.

<sup>97</sup> 16 U.S.C. § 475 (2006). The Multiple Use Sustained Yield Act of 1960 (1960 Act), 16 U.S.C. § 528 *et seq.* (2006), broadened the purposes for which national forests had previously been administered to include outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Section 528 of the 1960 Act provides, however, that these purposes are “to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in [the Organic Administration Act].” Under FPA section 4(4), the Commission, in determining whether a project would interfere or be inconsistent with “the purposes for which such reservation was created or acquired” considers only the purposes articulated in the Organic Administration Act. *See United States v. State of New Mexico*, 438 U.S. 696 (1978) (holding that the 1960 Act did not give rise to any reserved rights not previously authorized in the Organic Administration Act).

<sup>98</sup> As to the allegations that the project potentially could have adverse impacts on several resources, including water quality and erosion, we have addressed these arguments above.

waterways in the nation with over 21 million tons of commodities shipped annually.<sup>99</sup> Under the 1965 Manual, which includes the project's guide curves, Alabama Power must "discharge from Smith Reservoir water sufficient to maintain its pro rata share of inflow requirements to Bankhead Reservoir."<sup>100</sup> The manual further estimates that the pro-rata share to be released at the Smith development to maintain a total of 540 cfs inflow to Bankhead Lake would be no more than 245 cfs.<sup>101</sup>

71. The Lake Association argues that the License Order erred in not requiring a specific navigation flow and the record of the relicensing proceeding is inadequate to support a finding that the new license will protect downstream navigation under normal or low flow conditions.<sup>102</sup>

72. We disagree. The requirements of the new license give the Corps and the Commission ample authority to ensure that downstream navigation will be protected. Standard Article 12 provides:

The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, ... and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

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<sup>99</sup> See April 7, 2008 comments from the Corps, filed April 8, 2008.

<sup>100</sup> 1965 Manual, Chart 8, Operating Instruction (1).

<sup>101</sup> 1965 Manual at A-17, P 45.

<sup>102</sup> In support, the Lake Association points to comments on the draft EA submitted by the Corps in which the Corps expressed concerns regarding the draft EA's analysis of the effect of the relicensing proposal on flows for navigation. However, the final EA explained that, "with regard to low flow operations, staff is not recommending new project operations: rather, the project would operate much like it has in the past." EA at 197. The Corps did not file additional comments on this issue.

73. In addition, Article 404 of the license requires the licensee to:

operate the Warrior River Project in a manner to assure that during periods of extreme drought, or extended drawdown, flows for navigation are provided in accordance with U.S. Army Corps of Engineers (Corps) March 1965 Black Warrior-Tombigbee River Basin Reservoir Regulation Manual, Appendix A, for the Lewis M. Smith Reservoir (Manual), or as the Commission may require. The Manual states that during periods of extreme drawdown, the Corps would specify the required flow releases from the Smith Development, not to exceed 486 acre-feet per day. This would be equivalent to a release of about 245 cubic feet per second (cfs) from the Smith development that is needed to maintain a 540 cfs inflow to Bankhead Lake.

Under this article, Alabama Power must operate the Warrior Project so that it is able to release navigation flows as requested by the Corps, even during drought years. The article refers only to periods of extreme drought or extended drawdown because historically that is when there has been a problem.<sup>103</sup> However, as explained above, Alabama Power must meet the Corps' navigation flow requirements throughout the year, under all flow conditions.<sup>104</sup> Therefore, we will amend Article 404 to clarify that the obligation to release flows for navigation applies under all flow conditions. For the above reasons, we deny rehearing on this issue, but we will clarify Article 404 as noted.

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<sup>103</sup> See 1965 Manual at A-17, P 45, explaining:

It is not anticipated that special releases will frequently be required for [navigation]. Normal power release, combined with other inflow to Bankhead Lake, will usually be sufficient for navigation purposes. However, additional flow may be required during periods of extreme drought, after floods (if shoaling occurs in the upper reaches of Bankhead Lake), and during any extended drawdown of Bankhead Lake. Amounts required during such periods will be specified by the District Engineer, Corps of Engineers. Such amounts, however, will not exceed 486 acre-feet [245 cfs] per day.

<sup>104</sup> Under its prior license, during recent extreme drought years, Alabama Power was not at all times able to release adequate flows for navigation. It obtained variances from the Corps during these times. See License Order, 130 FERC ¶ 62,271 at P 19.

**B. Compliance with the National Environmental Policy Act (NEPA)**

**1. Need for an Environmental Impact Statement**

74. The Lake Association contends that relicensing the Warrior Project will significantly affect the quality of the human environment and that therefore, under the requirements of NEPA,<sup>105</sup> the Commission should have prepared an Environmental Impact Statement (EIS) rather than an EA to support issuance of the Warrior license. Specifically, the Lake Association alleges that the EA lacks substantial evidence for its finding that the proposed action would not have a significant impact on the environment.<sup>106</sup> The Lake Association contends that the finding of no significant impact is inconsistent with what it alleges are findings in the EA that the project may have “ongoing, significant impacts” on water quality, erosion, fisheries, threatened and endangered species, recreation, and socioeconomics.

75. We disagree. The test for determining the need for an EIS is whether the action would have a significant impact on the human environment.<sup>107</sup> In relicensing proceedings, the Commission uses existing environmental conditions (i.e., continued project operation under the existing license) as a baseline against which to evaluate the environmental impacts of an applicant’s proposal and other reasonable alternatives.<sup>108</sup>

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<sup>105</sup> 42 U.S.C. §§ 4321-4370(f) (2006).

<sup>106</sup> The Lake Association also argues (request for rehearing at 45) that the EA is flawed because its finding of no significant impact is based on a “conclusory” statement that “[c]ontinuing to operate the Warrior Project, with [staff’s] recommended measures, would enhance water quality, protect federally-listed species and designated critical habitat, improve the recreation resources, and protect historic properties in the project’s [area of potential effect].” EA at 149. This argument is incorrect. An EA’s finding of no significant impact “need not repeat any of the discussion in the assessment, but may incorporate it by reference.” See section 1508.13 of the Council on Environmental Quality’s regulations implementing NEPA, 40 C.F.R. § 1508.13 (2011).

<sup>107</sup> 42 U.S.C. § 4332(2)(c) (2006).

<sup>108</sup> See *Eugene Water & Electric Board*, 81 FERC ¶ 61,270, at 62,326-27 (1997), *aff’d sub nom. American Rivers v. FERC*, 201 F.3d 1186, 1195 (9<sup>th</sup> Cir. 1999).

76. The EA adequately set forth the basis for why an EIS was not required. It examined the potential impacts of relicensing the project on various resources,<sup>109</sup> including water quality, fisheries and aquatic resources, downstream erosion, flow fluctuations, terrestrial resources, threatened and endangered species, recreation and land use, cultural resources, and socioeconomics. Although the EA identified potential ongoing impacts to some target resources, it identified no impacts as significant. Indeed, as the Lake Association itself recognizes, the EA analyzed the effects of the project on various resources and concluded that the new license “will improve the baseline condition of various beneficial uses in the near term.”<sup>110</sup> We agree with the analysis and findings in the EA that the anticipated impacts of the project, taken as a whole, are not of sufficient magnitude to significantly affect the human environment. We therefore deny rehearing on this issue.

## 2. Adequacy of EA

77. The Lake Association next argues that the Commission violated NEPA because the EA did not comply with the requirements of the statute and the Council on Environmental Quality’s (CEQ) regulations that implement NEPA (CEQ regulations). First, the Lake Association contends that the EA did not adequately define the purpose of the proposed action, as required by section 1502.13 of the CEQ regulations, 40 C.F.R. § 1502.13 (2011), and this failure prevented a proper consideration of action alternatives for the non-power purposes of flood control, water quality, and navigation.

78. We disagree. The regulations to which the Lake Association cites establish the requirements for an EIS, not an EA. In contrast to the detail required for an EIS, an EA must include “a brief discussion of the need for the proposal.”<sup>111</sup> The EA for the Warrior Project met, and indeed exceeded, this requirement. Moreover, the EA properly described the purpose of the proposed action. The EA (at section 1.2) stated that the purpose of the action is to consider whether, and if so under what conditions, to issue a new license for the Warrior Project, and described the factors that the Commission must consider in making this determination (power and developmental purposes; energy conservation; protection, mitigation, and enhancement of fish and wildlife resources; recreation, and other aspects of environmental quality). This section identified water level fluctuations, water quality, and recreation as important issues in the proceeding.

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<sup>109</sup> See EA at 31-115.

<sup>110</sup> See, e.g., request for rehearing at 14.

<sup>111</sup> 40 C.F.R. § 1508.9(b) (2011).

79. Next, citing to NEPA section 102(2)(C)(iii) and section 1502.14 of the CEQ regulations,<sup>112</sup> the Lake Association argues that the EA failed to consider reasonable alternatives to the applicant's proposal for protection, mitigation, and enhancement of environmental quality, as required by those authorities. It alleges that the EA was deficient in failing to provide a level of analysis of the Lake Association's alternative proposal for higher, more stable lake levels that was comparable to the analysis of the applicant's proposal, and in failing to identify and evaluate any other alternatives to existing lake level and flow management.<sup>113</sup> It also contends that the EA failed to adequately consider alternatives not within the Commission's jurisdiction, arguing that the EA should have considered "an alternative whereby [Alabama Power] would construct cooling towers at the Gorgas Plant."<sup>114</sup>

80. We deny rehearing on this issue. As we explained in *Appalachian Power*,<sup>115</sup> section 102(2)(E) of NEPA<sup>116</sup> requires action agencies to take a "hard look" at the potential environmental consequences of their proposed action.<sup>117</sup> However, in carrying out their NEPA responsibilities, federal agencies are governed by a rule of reason.<sup>118</sup> The

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<sup>112</sup> 42 U.S.C. § 4332(2)(C)(iii) (2006) and 40 C.F.R. § 1502.14 (2011), respectively. As with the preceding argument, the Lake Association, by citing to statutory and regulatory requirements for, and case law relating to, an EIS, attempts to judge our EA by those standards, rather than the less stringent standards for an EA.

<sup>113</sup> The Lake Association alleges that the EA was deficient because it failed to consider any alternatives to (1) the project's existing rule curve (i.e., mode of operation), (2) a 50-cfs minimum flow from the Smith development, (3) "baseline operation of Bankhead or other [unnamed] Army Corps developments downstream for flood control and navigation," or (4) "baseline coordination of Smith Dam and Gorgas Plant." Request for rehearing at 50-51.

<sup>114</sup> Request for rehearing at 55.

<sup>115</sup> *Appalachian Power*, 132 FERC ¶ 61,236, at PP 78-82 (2010) (addressing identical argument).

<sup>116</sup> 42 U.S.C. § 4332(2)(E) (2006).

<sup>117</sup> *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

<sup>118</sup> *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

range of alternatives that must be considered is a matter within an agency's discretion.<sup>119</sup> The discussion of alternatives need not be exhaustive and need only provide sufficient information to permit a reasoned choice of alternatives, i.e., "reasonable" alternatives.<sup>120</sup> There is no requirement to examine each proposed mitigation or enhancement measure (or groups of such measures submitted by an entity) as a separate alternative or alternatives.<sup>121</sup>

81. While an EIS must provide a "detailed statement" on the environmental impact of the proposed action and alternatives to the proposed action,<sup>122</sup> an EA, in contrast, must provide only "brief discussions" of these matters.<sup>123</sup> In *Richard Balagur*, the Commission explained:<sup>124</sup>

[A] discussion of environmental alternatives need not be exhaustive and need provide sufficient information to permit a reasoned choice of alternatives. Further, the range of alternatives that must reasonably be considered decreases as the environmental impact of the proposed action becomes less substantial. Thus, an agency's finding of no significant impact, if otherwise valid, permits the agency to consider a narrower range of alternatives than it might be obliged to assess before undertaking an action that would significantly affect the environment. [Footnotes omitted.]

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<sup>119</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551-52 (1976).

<sup>120</sup> See section 102(2)(C)(iii) of NEPA, 42 U.S.C. § 4332(2)(C)(iii) (2006); and *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976) (citing *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)).

<sup>121</sup> *Idaho Power Co.*, 110 FERC ¶ 61,242, at PP 80-85 (2005).

<sup>122</sup> Section 102(C)(i) and (iii) of NEPA, 42 U.S.C. § 4332(2)(C)(i) and (iii) (2006).

<sup>123</sup> Section 1508.9(b) of the CEQ regulations, 40 C.F.R. § 1508.9(b) (2011). CEQ typically recommends that EAs be 10-15 pages long. See *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 55 *Fed. Reg.* 18,026 at 18,027 (March 23, 1981) (Question 36a).

<sup>124</sup> *Richard Balagur*, 57 FERC ¶ 61,315, at 62,018 (1991), *aff'd sub nom. Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556-57 (2<sup>nd</sup> Cir. 1992).

82. The EA considered three alternatives: (1) Alabama Power's proposal, which included measures for erosion and sedimentation, water quality, drought management, fishery enhancement, recreation enhancement, and plans to manage wildlife habitat, aquatic vegetation, shoreline development, and historic properties; (2) a staff alternative that included most, but not all, of Alabama Power's proposed measures and additional staff-recommended measures; and (3) no action, i.e., continued project operation under the conditions of the then-current license.

83. The EA also discussed the Lake Association's recommendations, comments, and proposed alternative mitigation measures as they applied to the particular resources at issue. To the extent the EA did not specifically adopt into the staff alternative certain measures that the Lake Association and others recommended, it discussed the reasons for not adopting those recommendations.<sup>125</sup> We conclude that the analytical approach taken in the EA, which is the same approach that the Commission has employed for decades, considered a sufficient range of reasonable alternatives and enabled Commission staff to make an informed decision in relicensing the Warrior Project.<sup>126</sup> Moreover, with respect to the allegation that the EA should have more fully considered modifications to the downstream Gorgas plant as a reasonable alternative to Alabama Power's proposal, how the Gorgas steam plant operates is not a discrete alternative to the proposed action, but rather is just one element of the existing environment that has the potential to be directly

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<sup>125</sup> See, e.g., discussion of why EA did not recommend adopting the Lake Association's proposed operating curve to reduce water level fluctuations and maintain higher lake elevations through the summer months (EA at 132-36); and responses to Lake Association concerns regarding erosion at the project (EA at 191), habitat fragmentation caused by the project and project effects on threatened and endangered species (EA at 191), effect of low lake levels in 2007 on recreational boating (EA at 192), effect of conversion of downstream fishery to a coldwater fishery caused by construction of the project (EA at 194), and the Lake Association's contention that the EA should have evaluated an operational alternative that would have resulted in maintenance of DO levels higher than state standards (EA at 194).

<sup>126</sup> Indeed, as a practical matter, Commission staff's draft and final EAs reflected the extensive and detailed analysis of potential environmental impacts that one would expect to find in an EIS, and as a result, there is little if any difference between the analyses conducted in an EIS and the analyses conducted in the EAs for the Warrior Project.

or indirectly affected by the proposed action. As such, the EA's consideration of potential project effects to Gorgas was more than adequate.<sup>127</sup>

84. The Lake Association argues that the EA's analysis of the new license's direct, indirect, and cumulative impacts on the environment was inadequate because it failed to forecast trends and end conditions over the next 30 years. However, NEPA does not require such precision.<sup>128</sup> As explained above, the adequacy of an EA (or an EIS) is determined by a "rule of reason," which requires only a "reasonably thorough discussion of the significant aspects of the probable environmental consequences."<sup>129</sup> We believe that standard has been met.<sup>130</sup>

85. In sum, in this order the Commission has reviewed the issues raised by the Lake Association in this proceeding. For the reasons detailed above, the Commission denies rehearing and ratifies OEP's actions in this docket, and affirms the issuance of the new license to Alabama Power. The Commission also finds that the Lake Association's interests have not been infringed upon or harmed. Accordingly, the Lake Association's argument that the proceeding was contested and therefore OEP lacked authority to issue the license is moot.

The Commission orders:

(A) The request for rehearing filed April 30, 2010, by the Smith Lake Improvement Stakeholders Association, is denied.

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<sup>127</sup> See EA at 15-16 (explaining that project operations result in a "secondary benefit" to the Gorgas plant), 40-41 (describing Gorgas plant operations), 132-36 (describing effects of Lake Association alternatives for higher, more stable lake levels on generation, project resources, and non-project water uses, e.g., municipal water withdrawals and Gorgas plant operations).

<sup>128</sup> *Idaho Power Co.*, 110 FERC ¶ 61,242, at PP 89-95 (2005).

<sup>129</sup> *Columbia Land Basin Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9<sup>th</sup> Cir. 1981), quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9<sup>th</sup> Cir. 1974).

<sup>130</sup> Concerning speculative and unknown information, "NEPA does not require a 'crystal ball' inquiry . . . . An EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

(B) The first sentence of Article 404 of the license for the Warrior Project, issued March 31, 2010, is revised by deleting the phrase “during periods of extreme drought, or extended drawdown.”

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.