

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Alabama Rivers Alliance and)	
American Rivers,)	
Petitioners,)	
)	EMC Docket No. 05-14
vs.)	
)	[Administrative Action: ADEM Water
Alabama Department of)	Quality Certifications issued on July 1,
Environmental Management,)	2005, to Alabama Power Company
Respondent,)	for Coosa River, Jordan, Mitchell, and
)	Warrior River Hydroelectric Projects,
and)	FERC Project Nos. 2146, 618, 82, and
)	2165]
Alabama Power Company,)	
Intervenor.)	

ORDER

This cause having come before the Environmental Management Commission pursuant to the Administrative Law Judge's Recommended Findings of Fact and Conclusions of Law Regarding ADEM's and Alabama Power Company's Motions for Summary Judgment in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Administrative Law Judge's Recommended Findings of Fact and Conclusions of Law Regarding ADEM's and Alabama Power Company's Motions for Summary Judgment is hereby ADOPTED; and

2. That pursuant to the adoption of the Administrative Law Judge's Recommended Findings of Fact and Conclusions of Law Regarding ADEM's and Alabama Power Company's Motions for Summary Judgment, both ADEM's and Alabama Power Company's motions for summary judgment are hereby GRANTED and the petition for hearing of Alabama Rivers Alliance and American Rivers is hereby DISMISSED WITH PREJUDICE; and

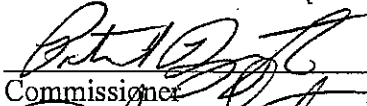
3. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and

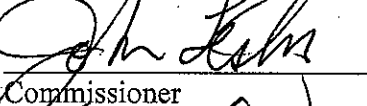
Alabama Environmental Management Commission Order
Page 2

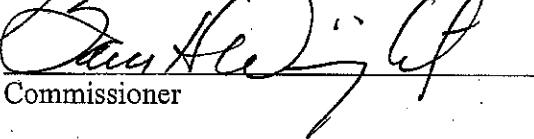
4. That a copy of this Order, along with a copy of such Recommended Findings of Fact and Conclusions of Law Regarding ADEM's and Alabama Power Company's Motions for Summary Judgment, attached hereto as Exhibit "A", and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 24th day of February 2006.

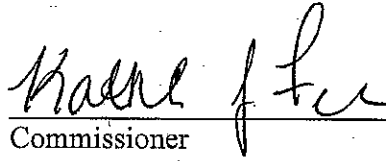
APPROVED:


Commissioner


Commissioner


Commissioner

Commissioner


Commissioner

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DISAPPROVED:

Commissioner

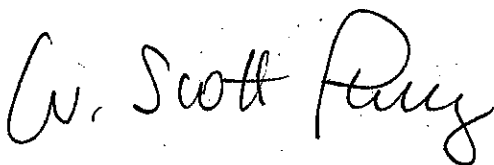
Commissioner

Commissioner

ABSTAINED:

Commissioner

RECUSED:



**BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION
STATE OF ALABAMA**

**ALABAMA RIVERS ALLIANCE and)
AMERICAN RIVERS,)**

Petitioners,)

EMC Docket No. 05-14

v.)

**ALABAMA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,¹)**

Respondent,)

ALABAMA POWER COMPANY,)

Intervenor.)

**RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
REGARDING ADEM'S AND ALABAMA POWER COMPANY'S
MOTIONS FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY

The present petition centers upon two water quality certifications issued by the Alabama Department of Environmental Management (hereinafter "ADEM") to Alabama Power Company (hereinafter "APC") on or about July 1, 2005.

¹ Alabama Rivers Alliance and American Rivers originally appealed this action naming as the respondent, S. Phillips, Chairman of the Environmental Commission. Neither the Commission, nor it's Chairman, is a proper party in interest. See ALA. ADMIN. CODE R. 335-2-1-.06 (2) which provides "In any hearing to contest an administrative action of the Department, the Department shall be a party." The Department is defined in the rules as the Alabama Department of Environmental Management (hereinafter "ADEM"). Alabama Administrative Rules provide that petitions for a hearing may be filed "with" the Commission, not "against" the Commission. Therefore, ADEM is the only proper party in interest. ADEM has been fully represented throughout this proceeding. Accordingly, ADEM has been substituted as the proper party in interest.

Specifically, two of the certifications applied to APC's existing hydroelectric generating units located on the Coosa River and the Black Warrior River.²

Following ADEM's certification of APC's hydroelectric units, on August 1, 2005, Alabama Rivers Alliance (hereinafter "Alabama Rivers" or "Petitioner") and American Rivers (hereinafter "American Rivers" or "Petitioner"), requested a hearing challenging ADEM's grant of water quality certifications to APC regarding these generating units pursuant to Admin. Code 335-2-1-.04.

Specifically, the Petitioners challenge, *inter alia*, "whether the certifications assure compliance with water quality standards applicable to the affected [regions] of the Coosa and Black Warrior Rivers in Alabama as required by the Clean Water Act (hereinafter "CWA"), § 401 (a)(1)-(2), 33 U.S.C. § 1341 (a)(1)-(2), Alabama Code § 22-22-9 (g) , and ALA. ADMIN. CODE R. 335-2-1-.02 *et seq.*"³ Petitioners contend APC's operations located on the Coosa and Black Warrior River Projects fail to provide reasonable assurances that APC would maintain compliance with Federal and State Water Quality standards regarding dissolved oxygen levels.

The Alabama Attorney General's Office, Administrative Division, to whom this matter was initially assigned, referred this cause to the undersigned to serve as

² The certifications obtained by APC are an integral part of its application for new licenses from the Federal Energy Regulatory Commission (hereinafter "FERC").

³ Petition of Alabama Rivers and AR filed on August 1, 2005.

a designated Hearing Officer for the petition.⁴ As part of the pre-hearing process, the parties submitted stipulated and disputed factual statements which were incorporated into a pre-hearing order dated September 19, 2005. The parties elected to waive the forty-five day time period for the commencement of the hearing as required by ALA. ADMIN. CODE R. 335-2-1-.14 (1), (2). The parties were advised, that the Pre-Hearing order controlled the issues to be decided in this proceeding.

Thereafter, both the Respondant, ADEM and Intervenor, APC, filed motions for summary judgment on numerous grounds pursuant to ALA. ADMIN. CODE R. 335-2-1-.22. Petitioners, Alabama Rivers and AR responded on November 30, 2005. Additionally, the parties orally argued the matter on December 9, 2005. Following the oral argument that same day, the undersigned advised the parties that the Respondent's and Intervener's motions merited a recommendation of a judgment as a matter of law. There being no genuine issue of material fact, the petition is due to be dismissed. The basis of this recommendation is hereinafter discussed.

⁴ ALA. ADMIN. CODE R. 335-2-1-.03.

II. FINDINGS OF FACT

A. State and Federal Regulations, Generally

ADEM, as the agency responsible for regulating water quality in Alabama, administers the CWA's § 401 certification program as provided by Alabama law.⁵ ADEM established water quality standards for waters which include regulations classifying each location according to use classifications and associated criteria.⁶ Section 401 of the CWA applies when a person, corporation or legal entity seeks a federal permit or license for any activity potentially resulting in a discharge into a body of water in the United States. 33 U.S.C. § 1341(a)(1). Obtaining a license or even renewing a license often takes several years. The process of license renewal beings under the Act by requiring the applicant to first obtain a water quality certification from the state where the discharge originates. Alternatively, the State may waive the certification process. A state may waive its authority by failing or refusing to act upon an application within a reasonable period of time, which should not exceed one year following the receipt of such request. 33 U. S. C. § 1341 (a)(1). Thus, a States certification (or waiver thereof) constitutes an initial prerequisite which APC must take to renew its Federal licences, some of which

⁵ See the Parties' Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005; Ala. Code (1975) §§ 22-22A-4(n), - 5 (10).

⁶ ALA. ADMIN. CODE R. 335-6-10, 11.

expire in 2007.⁷ Specifically, the licenses up for renewal from FERC are those APC projects located on the Coosa River (FERC No. P-2146) and Lake Jordan (FERC No. P-618), Lake Mitchell (FERC No. P-82), and the Black Warrior River Projects (FERC No. P-2165).⁸

If the State elects to act upon an application for certification,⁹ then the State must undertake to make a determination, *inter alia*, whether “such discharge will comply with the applicable provisions of [the sections of the CWA dealing with effluent limits from point sources (§§ 1311 & 1312), water quality standards (§ 1313), national standards of performance for certain categories of sources (§ 1316), and toxic standards (§ 1317)].” 33 U.S.C. § 1341(a)(1). Regulations issued by the U.S. Environmental Protection Agency, instruct that the State is charged with the responsibility for making a predictable determinations regarding whether *reasonable assurances* ensure “the activity [which is the subject of the certification] will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2 (a)(3). The “reasonable assurance” standard, consistent with the CWA’s requirements, requires the evidence presented to

⁷ The purpose of state certification procedural mechanism is to prevent Federal licensing agencies to override a State’s water quality requirements.

⁸ See the Parties’ Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005.

⁹ A State may waive its authority to issue a water quality certification under Section 401. See 33 U.S.C. § 1341(a)(1); *Environmental Defense Fund v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) (“The purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements. A state need not avail itself of this protection. . . . [A] state may make an affirmative decision to waive § 401 certification.”)(emphasis added) (internal citation omitted).

reviewing State Agency must provide sufficient data from which the Agency may conclude with a probable degree of certainty that the water quality standards will be maintained by the licensed applicant and state certifying agencies. *Miners Advocacy Council v. Alaska Dept. of Environ. Conservation*, 778 P.2d 1126, 1138 (Alaska 1989). The CWA “do[es] not necessarily require [the State] to provide absolute certainty that a licenced applicant will never violate State standards” (even if this were possible) rather, the CWA only requires a “reasonable assurance” that standards will be followed in the future. *Id.* A State agency reviewing the matter may conclude “reasonable assurances” exists by considering various types of evidentiary material such as information provided by the applicant, monitoring data from past activity, future plans and developments, the maintenance and repair of the project areas, the addition of new equipment as well as the States’ own monitoring data together with any other relevant information. The State may also include the certification “any conditions which the agency deems necessary or desirable with respect to the discharge of the activity.”¹⁰

B. Alabama Regulations Applicable to the Present Action

Alabama’s water quality standards vary according to the use for which the body of water may be intended. Therefore, ADEM classifies all designated bodies of water into one or more of the following assigned uses categories: Public Water Supply (PWS); Swimming and Other Whole Body Water-Contact Sports (S); and

¹⁰ 40 C.F.R. § 121.2(a)(2), (4).

Fish & Wildlife (F&W). For each use classification, ADEM developed both narrative and numeric criteria designed particularly for each use.¹¹ ADEM's numeric criteria regulates various parameters affecting water quality such as pH levels, temperature ranges, dissolved oxygen levels, bacteria, radioactivity, and turbidity. *Id.* (i.e. For instance, ph ranges may range from 6.0 to 8.5) Likewise, ADEM's narrative criteria describe regulations other acceptable levels regarding the expected condition of the water. For example, narrative criteria may state that "state waters shall be free of floating debris, oil, scum and other floating materials attributable to sewage, industrial wastes..."¹² These detailed criteria are contained within Alabama's Administrative Code. Generally, a State's water quality standards contain regulations set a minimum criteria for ph, temperture levels, dissolved oxygen levels and other element which may effect water quality. The regulation also address "backsliding" or anti-degradation policies preventing high quality waters from becoming minimum quality waters. Thus, high quality waters, which surpass applicable criteria, are under some circumstances, held to a higher standard than minimum quality waters. 40 C.F.R. § 131.6 (d); Ala. Admin Code r. 335-6-10-.04 - .012. Each State develops its own water quality standards which are later submitted for approval to the U.S. Environmental Protection Agency

¹¹ These specific criteria are based on ADEM's "present scientific knowledge, experience and judgment." ALA. ADMIN. CODE R. 335-6-10-.01(3). *See* ALA. ADMIN. CODE R. 335-6-10-.09(2) (Public Water Supply criteria); 335-6-10-.09(3) (Swimming criteria); 335-6-10-.09(5) (Fish and Wildlife criteria).

¹² ALA. ADMIN. CODE R 335-6-10-.06

(hereinafter "EPA") for approval. 33 U.S.C. § 1313 (a)(3); 40 C.F.R. § 131.4 (a), § 131.5 (a).

In 1992, the EPA approved Alabama's water quality standards pursuant to section 303 of the CWA, 33 U.S.C. § 1313; 57 Fed. Reg. 21087 (May 18, 1992).¹³ In accordance with State and Federal authority, ADEM maintains the responsibility for regulating water quality in Alabama.

C. APC's Hydroelectric Projects and Certification Applications

On July 2, 2004, APC submitted applications to ADEM requesting CWA section 401 water quality certifications from ADEM including: one for the Coosa River Projects (which includes the Weiss, Neely Henry, Logan Martin, Lay, Mitchell, Jordan, and Bouldin developments), and one for the Black Warrior River Projects (which includes the Smith and Bankhead developments).¹⁴ APC submitted the applications included several types of water quality data (including dissolved oxygen data) collected by Alabama Power over a period of more than the required 18 months and had been monitored for several years at each development.¹⁵ With regard to its dissolved oxygen levels, APC demonstrated in excess of a 90% compliance rate at nearly every facility. Additionally, APC

¹³ See the Parties' Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005

¹⁴ See the Parties' Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005; APC Exs. 6, 7.

¹⁵ APC Exs. 6, 7; Hall Deposition at pp. 28-30.

submitted plans to repair existing hydroelectric units and add additional equipment which would enhance dissolved oxygen levels.

As a matter of background, the Weiss development began operation in 1961; Neeley Henry in 1966; Logan Martin in 1964; Lay in 1914; Mitchell in 1923; Jordan in 1928; Bouldin in 1967; Smith in 1961; and Bankhead in 1963. Each development contains one or more hydroelectric generation units.¹⁶

Every number of years, state certifications and Federal licenses must be renewed upon expiration. APC submitted its state certification applications for the projects at issue on July 2, 2004, more than one year prior to this appeal. Each applications includes background information about each APC hydroelectric plant, years of historical water quality data, a water quality monitoring plan, descriptions of proposed monitoring locations and descriptions of actions for improving dissolved oxygen levels in project discharges.¹⁷ APC provided both raw data as well as provided a cumulative analysis summarizing conclusions which could be drawn from the data. In addition to APC's data, ADEM collects its own data regarding dissolved oxygen levels per its own water quality monitoring.¹⁸ APC provided a table summarizing the percentage of time where discharges from the projects resulted in a dissolved oxygen content of 4.0 mg/l or

¹⁶ See the Parties' Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005.

¹⁷ APC Exs. 6, 7.

¹⁸ APC Exs. 11, 12.

greater. For instance, one summary chart depicted the following compliance rate with regard to dissolved oxygen levels located at each project.

Development	Percentage at or above 4.0 mg/l
Weiss (tailrace)	94.7%
Weiss (bypass at catfish farm)	98.6%
Weiss (bypass at sod farm)	89.7%
Neely Henry	96.4%
Logan Martin	94.8%
Lay	96.0%
Mitchell	94.2%
Jordan	99.9 %
Bouldin	98.7%
Smith	81.7 %
Bankhead	99.8 %

In these applications, APC does not propose to construct any new impoundments or dams. Rather APC only seeks to renew its licences with FERC for the continued operations of older developments which have been operating beginning as early as 1914.¹⁹ While APC's application states its intent to perform some maintenance and refurbishment work in connection with the re-licensing of its developments, it does not intend to provide any additional units other than

¹⁹ APC Exs. 16, 17.

those already in existence.²⁰ Following the completion of this refurbishment, the same number of units will exist at the developments as existed prior to the refurbishment. *Id.*

Thereafter, on December 14, 2004, ADEM provided public notice and copies of the applications for water quality certifications on its website.²¹ The notice solicited comments and information from interested parties and copies of the applications could be downloaded from the website or requested from ADEM's Water Quality Branch.²² Per Alabama Rivers's request, ADEM issued a public notice on January 14, 2005, extending the time for the public to submit comments on the applications.²³ While Alabama Rivers filed comments with ADEM concerning the applications; AR failed to submit any comments.²⁴

Thereafter, more than six months following the initial public notice of APC's application for water quality certifications, ADEM issued to APC several CWA § 401 water quality certifications on July 1, 2005. The two at issue are the

²⁰ APC Ex. 6, 7, 16, & 17.

²¹ See the Parties' Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005.

²² APC Ex. 13.

²³ See the Parties' Stipulation of Facts contained in the Pre-Hearing Order issued September 19, 2005; APC Ex. 14, 15.

²⁴ See the parties's stipulation of facts listed in the Pre-hearing Order.

certification for the Coosa River Projects and one the Black Warrior River Projects.²⁵

Following APC's receipt of the required State Certifications, APC filed its license renewal application with FERC on July 28, 2005 for projects located on the Coosa River, Jordan, Mitchell, and Black Warrior River. As part of its application, APC submitted the water quality certifications granted by ADEM.²⁶ Throughout the FERC re-licensing process, FERC considers a broader range of additional water-quality related considerations including concerns for fish, wildlife, endangered species and recreation. For instance, the Federal Power Act permits FERC to consider and impose conditions "for the adequate protections, mitigation, and enhancement of fish and wildlife." FERC gives due consideration to the recommendations from the Alabama Department of Conservation and the U.S. Fish and Wildlife Service. 16 U.S.C. § 803. FERC also examines the applicant's compliance with the Endangered Species Act by consulting with the Fish and Wildlife Service. 16 U.S. C. § 1536 (a).

D. The Hydroelectric Plants and ADEM Certifications

The Coosa River, Jordan, Mitchell, and Black Warrior River Projects currently provide approximately 1,164 megawatts of hydroelectric generating

²⁵ See the parties's stipulation of facts listed in the Pre-hearing Order; APC Exs. 1, 2.

²⁶ See the parties's stipulation of facts listed in the Pre-hearing Order.

capacity.²⁷ The location and physical description of the hydro-power developments and associated monitoring locations which comprise the Coosa River, Jordan, Mitchell, and Black Warrior River Projects are as stated in APC's applications for water quality certification.²⁸

The certifications impose a dissolved oxygen limitation at each development, requiring that operation of the individual developments, including the operation of the turbines, shall be managed such that no less than 4.0 mg/l of dissolved oxygen shall be maintained at all times at the monitoring locations prescribed in the certifications.²⁹ This limitation requires 4.0 mg/l to be maintained at the monitoring locations while water is discharged.. The limitation does not apply to APC when it is not discharging water.³⁰

Pursuant to the certifications, ADEM requires APC to develop and implement some measures to increase the dissolved oxygen downstream of project discharges through structural and/or operational modifications at the project within 18 months of issuance of new licenses for the projects by FERC.³¹ To meet this requirement, the certifications contain monitoring and reporting provisions

²⁷ See the parties's stipulation of facts listed in the Pre-hearing Order.

²⁸ See the parties's stipulation of facts listed in the Pre-hearing Order.

²⁹ See the parties' stipulation of facts; APC Exs. 1, 2.

³⁰ Sisk Deposition at 35-36, 42, 134-35.

³¹ See the parties's stipulation of facts listed in the Pre-hearing Order; APC Exs. 1, 2.

requiring Alabama Power to install a monitor at each development to measure dissolved oxygen and temperature.³² APC is in the process of (or has plans to) install aeration systems at Weiss, Neely Henry, Logan Martin, and Smith dams within 18 months of new license issuance by FERC in an effort to increase dissolved oxygen levels below these developments during periods of generation.³³ Required monitoring records dissolved oxygen and temperature at sixty-minute intervals during periods of generation at certain specified months of the year.³⁴ APC provides adequate and frequent maintenance and calibration of the monitors to assure proper operation. *Id.* APC's monitoring program extends for three years. *Id.* As part of the certification and license renewal process, APC must submit dissolved oxygen and temperature monitoring reports to ADEM within ninety days following the end of each annual monitoring period. *Id.* Following the final year of monitoring, APC submits the complete set of data to ADEM for review and comment. *Id.* Following this three-year monitoring period, the certifications assess the impact of APC's operation on Alabama's water quality standards based on the results of the monitoring. *Id.* As part of the assessment, APC must furnish to ADEM upon request other available data and information not expressly required by the monitoring plan. *Id.* If the assessments do not indicate substantial

³² See the parties' stipulation of facts; APC Ex. 1 & 2

³³ See the parties's stipulation of facts listed in the Pre-hearing Order.

³⁴ APC Exs. 1, 2.

compliance with Alabama's water quality standards, ADEM requires APC to develop and implement measures ensuring compliance with the 4.0 mg/l criterion through structural and/or operational modifications at the projects. *Id.* Maintenance of the 4.0 mg/l criterion for ninety-five percent of the time is considered substantial compliance by ADEM.³⁵

In addition to the monitoring performed by APC, ADEM periodically conducts its own monitoring of waters in Alabama, including the APC developments.³⁶ ADEM collects data regarding both dissolved oxygen levels and temperature.³⁷ All segments of the Coosa River and Black Warrior River are classified by ADEM's regulations as falling into one or more of the following use classifications: Public Water Supply, Fish & Wildlife, and/or Swimming and Other Whole Body Water-Contact Sports.³⁸ The classification(s) for each specific river segment are set out at ALA. ADMIN. CODE R. 335-6-11-.02(6).³⁹

It is undisputed that the applicable dissolved oxygen criteria for the Public Water Supply, Fish & Wildlife, and/or Swimming and Other Whole Body Water-

³⁵ See the parties's Stipulation of Facts contained within the Prehearing Order.

³⁶ Sisk Deposition at 18-19, 86-89; APC Ex. 11, 12, 25.

³⁷ Sisk Deposition at 18-20, 86-89.

³⁸ See the parties stipulation of facts listed in the Prehearing Order.

³⁹ See the parties's stipulation of facts listed in the Pre-hearing Order.

Contact Sports classifications is identical and provides:

“For a diversified warm water biota, including game fish, daily dissolved oxygen concentrations shall not be less than 5 mg/l at all times; except under extreme conditions due to natural causes, it may range between 5 mg/l and 4 mg/l, provided that the water quality is favorable in all other parameters. The normal seasonal and daily fluctuations shall be maintained above these levels. **In no event shall the dissolved oxygen level be less than 4 mg/l due to discharges from existing hydroelectric generation impoundments.** All new hydroelectric generation impoundments, including addition of new hydroelectric generation units to existing impoundments, shall be designed so that the discharge will contain at least 5 mg/l dissolved oxygen where practicable and technologically possible. The Environmental Protection Agency, in cooperation with the State of Alabama and parties responsible for impoundments, shall develop a program to improve the design of existing facilities.”⁴⁰

(Emphasis Supplied).⁴¹

The certification for the Coosa River, Mitchell and Jordan Projects and the certification for the Warrior River Project contain substantially the same dissolved oxygen limitation and compliance schedule for each development:

“The operation of the ... development, including the operation of the turbines, shall be managed such that no less than 4.0 mg/l of dissolved oxygen (D.O.) shall be maintained at all times at the monitoring locations prescribed herein. Management required to

⁴⁰ See the parties stipulation of facts. ALA. ADMIN. CODE R. 335-6-10-.09(2)(e)(4), (3)(c)(4), (5)(e)(4).

⁴¹ The U.S. Environmental Protection Agency has approved Alabama's water quality standards, including the 4.0 mg/l standard for discharges from existing hydroelectric generation impoundments. See the parties stipulation of facts; 37 Fed. Reg. 5260, 5260-61 (March 11, 1972) (proposed approval) (APC Ex. 3); 37 Fed. Reg. 28775, 28777 (Dec. 29, 1972) (final approval) (APC Ex. 4); 57 Fed. Reg. 21087 (May 18, 1992) (APC Ex. 5).

maintain the 4.0 mg/l dissolved oxygen criterion shall be implemented. . . . Alabama Power shall develop and implement measures to increase the D.O. downstream of project discharges to comply with the limitations herein through structural and/or operational modifications at the project within 18 months of issuance of a new license for the [project] by the Federal Energy Regulatory Commission (FERC).”

As reflected in the chart above, in a minority of instances, APC’s monitoring results submitted to ADEM have shown some dissolved oxygen concentrations below 4.0 mg/l.⁴²

III. STANDARD OF REVIEW

The provides that the “burden of going forward with the evidence shall be on the party requesting the hearing. The hearing shall be conducted as a de novo proceeding.” ALA. ADMIN. CODE R. 335-2-1-.14 (6). The Rules also provide “a Hearing Officer may render an ‘accelerated recommendation”, also entitled by the Rule as “Summary Judgment.” ALA. ADMIN. CODE R. 335-2-1-.22.⁴³ The Rule states:

(a) The Commission or Hearing Officer, upon motion of any party or sua sponte, may at any time render an accelerated recommendation in favor of the petitioner or the respondent as to all or any part of the proceeding without further hearing or upon such limited additional evidence, such as affidavits, as the Commission or Hearing Officer may require, if no genuine issue of material fact exists and a party is entitled to [a] decision as a matter of law as to all or any part of the proceeding.

⁴² See the parties’s stipulation of facts listed in the Pre-hearing Order.

⁴³ *Doug Palmer and the Friends of Big Canoe Creek v. Ala. Dept. Of Environ. Management*, EMC Docket No 99-25, 2000 WL 33158702, p. 4.

(b) Before any motion is granted in accordance with this rule, all parties shall be given a reasonable opportunity to oppose such motion.

The initial burden is upon the moving party to make a prima facie showing that no genuine issue of material facts exists and that it is entitled to a judgment as a matter of law. Where the moving party makes a prima facie showing, the non-movant must come forward with specific material facts contradicting and overcoming this motion. *Ex parte Martin*, 733 So. 2d 392, 394 (Ala. 1999).

The law provides that when interpreting an agency's rules, policies and regulations, deference must be given to an agency's interpretation of its own rules. *Brunson Constr. & Environ. Serv. Inc. v. City of Pritchard*, 664 So. 2d 885, 890 (Ala. 1995).

IV. ISSUES PRESENTED⁴⁴

A. Do Petitioners possess the standing to bring this action against the respondents?

B. Where the Petitioners make several procedural challenges⁴⁵

⁴⁴ Parties attempted to set forth all relevant issues in the Pre-Hearing Order of September 19, 2005.

⁴⁵ Specifically, Petitioners contend

(1) ADEM was obligated to make findings of fact and conclusions of law to support the certification;

(2) ADEM was obligated to produce a docket or compile an indexed record during the certification process; and

(3) ADEM was obligated to give additional time for public comment during the

claiming that prior to ADEM's issuance of the certifications at issue, ADEM should have imposed various procedural requirements, are those issues now moot? ⁴⁶

C. (1) Did the certifications at issue provide reasonable assurances that APC's hydroelectric generating units would comply with applicable water quality standards.⁴⁷ (2) Does Alabama's water quality standard require APC to comply with water quality standard during periods of generation as well as non-generation?

D. Is ADEM required to impose a higher a dissolved oxygen standard greater than the minimum of 4.0 mg/l upon APC? ⁴⁸

certification process.

⁴⁶ The Parties were unable to agree upon a statement of the second issue presented. Therefore, both statements contained in the Pre-Hearing order are set forth as follows:

Petitioners Statement of Issue Three: Is the Department required to assure that APC complies with water quality standards during periods of non-generation as well as generation?

The Department's and Alabama Power's Statement of Issue Three: Whether Alabama Power's applications and other available data provided the Department with reasonable assurance that the proposed discharges from Alabama Power's hydroelectric generating units would comply with applicable Alabama water quality standards following the issuance of the new FERC licenses?

⁴⁷ The manner in which the Petitioner's phrase the third issue would make APC responsible for other unknown third parties who might effect water quality during periods of non- generation. See footnote 47.

⁴⁸ The Parties could not agree jointly agree upon a statement defining the fourth issue in the Pre-hearing Order. The parties phrased this issue as follows:

Petitioners Statement of Issue Four: Does the Department have discretion to prescribe a dissolved oxygen standard greater than 4.0

E. Do the refurbishment of generation units, or maintenance work on some of the four existing units constitute the addition of "new" units, thereby requiring a higher 5 mg/l dissolved oxygen standard.⁴⁹

IV. CONCLUSIONS OF LAW

A. Petitioners Lack Standing in This Appeal

ALA. ADMIN. CODE R. 335-2-1-.02 *et seq.* authorizes only persons "aggrieved" or adversely affected by an action of ADEM to seek review of that action APC and ADEM argue the Petitioners have not been "aggrieved" and therefore have no standing to bring this action.⁵⁰

mg/l if it finds that a higher standard is necessary to protect beneficial users?

The Department and Alabama Power's Statement of Issue Four: Whether Petitioners can bring a collateral attack on the Department's duly-promulgated and longstanding regulation establishing a 4.0 mg/l dissolved oxygen standard for existing hydroelectric generating impoundments as part of this quasi judicial proceeding.

Petitioner's issue, is based upon an inaccurate assumption for which is submitted no proof, that is Petitioners assumes ADEM possessed knowledge that an increased dissolved oxygen level was "necessary."

⁴⁹ The parties could not agree on the Fifth issue as well. The respective issues were set forth as follows by the parties:

Petitioners' Statement of Issue Five: Whether the refurbishment of generation units constitutes the addition of new unites subject to a 5 mg/l DO standard pursuant to .ALA. ADMIN. CODE R 335-6-10-.09 (5)(e)(4).

The Department and Alabama Power's statement of Issue Five: Whether maintenance work on some of the components of four existing units constitutes the "addition of new hydroelectric generation units to existing impoundments?

⁵⁰ Standing is a jurisdictional requirement which must be reviewed at all stages of the case. *See Auburn Medical Center v. Alabama State Health Planning and Development Agency*,

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Specifically, ALA. ADMIN. CODE R. 335-2-1-.03 states:

Right to Hearing. Upon a proper request made and filed in accordance with Rule 335-2-1-.04, *any person aggrieved* by an administrative action of the Department [defined as ADEM]⁵¹ shall be entitled to a hearing before the Commission or its designated Hearing Officer.”

(Emphasis supplied).

The Alabama Administrative Code defines “aggrieved” as “having suffered a threatened or actual injury in fact.” ALA. ADMIN. CODE R. 335-2-1-.02 (b).

Additionally, the rules provide with regard to a request for a hearing:

(1) Any person *aggrieved* by an administrative action of the Department, other than the issuance of any rule or regulation or emergency order, may file with the Commission a request for a hearing to contest such action within 30 days of such action. ...

ALA. ADMIN. CODE R. 335-2-1-.04 (1) (emphasis supplied).

Federal and state law defines “aggrieved” as including at least one member of the Petitioner’s organization who suffers a concrete injury in fact by virtue of the contested administrative action. Alabama Code (1975) § 22-22A-7(c).

Aesthetic, environmental, or recreational concerns alone do not confer “aggrieved party” status; rather, complainant must demonstrate that adverse agency action somehow affected his or her interests. *Save Our Dunes v. Alabama Dept. of Environmental Management*, 834 F.2d 984 (11th Cir. 1987). In *Save Our Dunes* the 848 So. 2d 269, 273 (Ala. Civ. App. 2002).

⁵¹ ALA. ADMIN. CODE R. 335-2-1-.02 (d) states that the term “ ‘Department’ means the Alabama Department of Environmental Management, established by the Alabama Environmental Management Act, Code of Alabama 1975, §§ 22-22A-1 to 22-22A-16.”

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Eleventh Circuit held Civic-minded and environmental organizations were not "aggrieved parties" for purposes of challenging actions taken by the Alabama Department of Environmental Management in granting permit application for developments along coastline, and thus, organizations did not have constitutionally cognizable "property" interest under state law subject to Fourteenth Amendment protection. The Eleventh Circuit held that although the organizations claimed they used and enjoyed coastal beaches, this allegation standing alone failed to demonstrate how agency's actions adversely affected their legal or equitable interests.

Since that time, the Alabama Supreme court, two years later in 1990, disagreed in part with *Save Our Dunes* and narrowed the Eleventh Circuit's holding stating that a citizen's statutory right to appeal an ADEM decision should be interpreted "broadly" However, the Court did not go so far as to explicitly overrule *Save our Dunes*, nor did the Court specifically set any parameters for determining under what circumstances standing is created.

A majority of courts generally follow a three part test to determine standing in the case of an organization purporting to represent a group of concerned citizens.

- (1) The organizations' members must otherwise have standing to sue in their own right." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977).
- (2) The petitioner must have some legally protectable interest and suffered

an injury in fact. At minimum, the petitioner "must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (quotations and citations omitted). The Alabama Supreme Court adopted the associational standing test in *Bama Budweiser v. Anheuser Bush*, 783 So. 2d 792, 795 (Ala. 2000).

(3) In addition to stating an actual concrete particularized injury, a petitioner must also demonstrate a "causal connection between the injury and the conduct complained of which would likely be addressed be addressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560- 61.

An organization, however, may not base its standing on generalized grievances (that is, injuries suffered by the public generally) or on political disagreement. *Friends of Play Ball Basin*, EMC Docket No. 97-13, at p. 8; *Fowler v. ADEM*, EMC Docket No. 97-16, 1997 WL 529531, August 19, 1997, at p. 5 (holding the Commission will not adjudicate abstract questions of wide public significance which amount to nothing more than a generalized grievance pervasively shared and most appropriately addressed in legislative bodies."). See also *Warth v. Seldin*, 422 U.S. 490, 499 (holding "when the asserted harm states a generalized grievance shared in substantially equal measure by all or a large class of citizens, that harm

alone normally does not warrant the exercise of jurisdiction. *Valley Forge v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982).

The party invoking jurisdiction, bears the burden to establish it. *See Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136. Courts have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state a “case or controversy.” *Lujan*, 504 U.S. at 573-74, 112 S. Ct. at 2143. *See also, Legal Environmental Assistance Foundation, Inc. v. U.S. E.P.A.*, 400 F.3d 1278 (11th Cir. 2005) . Thus, only a party, meeting the definition of an “aggrieved” person, possess the right to challenge and to appeal final actions taken by ADEM.⁵²

⁵² While the Administrative Rules may be interpreted broadly, at minimum the Petitioner, representing an organization, must produce at least one plaintiff in that organization with some legally recognizable injury other than any member of the general public might allege. In *Marshall Durbin & Co. of Jasper, Inc. v. Alabama Dep't of Env'tl. Management, Inc.*, (Ala. Ct. App., 1987), *cert. granted*, No. 86-1214 (Ala. Oct. 13, 1987), the court found that plaintiff, a company which sought to challenge rate hikes purportedly caused by the issuance of a sewage emission permit, “lacks statutory standing to challenge the issuance of the new permit because it is unable to show that the injury which it sustained was directly inflicted by an administrative action. *See*, Ala. Code (1975) § 22-22A-7(c). In *Cox v. Poer*, 45 Ala. App. 295, 229 So. 2d 797 (1969), the court set forth that an “aggrieved” party, “... in addition to showing the proximity of one property to the other, **requires proof of the adverse affect** the changed status of the re-zoned property has, or could have, on the use, enjoyment and value of the property of the protestant...” *Id.* at 297, 229 So. 2d at 798-99 (emphasis supplied). *See also Crowder v. Zoning Bd. of Adjustment*, 406 So. 2d 917, 918 (Ala. Ct. App.) (“party aggrieved” must show “the adverse effect the changed status of the re-zoned property has, or could have on the use, enjoyment, and value of his own property.”) *cert. denied*, 406 So.2d 919 (Ala.1981). *See also, Board of Adjustment v. Matranga, Hess & Sullivan*, 51 Ala. App. 154, 283 So. 2d 607 (Ala.Civ.App.1973). As some Alabama land use cases suggest, aesthetic, environmental, or

The Petitioners allege standing to bring this action relying upon the following facts:

- Alabama Rivers filed comments with ADEM following its notice of applications for water quality certifications published on December 14, 2004;
- members of both Alabama Rivers and American Rivers use the affected waters;
- the allegation that Alabama Rivers and American Rivers' members would be adversely affected by ADEM's issuance of water quality certifications which did not assure the relevant hydro-power projects compliance of applicable water quality standards for the remaining time under the FERC issued licenses; and
- Both Alabama Rivers and American Rivers are active participants in the underlying Federal Energy Regulatory Commission re-licensing proceedings.

In the present case, the Petitioners attempted substantiate standing by

recreational concerns alone do not confer "aggrieved party" status; the complainant must show that an adverse agency action somehow affected his or her interests. In one decision the Supreme Court of Alabama held that an adjacent property owner who owned a condominium along the coast was not an "aggrieved" party under Ala. Code (1975)§ 11-52-81. In that case, the court held where a plaintiff complained that he was deprived of a view of the Gulf Coast, the court held he failed to show the existence of a legal right which requires protection. *Gulf House Ass'n, Inc. v. Town of Gulf Shores*, 484 So. 2d 1061, 1063-64 (Ala. 1985).

relying upon the testimony of a single witness, Ms. April Hall (hereinafter "Hall"), a paid employee of American Rivers. Hall's testimony provides an inadequate basis for standing. Hall, pursuant to the instructions of her superiors, refused to specifically identify even one member of either Alabama Rivers and American Rivers who suffered an actual or threatened injury as a result of the certifications issued to APC. Instead, Hall made only generalized statements about the members, their addresses and zip codes. Hall testified attempted to state she knew one unidentified individual who suffered damage, but the "individual" she referred to was herself. Hall only offered testimony regarding the standing of Alabama Rivers Alliance, not American Rivers.

The Petitioners contend no legal requirement exists mandating the identify any specific individual, or specific injury or a particularized connections between the conduct complained of and the injury. Petitioners contend that mere allegations are sufficient, so long as its function and purpose represents a class of persons would otherwise have standing to sue. While the corporate purpose of both Petitioners represent a group of Alabama citizens, the Petitioners failed to offer even one member substantiating an actual injury, thus it is impossible to analyze whether any of the members are capable of suing in their own right.⁵³ Hall stated

⁵³ The right to sue is not an automatic right created by simply joining an environmental organization. For example, under most circumstances an individual must be of a certain age of

some members live in the same zip codes as the Coosa and Black Warrior Rivers but offered no evidence of any individual's qualifications, injury or loss caused by acts of APC resulting from ADEM's issuance of the certification.

Petitioners failure to identify a single person, a particularized injury and a causal connection between the acts of ADEM and APC on the affected regions, fails to establish standing. Vague allegations of unidentified individuals who potentially, but not actually, who might have been impacted fails to comply with the legal authority cited herein requiring the identification of someone capable of suing, a particularized injury, caused by ADEM or APC, which could be remedied by a favorable decision. Even the cases cited by the Petitioners included at least one identifiable individual, an particularized injury with a causal connection between the injury and the acts complained of which could be remedied by a favorable decision. In one case the court held "[w]e need only find that one petitioner has standing to allow a case to proceed." *Public Citizen v. Dept. of Transportation*, 316 F. 3d 1002, 1014 - 13 (9th Cir. 2003). *See also Sierra Club v. Simkins Industries, Inc.*, 847 F. 2d 1109 (4th Cir. 1988)(wherein the Petitioners admit that at least one plaintiff demonstrated an injury).

majority, legally competent and a citizen of the United States. Moreover, that individual must be able to articulate and prove some legally recognizable injury. Therefore, most courts have held in order for an organization to establish standing, at least one member must be identified as a plaintiff.

Applied to the instant case, Hall failed to offer testimony regarding the standing of American Rivers. Therefore, no standing exists in this case for American Rivers. With regard to Alabama Rivers Alliance, the only possible "injury" Hall expressed involved one incident when as Hall canoed around the Jordan dam last summer, she observed an area of water with some "skunky brown stuff", foam and debris where she also inhaled a strong, unpleasant odor. Hall admitted she is not a water quality expert and offered no proof of any causal connection between APC's activities or the level of dissolved oxygen caused to these conditions. Nor did Hall offer any testimony that altering the dissolved oxygen levels would resolve these conditions. Nor did she offer any evidence that challenging dissolved oxygen levels with ADEM would remedy Lake Jordan of "skunky brown stuff." Moreover, Hall left open the possibility that the conditions she observed could have equally been caused by any number of other conditions, such as third parties, or acts of God for which neither ADEM or APC are responsible. Hall presented no evidence regarding her precise location or that APC's project impacted the area. Hall's vague testimony assumes, without supporting evidence, that APC is responsible for every water quality issue along the entire river area below the Jordan dam. When proof fails to demonstrate that one possibility is more probable than another, the proof equates to nothing more than

legal speculation. Thus, the conclusion that dissolved oxygen levels may possibly have caused the conditions observed by Hall fails standing on behalf of Alabama Rivers.

Assuming arguendo, standing had been established, the petition still fails to identify any genuine issue of material fact which could be resolved by a hearing.

B. Petitioners Procedural Challenges To The Certification Process Are Moot, Without Merit or Were Remedied In This Appeal.

First, Petitioners contend ADEM should have allowed more time for public comment. Alabama Rivers requested additional time to comment and ADEM extended the deadline, wherein Alabama Rivers did have an opportunity to submit comments. American Rivers however elected not to submit comments. If during the course of the year APO's certification remained pending with ADEM, American Rivers failed to voice its opinions, no evidence or authority mandated ADEM grant members of the public additional time.

Next, Petitioners contend Alabama's Administrative Procedure Act required ADEM to provide an index of records regarding the certifications as well as make detailed "Findings of Fact and Conclusions of Law." This position is without merit. Simply stated, the AAPA specifically exempts ADEM from the provisions relied

upon by the Petitioners.⁵⁴

Moreover, Petitioners contention they were deprived of an index of all records was remedied in this de novo proceeding. During the course of discovery in this case, ADEM provided the Petitioners with a general index as well as an opportunity to inspect and copy documents related to the certifications at issue. The Commission's rules provide for a de novo standard of review for hearings, like this one, challenging an administrative action by the Department. ALA. ADMIN. CODE R. 335-2-1-.14(6) (2005). Because the Commission afford aggrieved persons a de novo hearing, ADEM's alleged procedural errors are moot. *See Legal Environmental Assistance Foundation, et al. v. ADEM*, EMC Docket No. 03-09, 2004 AL ENV LEXIS 3, June 29, 2004, at p. 27 ("The EMC opine[s] t a de novo hearing renders procedural errors irrelevant and moot."); *Marshall County Environmental Action Group, Inc. et al. v. ADEM*, EMC Docket No. 96-21, 1997 WL 63572, Feb. 11, 1997, at p. 8 (holding "because this is a de novo hearing, the Commission must consider the merits of the substantive issues raised, not the procedures used below. Any error that might have been committed by a previous decision maker (here ADEM) is irrelevant in a de novo proceeding"); *West Bay Watch, Inc. v. ADEM*, EMC Docket No. 98-21, 1999 WL 86944, Feb. 16, 1999, at

⁵⁴ Ala. Code (1975) § 41-22-27(f) exempts the Alabama Department of Environmental Management from the provisions of Ala. Code (1975) §§ 41-22-12 through 41-22-19.

p. 5 (“[P]rocedural errors by the Department are irrelevant.”). Thus, Petitioners’ procedural challenges are irrelevant, moot, and dismissed.

Even if Petitioners’ procedural challenges were not irrelevant, Petitioners contention that ADEM was required to issue findings of fact and conclusions of law lacks legal merit.⁵⁵ The regulations only require such findings for Commission decisions, not ADEM decisions. *See* ALA. ADMIN. CODE R. 335-2-1-.17(3).⁵⁶ Finally, Petitioners demand additional opportunity for public participation.⁵⁷ The facts demonstrate Petitioners had ample opportunity to make their views known and provide relevant information, and in fact ADEM extended the time for public comment at American Rivers’s request.⁵⁸ Regardless, Petitioners provide no statutory or cause authority for such a demand.

⁵⁵ Petition for Hearing at ¶ 59.

⁵⁶ Petitioners make a new argument in their summary judgment response that ADEM is subject to two provisions of the Alabama Administrative Procedures Act (AAPA)—one dealing with findings of fact and conclusions of law (ALA. CODE § 41-22-16(b)) and the other setting forth a standard for judicial review (ALA. CODE § 41-22-17(c)). Petitioners’ Response at ¶ 57. These two provisions have no application here, however, because the AAPA specifically exempts ADEM from these two provisions cited by Petitioners. ALA. CODE § 41-22-27(f) (exempting ADEM from the provisions of ALA. CODE §§ 41-22-12 through 41-22-19).

⁵⁷ Petition for Hearing at ¶ 90.

⁵⁸ APC Ex. 14.

C. (1) ADEM Acted Within Its Statutory Discretion in Determining Whether APC Provided "Reasonable Assurances" of Future Compliance With State and Federal Water Quality Standards.

Petitioners contention APC failed to provide ADEM with "reasonable assurances" of future compliance with State and Federal water quality standards is without factual or legal merit.

In essence, Petitioners appear to argue that because APC has not achieved dissolved oxygen levels of 4.0 mg/l or higher 100% of the time, thus the "reasonable assurances" standard has not been met.

While, ADEM's policy requires a maintenance of a dissolved oxygen level of 4.0 mg/l o regarding discharges from existing hydroelectric generation impoundments, it is within ADEM's authority to determine when APO has "substantially complied". Moreover, ADEM could consider, and did consider, future plans, pending improvements and other matters before issuing the certifications. The requirements for certification do not mandate 100% past compliance, only a "reasonable" prediction that APC will comply with the 4.0 standard in the future. ADEM concluded that all available evidence provided reasonable assurances that future discharges would comply with the 4.0 mg/l

standard.⁵⁹ Water quality certifications reviews interpret past data in order to determine a probable *prospective* and *predictive* future result from further discharges. The CWA anticipates that generally some uncertainties exist when predicting the precise impacts of a proposed activity. In order to allow for flexibility to adapt to any unforeseen events, certifications often include requirements to conduct future monitoring and the ability to adapt with future monitoring results. *Port of Seattle*, 90 P.3d at p. 676. The fact that the certification mandates ADEM's ability to conduct future monitoring and the some discretion in enforcement of CWA standards, provides additional support for the conclusion that the State has been provided reasonable assurance of compliance with future water quality standards. By granting APC's certification, ADEM determined the evidence provided sufficient reasonable assurances that APC's future discharges will meet applicable water quality standards, a determination supported by the

⁵⁹. State and Federal law charges ADEM with the responsibility to determine, consistent with the CWA, § 401 whether "there is a *reasonable assurance* that the activity will be conducted in a matter which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3). This "reasonable assurance" standard is consistent with the Clean Water Act's requirements and reflects an appropriate degree of certainty to require of license applicants and state certifying agencies. See *Miners Advocacy Council v. Alaska Dept. of Environmental Conservation*, 778 P.2d 1126, 1138 (Alaska 1989). Section 401 "do[es] not necessarily require [the State] to provide absolute certainty that permittees will never violate state standards, assuming this sort of guarantee is even possible." *Id.*; see also *Port of Seattle v. Pollution Control Hearings Board*, 90 P.3d 659, 676 (Wash. 2004) ("Clearly, the 'reasonable assurance' standard does not require absolute certainty.").

record.⁶⁰ ADEM's premised it's decision by multiple years (over a decade in some cases) of water quality data collected by both ADEM and APC.⁶¹ The data demonstrated that previous dissolved oxygen levels were maintained at or above 4.0 mg/l the vast majority of the time.⁶² In the limited instances where historical data demonstrated dissolved oxygen levels temporarily fell below 4.0 mg/l, the certifications impose new limitations on APC, together with specific compliance schedules to prevent future deviations. Under the compliance schedule espoused in the certifications, ADEM requires APC to develop and implement measures increasing dissolved oxygen levels downstream of project discharges through structural and/or operational modifications at the project within 18 months of issuance of new licenses for the projects by FERC.⁶³ To meet this requirement, APC modifications include the installation of aeration systems at Weiss, Neely Henry, Logan Martin, and Smith dams within 18 months of new license issuance by FERC resulting in an increase in dissolved oxygen levels below these developments

⁶⁰ See Sisk Deposition at 28-29; APC Exs. 1 & 2.

⁶¹ APC Exs. 6, 7, 11 (ADEM Water Quality Data for Coosa Reservoir from 1990 to 2004), 12 (ADEM Water Quality Data for Warrior from 1990 to 2003).

⁶² APC Exs. 6, 7.

⁶³ See the Parties' Stipulation of Facts.

during periods of generation.⁶⁴ The type of aeration system that APC installs at its units (called a draft tube aeration system) is an industry-accepted and proven technology for increasing dissolved oxygen levels in project discharges.⁶⁵ Furthermore, FERC (the agency responsible for licensing the operation of hydro projects) has recognized and based its own licensing decisions on the effectiveness of these aeration systems used by Alabama Power. *See* Order Amending License, 104 FERC ¶ 61,216 (2003) (FERC order amending license for Alabama Power's Martin Dam based on "proven effectiveness" of draft tube aeration system installed at the project). Petitioners offer no evidence to disputing the effectiveness of these systems.

Further, to ensure that these systems are effective, the certifications require APC to monitor water quality over three years, report the results to ADEM, provide any other data and information ADEM requests, and take additional action if dissolved oxygen levels are not achieved.⁶⁶ In addition to this three-year period of intensive monitoring, ADEM conducts its own water quality monitoring while the

⁶⁴ Hall Deposition at 32-33.

⁶⁵ APC Ex. 23 at 6-88 – 6-102; APC Ex. 6 at 34 (describing use of draft tube aeration at Logan Martin).

⁶⁶ APC Ex. 1 & 2.

license is in effect.⁶⁷

Thus, the record supports the conclusion ADEM had sufficient evidence to conclude APC produced "reasonable assurances" that future discharges would meet and exceed the 4.0 mg/l standard. This assurance is demonstrated by numerous facts, including:

- (1) historical data showing that Alabama Power meets and exceeds the 4.0 mg/l dissolved oxygen limitation the vast majority of the time;
- (2) the requirements to make structural and/or operational changes to meet the 4.0 mg/l limitation going forward;
- (3) the historical track record of draft tube aeration in improving dissolved oxygen levels;
- (4) the requirement to intensively monitor discharges for three years and submit an assessment to the Department;
- (5) the requirement to adapt the structural and/or operational changes to achieve compliance, if needed based on the assessment; and
- (6) the Department's continued monitoring program throughout the term of the license.

Given the inherent prospective nature of a water quality certification, ADEM

⁶⁷ Sisk Deposition at 18-19, 86-89; APC Exs. 11, 12, 25.

acted within its discretion in making the determination that reasonable assurances were provided.⁶⁸

(2) ADEM's Is Only Required To Apply the 4.0 mg/l Dissolved Oxygen Standard During Periods of Generation.

Petitioners' contend that the certifications should "assure that APC complies with water quality standards during periods of generation *and* non-generation."⁶⁹

Petitioners rely primarily on the United States Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), a case involving water quality standards of the State of Washington.

Petitioners use rely upon *PUD No. 1* to argue "[hydro projects] in their entirety, not just the discharges during generation, must comply with all water quality standards, including designated beneficial uses."⁷⁰ The result of implenting such a standard would be to demand that ADEM require APC to release continuous minimum flows from its dams.⁷¹

⁶⁸ See, e.g., *Port of Seattle*, 90 P.3d at pp. 676 - 677 ("The inherent predictive nature of a § 401 certification cannot be avoided. . . . [the certifying agency] may rely on future submissions of revised plans, reports, and studies, so long as their implementation and anticipated outcome meet the reasonable assurance test.").

⁶⁹ Pre-Hearing Order at 12.

⁷⁰ Pre-Hearing Order at 13.

⁷¹ See Petition for Hearing at ¶¶ 84-89 ("Although the certifications do not expressly require minimum flow schedules, the necessity of minimum flow schedules is implied because

Petitioners' arguments fail are without merit. First, the plain statutory language of Alabama's regulation which states in pertinent part:

"In no event shall the dissolved oxygen level be less than 4.0 mg/l due to **discharges** from existing hydroelectric generation impoundments." ALA. ADMIN. CODER. 335-6-10-.09(2)(e)(4), (3)(c)(4), (5)(e)(4) (emphasis added). Clearly, the language of the regulations only apply when the operator "discharges" water (either to generate electricity or through the spillway). The regulations do not address required dissolved oxygen standards in any other circumstance.⁷² Similarly, the CWA, § on 401's instruction provides that States certify that "such **discharge** will comply with [water quality standards]." 33 U.S.C. § 1341(a)(1) (emphasis added). Petitioners cite to no Alabama water quality standard or other regulation mandating that these provisions include periods when no discharges from the hydroelectric units are produced. As previously discussed, ADEM's interpretations of its own regulations must be given deference where ADEM possesses the discretionary authority. The regulations require 4.0 mg/l to be maintained in discharges from existing hydroelectric generation impoundments, like those at issue here, only when

meeting the appropriate DO standards will plainly require APC to release minimum flows below the dams"). *See also* Jöbsis Deposition at 32.

⁷² Sisk Deposition at 35-36, 42, 134-35.

the operator is discharging water (either to generate electricity or through the spillway); the limitation does not apply when water is not discharged. Sisk Deposition at 35-36, 42, 134-35. *Biodiversity Legal Foundation*, EMC Docket No. 01-01, at p. 3.⁷³

Second, Petitioners overstate the Supreme Court's holding in *PUD No. 1 of Jefferson County*. In that case, the Supreme Court held only that a State's water quality certification under Section 401 "may" require compliance with both the designated use classification and the applicable criteria, not what a state "must" require. See *PUD No. 1 of Jefferson County*, 511 U.S. at 715 ("[T]he State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards."). Nothing in *PUD No. 1 of Jefferson County* mandates a State to go above and beyond the specific limitations set out in its regulations. In addition, the *PUD No. 1 of Jefferson County* case is distinguishable. In *PUD No. 1 of Jefferson County*, the court upheld the minimum flows imposed by the State of Washington because the proposed activity involved the construction of a new dam which altered existing stream flows. *Id.* at 718-720. The State found, and the Supreme Court agreed, that minimum flows were justified by the State's anti-degradation policy which protected "existing uses." *Id.* at 719. In contrast,

⁷³ Because the Department was correct in its decision not to impose a dissolved oxygen limitation on Alabama Power when it is not discharging, the ALJ need not decide whether that "non-generation" standard would be or should be 4.0 mg/l or 5.0 mg/l.

the present case, APC does not propose building new dams, it only seeks to renew licenses and continue operation of existing dams. The “existing uses” of the Coosa and Warrior Rivers, therefore, include the impoundments and the current conditions below them. 40 C.F.R. § 131.3(e) (emphasis added) (“Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.”). Thus, Alabama’s anti-degradation policy—which is designed to protect “[e]xisting in stream uses and the level of water quality necessary to protect the existing uses” does not justify changing the current flow below the existing dams at issue here, which were in operation prior to November 28, 1975. ⁷⁴ Finally, Alabama law gives ADEM broad discretion to tailor its water quality limitations and requirements and to balance environmental and economic considerations. *See ADEM v. Legal Environmental Assistance Foundation*, --- So. 2d --, 2005 WL 1925756, * 9 (Ala. Civ. App. August 12, 2005). The Alabama Court of Civil Appeals recently explained:

In carrying out those duties [under the Alabama Environmental Management Act], ADEM must have the discretion to decide whether, at some level, the “needs of the people” of Alabama will be better served by placing upper limits upon the costs of permit applicants’ industrial plants and equipment than by requiring massive and inefficient expenditures from those applicants in order to achieve marginal improvements in water quality. While the authority to make such choices might well have been retained by the

⁷⁴ ALA. ADMIN. CODE R. 335-6-10-.04; Stipulated Fact No. 4.

Legislature had that body elected to do so, ADEM and the Commission, as the Legislature's delegates, succeed to that body's plenary power to manage the delicate balance between the economy and the environment of Alabama.

Id. at p. 9 (emphasis added).

ADEM certification should not be denied merely because a Petitioner seeks impose additional regulations not required by the applicable statute or regulations.⁷⁵ No legal basis exists for mandating ADEM to enforce a new standard or additional requirement.

Petitioners concede their arguments about whether the 4.0 mg/l limitation will protect aquatic resources is really a challenge to the rule itself. Petitioners' Objection at ¶ 17. In essence, the petition attempts to circumvent the rule making process, and impose new regulations by the use of a quasi-judicial process. The opportunity to challenge ADEM's regulations, policies and statutory obligations contained in the regulations and create or eliminate existing criteria arises at various stages of the administrative rule making and legislative processes. Absent some conflict with other statutory authority or constitutional challenge, challenges intended to alter a statute, a rule or regulation lies within the jurisdiction of the purview legislature or the rule making bodies within Agency or Commission, not

⁷⁵ See *Root v. ADEM*, EMC Docket No. 98-20, 1999 WL 86943, Feb. 16, 1999, at *8 (holding the Commission previously held that ADEM's actions cannot be disapproved on the grounds that ADEM failed to force a Permit Applicant to do something not mandated by applicable statute or regulation.)

quasi judicial administrative proceedings. ADEM provides specific procedures for challenging regulations and changing policy during the course of the creation and adoption of a regulation. *See* Alabama Administrative Code r. 335-2-1-.04(3) (“Any person aggrieved by the issuance, modification or repeal of any rule or regulation of the Department may file with the Commission a request for a hearing to contest such administrative action *within forty-five days of the adoption of the rule or regulation by the Commission.*”) Accordingly, Petitioner’s attack intended to rewrite any particular regulation may not be considered in these proceedings. (emphasis added). ADEM issued its 4.0 mg/l criterion for discharges from existing hydroelectric generation impoundments many years ago, and the U.S. Environmental Protection Agency approved that criterion as being consistent with the Clean Water Act. Pre-Hearing Order of September 19, 2005, Stipulated Fact No. 2; 37 Fed. Reg. 5260, 5260-61 (March 11, 1972) (proposed approval) (APC Ex. 3); 37 Fed. Reg. 28775, 28777 (Dec. 29, 1972) (final approval) (APC Ex. 4); 57 Fed. Reg. 21087 (May 18, 1992) (APC Ex. 5).

D. Regulations Permit ADEM Impose a 4.0 mg/l Dissolved Oxygen Standard With Regard To All Existing Hydroelectric Units.

Petitioners request that ADEM be required to impose a higher standard upon APC than the 4.0 mg/l of dissolved oxygen required for all existing units.

Petitioners offer no evidence or authority ADEM abused its discretion or acted outside its regulatory authority. Moreover, Petitioners cite no authority granting them the standing to challenge ADEM's direction.

In the present action, ADEM determined that the applicable standard requires project discharges for existing hydroelectric generation impoundments to maintain 4.0 mg/l dissolved oxygen. It is undisputed that all nine developments at issue are "existing hydroelectric generation impoundments."⁷⁶ Historically, ADEM has consistently applied the 4.0 mg/l standard to discharge from existing hydroelectric impoundments throughout the State and in other certifications.⁷⁷ In the present action, APC has not proposed the construction of any new impoundments or dams, but rather, only seeks to renew its licenses for its continued operations. ADEM's interpretation and application of this regulation is reasonable and must be enforced. *Personnel Bd. v. Bailey*, 475 So. 2d 863 (Ala. Civ. App. 1985); *Alabama Dept. of Public Health v. Perkins*, 469 So. 2d 651, 652-53 (Ala. Civ. App. 1985); *Ex parte Personnel Bd.*, 440 So. 2d 1106 (Ala. Civ. App. 1983); *See also U. S. v. Alabama Power Co.*, 372 F. Supp. 2d 1283 (N. D. Ala., 2005)(holding an Agency's interpretation of its own regulations must be given controlling weight unless it is

⁷⁶ See the Parties' stipulation of Facts.

⁷⁷ APC Exs. 18, 19, 20, 21.

plainly erroneous or inconsistent with another regulation.); *Roberts Health Care, Inc. v. State Health Planning and Dev. Agency*, 698 So. 2d 106 (Ala. 1997).

The Petitioners argue the imposition of a higher standard would improve water quality, however this is nothing more than a challenge on the rule and policy itself, rather than the application of the rule as discussed above. Petitioners admit the applicable regulation requires dissolved oxygen levels of 4.0 mg/l in discharges from **existing** units.⁷⁸ The evidence demonstrates APC has not proposed constructing any new impoundments or dams; rather APC is merely in the process of seeking to renew its licenses from FERC to continued its operations.⁷⁹ Thus, even if some ambiguity in the regulations exist, the law provides no discretion for an Administrative Law Judge to substitute his or her discretion over that of an agency.

E. APO's Refurbishment Of Existing Units Does Not Amount to Adding A "New" Unit.

In essence, the Petitioners argue that APC's refurbishment of existing units equates to the addition of new units which would require APC to meet higher dissolved oxygen level standards. ADEM's determined that the refurbishment of older units were not the equivalency of installing a new unit. In the absence of

⁷⁸ Hall Deposition at p. 38- 39, 46.

⁷⁹ *Id.*; APC Exs. 16 & 17.

evidence ADEM acted arbitrarily, illegally or outside the scope of their authority an agency's interpretation is binding. Simply stated, where ADEM's acts within the scope of its own rules and regulations, ADEM's discretion and interpretation of its rules must be given deference as a matter of law. *Personnel Bd. v. Bailey*, 475 So. 2d 863 (Ala. Civ. App. 1985) explained:

“...judicial deference to an administrative agency tends to insure uniformity and consistency of decisions in light of the agency's specialized competence in the field of operation entrusted to it by the legislature. Because of the specialized purposes and the uniformity of decisions, a court frustrates legislative intent and usurps the discretionary role by stepping in when the agency's choice is not clearly unreasonable or arbitrary.

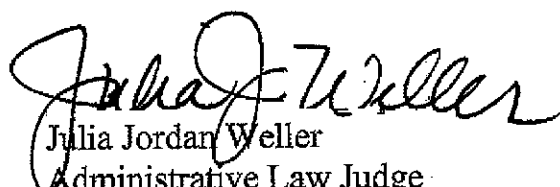
Ex parte Personnel Bd., 440 So. 2d 1106 (Ala. Civ.App.1983).” *Alabama*

Department of Public Health v. Perkins, 469 So. 2d 651, 652-53 (Ala. Civ. App. 1985).

IV. CONCLUSION

Therefore, it is the recommendation of the undersigned to the Commission that a judgment is appropriate as a matter of law and both ADEM's and Alabama Power's motions for summary judgment should be GRANTED. Accordingly, the petition of Alabama Rivers Alliance and American Rivers is due to be DIMISSED WITH PREJUDICE.

Done this the 26th day of January, 2006.



Julia Jordan Weller
Administrative Law Judge
State of Alabama
Personnel Department
300 Folsom Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(334) 242-3451
(334) 353-4481 (primary fax)
(334) 353-8707 (secondary fax)

VIA FACSIMILE AND FIRST CLASS MAIL AND E-MAIL*

Richard Roos-Collins
Julie Gantebein
NATURAL HERITAGE INSTITUTE
100 Pine Street, Suite 1550
San Francisco, CA 94111
(415) 693-3000
(415) 693-3178 (Fax)

James Wright
ADEM Office of General Counsel
P. O. Box 301463
Montgomery, Al 36130-1463

Michael D. Freeman
P. Stephen Gidiere III
Balch and Bingham LLP
1901 Sixth Avenue North, Suite 2600
Birmingham, Al 35203

James A. Byram
Balch and Bingham LLP
105 Tallapoosa Street, Suite 200
P.O. Box 78 (36101)
Montgomery, AL 36104

cc:
John D. Grogan
Manager of Environmental Compliance
Alabama Power Company
P.O. Box 2641
Birmingham, AL 35291

J. I Palmer, Jr.
Regional Administrator
US EPA, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street N. E.
Washington, D.C. 20426

Lynn Sisk, Chief
Water Quality Branch

Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Al 36130-1463

Stan Cook, Chief of Fisheries
Alabama Department of Conservation and Natural Resources
64 N. Union Street, Suit 468
Montgomery, AL 36130

Jeff Powell, Senior Field Biologist
U.S. Fish and Wildlife Service
Daphne Ecological Services Field Office
1208-B Main Street
Daphne, Al 36526

* Copies of all orders are e-mailed UPON REQUEST of any party providing an email address.