

**FARMERS' AND LANDOWNERS' PRELIMINARY RESPONSE TO  
ALABAMA POWER COMPANY'S STUDY PLAN NO. 12, MIG 3  
JANUARY 18, 2010**

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This preliminary response is made by and on behalf of the following individuals or entities (hereinafter called "Respondents") to the Company's Study Plan No. 12, MIG 3:

Auttosee Plantation; Judith P. Bryan; Daniel Grady Taylor Farms; Milstead Farm Group, Inc.; W. T. Dozier Farms; Morris & Morris Farms; Maddox & Screws Farms; SMT Farms; Taylor Brothers Farms; Taylor 7 Farms; Wisener Farms; Jenkins & Jenkins Farms; Jimmy Dozier Farms

The above-named Respondents are either individuals, partnerships, farming companies, landowners, or other entities engaged in agriculture along the Tallapoosa and Alabama Rivers downstream from Martin Dam. Respondents reserve the right to file additional responses after receiving the Power Company's filings on January 18, 2010.

Each can be reached by email: [michaud@copelandfranco.com](mailto:michaud@copelandfranco.com), or by hard mail to Euel A. Screws, Jr., P. O. Box 347, Montgomery, AL 36101-0347; phone (334) 834-1180.

Each of the above-named Respondents are and have been for the past many years involved in the farming of and ownership of lands along the Tallapoosa and Alabama Rivers below Thurlow Dam, or are otherwise involved with production agriculture in the area.

The Respondents have strong objections to the Alabama Power Company's "Study Plan and Proposed Modifications numbers 12a through 12 h," also referred to as "MIG-3." The background of Respondents to make these objections grow out of the following facts:

Twice during the crop growing season in 2003, the Alabama Power Company operated Martin Dam with total disregard of any obligations of flood control.

### THE FLOOD OF MAY 7-11, 2003

This minor weather event resulted from Tropical Storm "Bill" which had been predicted by all weather forecasts for several days prior to May 7, 2003. This was a 4-year flood event with most of the rain predicted to fall north of Martin Dam. During the week before the flood, Lake Martin's elevation was practically at full pool (490 feet), never dropping below 489 feet. The Power Company admitted it knew of the pending flood event at least by May 3, 2003.

The Alabama Power Company made no serious attempt to pre-evacuate Martin either by generation or the opening of a few flood gates which would have provided water storage and averted downstream flooding.

Rather, for 7 days prior to May 7, 2003, the average daily discharge from Martin was approximately 17,000 cubic feet per second (CFS) from generation. Martin remained virtually at full pool prior to the flood.

Then, on May 7, 2003, the company opened at once over 15 of its 20 flood gates, which, with generation, discharged over 140,000 CFS downstream, and this excessive discharge lasted for several days. The result of these actions, which discharged a virtual wall of water, was that:

1. Respondents lost their entire crops of cotton, corn, beans, hay and produce.
2. Fields and river banks were severely eroded, with the threat that the river might change its course and isolate hundreds of acres of farm lands.
3. Thousands of mature trees along the river bank (many older than Martin Dam) were uprooted and destroyed, such as oaks, poplars, gums and cypress.
4. Much wildlife was lost.

Once the water receded in late May, Respondents set up two boat tours of the Tallapoosa River from Tallassee to the Emerald Mountain toll bridge. Attending these tours were representatives of Alabama Power Company, the Alabama Department of Agriculture, the Alabama Department of Environmental Management (ADEM), representatives of the Corps of Engineers, Alabama Farmers Association (ALFA) and some of Respondents. Following these tours, the representatives of the Power Company stated unequivocally that the Company had no flood control responsibilities at Martin Dam.

In late May, Respondents repaired some of the eroded fields, re-planted their crops, and made plans to repair the eroded river banks.

### **THE FLOOD OF JULY 4, 2003**

This flood was a 2-year rain event. It resulted from a tropical depression from the south with most of the rain predicted to fall south of and downstream from Martin Dam, which predictions were accurate. Again, for several days before July 4, the Company's discharges from Martin were from generations (17,000 CFS). Then, on July 4, the Company opened multiple flood gates discharging 90,000 CFS for several days.

Respondents lost their entire re-planted crops, and it was too late in the year to plant again.

Respondents' actual out-of-pocket losses from these two floods, including river bank repairs, were over \$2,100,000.00. See **Attachment 1**, outlining these losses.

Respondents filed a civil action against the Company and employed Jack G. Ward, a professional engineer, retired from the Corps of Engineers, d/b/a Water Engineering, who, after extensive investigation, concluded that:

There are two apparent possibilities to provide reasonable flood control at Martin Dam:

- Option 1: Operate to pre-evacuate the pool in the face of weather reports of impending heavy rainfall events.
- Option 2: Get serious about flood control as a project purpose and operate with dedicated flood control storage on a year round basis.

s/ *J. G. Ward*

15 May 2004

Professional Engineer

No. 11766

Enclosed, as **Attachment 2**, is Jack Ward's Discharge Hydrographs study which shows (a) the discharge from Martin from May 1, 2003 through July 15, 2003 in CFS. The lighter lines show the discharge that would have occurred with prudent and modest evacuation efforts at Martin Dam (generation and two flood gates, 43,000 CFS) which would have averted flooding for both events.

Respondents recognize that certain "Act of God" floods are not preventable by prudent management procedures, such as the October 1995 Hurricane Opal flood and the March 1990 flood of record.

### **THE CIVIL LAWSUIT**

The Power Company took the position before the Alabama Supreme Court that its license with FERC imposed no duty of flood control, and that the Alabama Supreme Court's decision in Ellis v. Alabama Power Co., 431 So.2d 1242 (Ala. 1983) was controlling. In Ellis, the Court held that the Power Company is not liable for negligence "when it operates its hydroelectric dams in accord with the Federal Power Commission (FERC) license and the Department of Army (Corps of Engineers) regulations." Several organizations filed amicus briefs with the Alabama Supreme Court in support of Respondents' position. These included the Alabama Farmers Association (ALFA) and American Land Foundation.

The farmers and landowners lost their case before the Alabama Supreme Court. It is interesting to note the undisputed fact that Ellis involved an Alabama Power Company project

that was governed and controlled by the Army Corps of Engineers, whereas Martin is not a Corps project.

### CONCLUSION

Respondents sincerely request that the FERC, in its re-licensure of Martin Dam, to:

1. Impose upon the Alabama Power Company the unequivocal duty to operate Martin Dam with flood control responsibilities for downriver owners and farmers.

2. Reject and not approve the Company's Study Plan 12(A)(G) and (H), called also MIG-3, which purports, among other things, to:

(a) revise the Martin rule curve and operating guidelines to increase the winter pool level by 5 feet;

(b) maintain the summer pool level for a longer period of time; and

(c) beginning to refill Lake Martin earlier in the winter.

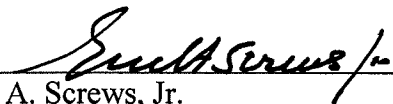
These proposed modifications of the Martin rule curve and operating guidelines will not only increase the flooding potential for Respondents and other downstream owners and operators during the winter months when most flood occur but also in the spring, summer and fall months during the crop growing and harvesting seasons.

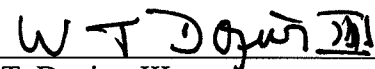
Finally, Respondents respectfully submit that to allow the Alabama Power Company to unilaterally control the level of Martin without flood control responsibilities and guidelines creates a prima facie conflict of interest in the Company. The higher the elevation at Martin results in an economic advantage to the Company -- the generators operate more efficiently and produce electricity at a reduced cost to the Company, i.e., the Company makes more money. Therefore, pre-evacuation of Martin in advance of a predicted flood event in order to maintain

adequate storage space will result in a financial loss (less water head for generation), and the loss of water from flood gate operations.

We submit that the FERC has the duty and responsibility to correct this conflict of interest at Martin as it has done in other hydroelectric dams operated by the Alabama Power Company.

Respectfully submitted,

  
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Euel A. Screws, Jr.

  
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W. T. Dozier, III

Representatives of Respondents

# Attachment 1

Table 20. Summary of Crop Losses, Additional Production Losses and Other Losses.

Prod	Crop Losses	Additional Production Losses	Other Losses	Total	Loss %
AUT	\$92,338.08	\$0.00	\$362,600.00	\$454,938.08	21.02
DGT	\$37,439.82	\$10,786.08	\$0.00	\$48,225.90	2.23
DOZ	\$336,046.32	\$0.00	\$50,500.00	\$386,546.32	17.86
JDW	\$50,700.00	\$10,400.00	\$30,000.00	\$91,100.00	4.21
JEJ	\$172,482.70	\$2,880.50	\$0.00	\$175,363.20	8.10
MOM	\$85,020.39	\$0.00	\$0.00	\$85,020.39	3.93
MSF/SMT	\$362,160.73	\$15,793.64	\$79,941.50	\$457,895.87	21.15
TAB	\$37,076.48	\$3,539.28	\$1,350.00	\$41,965.76	1.94
T7L	\$17,964.03	\$6,728.89	\$20,700.00	\$45,392.92	2.10
WIS	\$270,457.75	\$0.00	\$0.00	\$270,457.75	12.49
MFG	\$107,746.36	\$0.00	\$0.00	\$107,746.36	4.98
<b>Grand Total</b>				<b>\$2,164,652.53</b>	100.00

## Attachment 2

# Discharge Hydrographs

