Nos. 11-999, 11-1006 and 11-1007

In the Supreme Court of the United States

STATE OF FLORIDA, ET AL., PETITIONERS

v.

STATE OF GEORGIA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

STATE OF GEORGIA, ET AL.

SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC., PETITIONER

v.

STATE OF GEORGIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In the River and Harbor Act of 1946 (1946 RHA), ch. 595, 60 Stat. 634, 635, Congress authorized the United States Army Corps of Engineers to construct and operate Buford Dam, which forms Lake Sidney Lanier north of Atlanta, Georgia. The dam and lake constitute the Buford Project. In the Water Supply Act of 1958, 43 U.S.C. 390b, Congress authorized the Corps to modify its reservoir projects to include storage for municipal and industrial water supply unless, among other things, doing so would involve a major operational change at the project. In this case, the court of appeals held that the 1946 RHA unambiguously provides that the Buford Project may be made available to accommodate municipal and industrial water supply for the Atlanta area, that the scope of the Corps' authority under the Water Supply Act has not yet been delineated, and that the Corps must re-examine a water-supply request made by Georgia. The questions presented are:

1. Whether the court of appeals erred in setting aside the Corps' interpretation of the 1946 RHA and remanding for the Corps to re-examine Georgia's water-supply request.

2. Whether the court of appeals correctly concluded that the Corps has not taken final agency action, reviewable under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to reallocate storage in Lake Lanier to municipal and industrial uses pursuant to the Water Supply Act.

3. Whether the Water Supply Act limits the Corps' authority to accommodate municipal and industrial water supply as provided in the Buford Project's authorizing legislation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-86a) is reported at 644 F.3d 1160.[1] The opinion of the district court (Pet. App. 87a-187a) is reported at 639 F. Supp. 2d 1308.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2011. Petitions for rehearing were denied on September 16, 2011 (Pet. App. 188a-189a). On November 9, 2011, Justice Thomas extended the time within which to file petitions for a writ of certiorari to and including February 13, 2012, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Chattahoochee River originates in North Georgia, flows southwest past Atlanta, and then flows south along Georgia's border, first with Alabama, then with Florida. At Georgia's southwest corner, the Chattahoochee joins the Flint River to form the Apalachicola River. The U.S. Army Corps of Engineers operates several dams and reservoirs in the Apalachicola-Chattahoochee-Flint (ACF) basin. This case concerns the Corps' operation of the northernmost dam, Buford Dam, and the reservoir it forms, Lake Sidney Lanier.

a. In 1939, the Corps transmitted a report to Congress recommending development of the basin for multiple purposes. In 1945, Congress approved that plan, including a reservoir north of Atlanta. Pet. App. 5a-6a.

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[1] References to "Pet." and "Pet. App." are to the petition and appendix in No. 11-999, except as otherwise specified.

In 1946, the Corps' South Atlantic Division Engineer issued a report to the Chief of Engineers recommending several changes to the original plan for the ACF system, including moving a proposed hydropower generating dam and reservoir further upstream from Atlanta to its current site at Buford. H.R. Doc. No. 300, 80th Cong., 1st Sess. (1947) (1946 Corps Report) (excerpted at 11-1006 Pet. App. 197a-212a); see Pet. App. 6a, 47a. He concluded that modifying the ACF plan and adopting the proposed Buford Project would increase hydropower generation in the system, both by generating power itself and by providing storage to regulate flows downstream, which would make other proposed hydropower dams in the system economical. *Id.* at 52a; 11-1006 Pet. App. 211a. The project would also aid flood control and navigation throughout the ACF system. Pet. App. 6a-7a; see 1946 Corps Report 27.

The Division Engineer's report also addressed water supply in several respects. The Division Engineer recognized that locating the dam above Atlanta would not only aid in the operation of downstream dams, but would also "greatly increase the minimum flow in the river at Atlanta, thereby producing considerable incidental benefits by reinforcing and safeguarding the water supply of the metropolitan area." 11-1006 Pet. App. 205a. The Division Engineer noted that if the goal were to operate the Project for "maximum power value," the Project would be "shut down during week ends and week-day off-peak periods." *Id*. at 208a-209a. But shutting down power-generating operations during off-peak periods would potentially reduce the flow of the Chattahoochee at Atlanta to only about 50 cubic feet of water per second (cfs). Such a low flow would neither meet Atlanta's needs, nor provide fish habitat, nor protect riparian

owners. The Division Engineer therefore recommended that the dam be operated to ensure a minimum flow of 650 cfs at Atlanta at all times; during off-peak hours, the dam would release enough water through a smaller turbine to ensure that a flow of 650 cfs was maintained downstream, and the smaller turbine would also generate off-peak power. (The report estimated that releases of no more than 600 cfs would suffice to meet the goal of 650 cfs downstream.) See *ibid.*; Pet. App. 48a. The Division Engineer also noted that the 600 cfs "minimum release may have to be increased somewhat as the area develops." 11-1006 Pet. App. 209a. Thus, he concluded that by generating hydropower during peak hours and providing a regular flow at Atlanta during off-peak hours, the Buford Project "[i]ncidentally * * * would ensure an adequate municipal and industrial water supply for the Atlanta area." *Id.* at 211a.

The Chief of Engineers submitted a report recommending that Congress authorize the modified ACF plan, including the Buford Project, in accordance with the plans of the Division Engineer and "with such changes therein as in the discretion of the Secretary of War and the Chief of Engineers may be advisable." Pet. App. 59a. Congress then "authorize[d]" the modified ACF plan, including construction of the Buford Project, "in accordance with the report of the Chief of Engineers, dated May 13, 1946." River and Harbor Act of 1946 (1946 RHA), ch. 595, 60 Stat. 634, 635; see *id.* at 634 (projects are authorized "in accordance with the plans and subject to the conditions recommended by the Chief of Engineers"). The Corps built Buford Dam between 1950 and 1957 in accordance with that authorization and a subsequent document known as the Definite Project Report. Pet. App. 9a.

2. Buford Dam generates hydropower by releasing water through three hydropower turbines. Peak hydropower is generated by two large turbines, each of which discharges a volume of about 5000 cfs when running. A third, smaller turbine discharges about 600 cfs when it is running. Thus, when Buford Dam is generating maximum power, more than 10,000 cfs are released from the reservoir into the river. Pet. App. 12a.

Buford Dam can also release water through a small sluice gate, but it typically does so only when the small hydropower turbine is shut down for repairs or in an emergency. Pet. App. 12a. Those limited circumstances are the only times when Buford Dam releases water without generating hydropower.

Thus, at a multipurpose project like the Buford Project, releases through the dam to generate hydropower also support other project purposes. For example, generating hydropower at the Project supports navigation, water supply, and hydropower generation at other Corps projects downstream. A release of water made to meet those other concerns, however, may occur during off-peak hours, when the hydropower the release generates is less valuable. See Pet. App. 12a.

Behind Buford Dam is Lake Lanier, which covers about 38,000 acres and has 692 miles of shoreline. Pet. App. 11a. For purposes of managing the Buford Project to meet its purposes, the Corps has divided the reservoir into three "pools" that are distinguished by their elevation above sea level: the inactive pool, the conservation pool, and the flood control pool. The inactive pool is designed to account for sediment that will gradually accumulate in the reservoir. Above the inactive pool is the conservation pool. The Corps uses the conservation pool to meet project purposes other than flood control. As its

name implies, the conservation pool also conserves water for release to meet those project purposes during times of drought. *Ibid.* Above the inactive and conservation pools is the flood control pool, which is usually just empty space. Just as the conservation pool conserves water to release it during droughts, the flood control pool reserves space to hold water during floods. *Id.* at 11a-12a.

The volume of water that each pool can hold is important for planning to meet project purposes. The Corps describes that volume as the "storage" available, measured in acre-feet. Pet. App. 10a n.7. One acre-foot of water is the volume of water necessary to cover one acre to a depth of one foot. The flood control pool has enough empty space to store 637,000 acre-feet of water. *Id.* at 115a. The conservation pool varies seasonally from 1,049,400 acre-feet of storage in the winter to 1,087,600 acre-feet in the summer (reducing the summer flood control pool to 598,800 acre-feet). *Id.* at 11a-12a. The Corps refers to the combination of those two pools as the "usable storage" in the reservoir. The inactive pool stores another 867,600 acre-feet, for a total storage of 2,554,000 acre-feet in the reservoir.

3. Several years after authorizing the Buford Project, Congress enacted two additional statutes relevant to this litigation. First, in 1956, Congress specifically authorized the Corps to contract with Gwinnett County for municipal and industrial water supply storage. Act of July 30, 1956, ch. 785, 70 Stat. 725; see Pet. App. 11a.

Second, Congress enacted the Water Supply Act of 1958, 43 U.S.C. 390b, which applies more broadly to federal water projects operated by either the Corps or the Bureau of Reclamation. The Water Supply Act provides that, in general, the Corps or the Bureau may allocate

storage "in any reservoir project" for water supply, to meet "present or anticipated future demand," provided that the beneficiary States or localities pay for the storage. 43 U.S.C. 390b(b). An exception, however, specifies that a "[m]odification[]" of an existing project "to include storage" for water supply requires the consent of Congress if the modification "would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or * * * would involve major structural or operational changes." 43 U.S.C. 390b(d).

4. Since 1959, the Corps' *Reservoir Regulation Manual* for Buford Dam has described the Buford Project as "a multiple-purpose project with major uses of flood control, flow regulation for navigation, and power." Pet. App. 163a; accord *id.* at 110a. In addition, increased flow in the river from dam operations "provides for an increased water supply for municipal and industrial uses in the metropolitan area of Atlanta." *Id.* at 110a. The *Reservoir Regulation Manual* provided that normally the Buford Project would be operated to produce hydropower during periods of peak demand, with sufficient releases during off-peak hours to provide the Atlanta area with a minimum flow of 600 cfs at all times. *Id.* at 14a.

Over the next 20 years, the Atlanta area grew, and the Corps gained information about the impact Buford Dam and water-supply withdrawals were having on the system. As early as 1960, based on "knowledge of the hydrological and hydraulic characteristics" gained during the first full year of operation, the Corps could ensure minimum flows at Atlanta of 650 cfs. Letter from Maj. Gen. F.M. Albrecht, Division Engineer, to Lt. Gen. E.C. Itschner, Chief of Engineers 1-2 (June 30, 1960),

3:07-md-1 Docket entry No. 106, at ACF2026-2027 (M.D. Fla. Apr. 14, 2008). In 1975, the Corps concluded that it could meet then-existing downstream water-supply needs—annual average withdrawals of 230 million gallons per day (mgd), with 327 mgd available during summer months—without significantly affecting hydropower generation. Pet. App. 16a. The Southeastern Power Administration, which distributes electricity generated at Buford Dam and other federal hydropower projects, concurred. *Ibid.* In 1979, the Corps determined that by scheduling additional weekend peak releases, it could provide an annual average of up to 266 mgd downstream as an incident of power operations, and up to 327 mgd in the summer, also without significantly impacting project operations. *Ibid.*

Recognizing that the growing Atlanta area needed a long-term plan for its municipal and industrial water supply, in 1973 the Senate Public Works Committee commissioned the Metropolitan Atlanta Area Water Resources Management Study (Study). Pet. App. 15a. While the Study was ongoing, the Corps entered into interim water-supply contracts with Atlanta-area providers. *Ibid.* The Study's final report recommended meeting Atlanta's needs through a new "reregulation" dam below Buford Dam that could capture the varying hydropower releases and rerelease the water at a steadier rate. *Id.* at 16a-17a. In 1986, Congress authorized construction of the reregulation dam but did not appropriate any funds to build it. *Id.* at 17a.

In 1986, the Corps, based on the recommendations in the Study, entered into a temporary water-supply contract with the Atlanta Regional Commission (ARC) as a bridge until a long-term solution could be reached. Pet. App. 19a. After implementing adjustments to the Pro-

ject through a Water Management System recommended by the Study, the Corps determined that it could provide ARC with releases sufficient to allow withdrawal of 327 mgd for downstream water supply year-round. *Id.* at 19a. The Corps also agreed to provide releases to support downstream withdrawals of an additional 50 mgd as needed, for which ARC would have to pay. *Ibid.* The contract expressly did not, however, provide any right to storage in the reservoir. *Id.* at 20a. Interim water-supply agreements for withdrawals directly from the reservoir were also reached with the City of Gainesville, the City of Cumming, and Gwinnett County. *Id.* at 19a-20a. None of the interim water-supply agreements granted storage rights in the Buford Project, and they all expired in 1990. *Id.* at 20a.

By 1989, and following further economic analysis using a new computer model, the Corps concluded that a reallocation of storage in the Buford Project would be more economical than building the reregulation dam. Pet. App. 17a-18a. The Governor of Georgia and ARC agreed, and the Corps prepared a draft Post Authorization Change (PAC) report recommending the reallocation. *Ibid.* The draft PAC report recommended allocating 207,000 acre-feet of storage in the Project to water supply, which would allow roughly 151 mgd to be withdrawn directly from Lake Lanier and 378 mgd from the river downstream. *Ibid.*

5. a. The draft PAC report prompted Alabama to file the first of the cases that now make up this consolidated litigation. In 1990, Alabama sued to prevent the Corps from carrying out the draft PAC report's recommendations. *Alabama* v. *United States Army Corps of Eng'rs*, No. 90-1331 (N.D. Ala. filed June 28, 1990). After Florida intervened as a plaintiff and Georgia as a

defendant, the parties agreed to a stay of the litigation. The 1990 stay order was followed in 1992 by a Memorandum of Agreement (MOA) signed by the Corps, Georgia, Alabama, and Florida. Pet. App. 21a. The MOA set up a "Comprehensive Study" of the water issues in the ACF basin, and the Corps agreed to withdraw the draft PAC Report to facilitate negotiations among the States. *Id.* at 38a. Thus, the parties agreed that "during the term of the Comprehensive Study, it is premature for the Army to commit, grant or approve any reallocation, allocation or apportionment of water resources to service long-term future water supply." *Ibid.* The MOA allowed parties, however, to continue withdrawing water for water supply and to make reasonable increases in those withdrawals, but specified that the agreement "shall [not] be construed as changing the status quo as to the Army's authorization of water withdrawals." Docket entry No. 106, at ACF19317, ACF19320-19321. The parties have usually referred to that provision as the "live and let live" agreement. Pet. App. 21a.

In 1997, the 1992 MOA was replaced by the ACF River Basin Compact, which was signed by all of the same parties and enacted into law by Congress. Pet. App. 21a-22a; see Act of Nov. 20, 1997, Pub. L. No. 105-104, 111 Stat. 2219. The Compact set up a framework for negotiating an equitable allocation of water among the three States. Art. VII, 111 Stat. 2222-2224. The ACF Compact also contained a live-and-let-live provision allowing for the continued withdrawal of water, with reasonable increases, that expressly lacked legal consequences for water storage. Art. VII(c), 111 Stat. 2223-2224. The ACF Compact remained in place until August 31, 2003, and the *Alabama* case remained stayed throughout that period. Pet. App. 22a.

b. In 2000, a second, distinct dispute arose. All of the interim water-supply contracts had expired in 1990, but under the live-and-let-live agreement the Corps provided for continued water-supply withdrawals without any formal contractual relationship between it and the various water-supply providers. In 2000, Georgia and various local entities wanted to formalize their water-supply withdrawals and ensure adequate storage to meet future needs through a reallocation of some storage to water supply. The State of Georgia thus asked the Corps to modify its operation of the Project to meet projected water-supply needs until the year 2030, including withdrawal of 408 mgd from the river and 297 mgd directly from Lake Lanier. Pet. App. 24a-25a.

The Corps determined that meeting Georgia's request would require it to reallocate 370,930 acre-feet of storage in the Buford Project to water supply. Pet. App. 25a. In April 2002, the Corps rejected Georgia's request. The Corps concluded that under the 1946 RHA, water supply was not intended as one of the "purposes which render the project economically feasible and which govern the operation of the reservoir," but was instead one of the "benefits that accrue to the project as a byproduct of its operation." 11-1006 Pet. App. 222a-223a. The Corps interpreted the 1946 RHA as providing it with discretion to adjust operations to accommodate downstream water supply incidentally, but the Corps concluded that it could not reallocate storage in the Buford Project to water supply without resorting to the Water Supply Act. The Corps further concluded that the necessary reallocation of storage was not permissible under the Water Supply Act without congressional approval. Pet. App. 25a.

Georgia and various local and municipal entities (the Georgia Parties),[2] which are respondents here, sued to challenge that denial. That action was abated pending resolution of the *Alabama* case. See *Georgia* v. *United States Army Corps of Eng'rs*, 144 Fed. Appx. 850 (11th Cir. 2005).

c. In December 2000, Southeastern Federal Power Customers, Inc. (SeFPC)—a group of entities that buy power from the Southeastern Power Administration—filed suit against the Corps in district court in the District of Columbia. SeFPC alleged that it was paying too much for hydropower because the Georgia Parties were continuing to withdraw water from the Buford Project without paying enough to offset the loss in hydropower generation and the resulting higher price. SeFPC sought relief requiring the Corps to end the alleged diversion of storage for water supply or to compensate SeFPC for the alleged loss of hydropower value. Pet. App. 22a-23a; *Southeastern Fed. Power Customers, Inc.* v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008) (*SeFPC*), cert. denied, 555 U.S. 1097 (2009).

The Corps, SeFPC, and the Georgia Parties negotiated an agreement to settle the *SeFPC* case. Pet. App. 23a. In that agreement the Georgia Parties agreed to a process that might have led to "interim contracts" under which they would pay for interim storage for water supply from the Buford Project, and which could convert to permanent storage contracts under certain conditions. The payments made under those contracts would then be used to determine a credit against rates charged to hydropower customers. *Ibid.*

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[2] References in this brief to the Georgia Parties include Gwinnett County, whose claims the court of appeals discussed separately. See Pet. App. 1a n.1.

Alabama and Florida objected to the settlement agreement, claiming that the Corps lacked the authority to reallocate storage as contemplated in the settlement agreement. Because the settling parties (including SeFPC) could not agree on the extent of the Corps' authority to accommodate water supply under the 1946 RHA, they defended the settlement agreement solely on the ground that it was authorized under the Water Supply Act, did not brief whether the 1946 RHA provided authority for the settlement agreement, and explicitly asked the D.C. Circuit to reserve judgment on that issue. See Joint Br. of Appellees at 5-6, *SeFPC*, *supra* (Nos. 06-5080, 06-5081), 2007 WL 917350.[3]

The D.C. Circuit held that the agreement violated the Water Supply Act because it would have led to a reallocation of storage that would have involved a major operational change without congressional approval. *SeFPC*, 514 F.3d at 1325 (Pet. App. 205a-206a).

d. The Judicial Panel on Multidistrict Litigation then consolidated several related actions, including *Alabama*, *Georgia*, and the remanded *SeFPC*, in the Middle District of Florida and assigned them to a judge sitting by designation from outside the ACF basin. Pet. App. 148a. The district court split the litigation into two phases, the first phase dealing principally with the water-supply issues at the Buford Project. *Id.* at 88a-89a. (The second phase is not at issue here.)

On cross-motions for summary judgment, the court held that the Corps' current operations, allowing withdrawals from Lake Lanier for water-supply purposes,

[3] SeFPC, which now contends (11-1007 Pet. 32-35) that the D.C. Circuit decided that zero storage was initially allocated to water supply, joined that brief, including the express reservation of the question of the Corps' authority under the 1946 RHA.

constituted a "de facto" reallocation of storage in the reservoir to water supply. Pet. App. 168a-174a. The court concluded that water supply "was not an authorized purpose" of the Buford Project under the 1946 RHA, *id.* at 183a, and that the putative reallocation was not authorized by the Water Supply Act because it was a "major operational change" and therefore required congressional approval. *Id.* at 174a-178a; see also *id.* at 179a-183a. The court also held that the Corps necessarily had correctly denied Georgia's much larger water storage request. *Id.* at 178a-179a, 183a.[4] The court ultimately issued an injunction requiring the Corps, starting in 2012, to limit releases from the Buford Project to 600 cfs during off-peak hours instead of accommodating water supply to the Atlanta area, and prohibiting most water-supply withdrawals from being made directly from Lake Lanier. In the meantime, the court allowed current withdrawals to continue, but not to increase without agreement of all of the parties. *Id.* at 28a-29a, 184a.

7. The court of appeals reversed. Pet. App. 1a-86a.

a. The court first concluded that the district court lacked jurisdiction over the claims filed by Alabama, Florida,[5] and SeFPC challenging the Corps' ongoing operation of Buford Dam. Pet. App. 34a-43a. A challenge under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, requires "final agency action," 5 U.S.C. 704. The court of appeals concluded that the Corps had not taken any such final action to reallocate

[4] The court thus entered final judgment against the Georgia Parties on their claims. Pet. App. 29a.

[5] References to "Alabama" and "Florida" as litigants on appeal or in this Court include Alabama Power Co. and the City of Apalachicola, Fla., respectively.

storage in the Buford Project, in part because the Corps had been "thwarted by the litigation process" from reaching any final decisions. Pet. App. 42a.

b. The court of appeals then held that Georgia's request for a reallocation of storage in the reservoir to water supply must be remanded to the Corps. Pet. App. 45a-69a.

The Corps had concluded that the 1946 RHA did not establish water supply as an authorized purpose of the project. The court of appeals disagreed with that reading. It held that Congress had unambiguously provided that the reservoir would be operated to accommodate downstream water-supply demands and therefore allowed an allocation of storage in the reservoir for that purpose. Pet. App. 46a-59a. The court also concluded that the Corps' interpretation of the 1946 RHA was not entitled to deference because it had been inconsistent over time. *Id.* at 61a-62a & n.27.

The court declined, however, to define the precise scope of the Corps' authority to accommodate water supply, concluding that the "authorizing legislation is ambiguous with respect to the extent of the Corps' balancing authority—i.e., the extent of the Corps' authority under the [1946] RHA to provide water supply for the Atlanta area." Pet. App. 74a-75a. Instead, the court remanded to the Corps to reconsider Georgia's request in light of the holding that the Corps has authority to accommodate downstream water supply as an authorized purpose of the Buford Project. The court left the precise definition of that authority to the Corps, "the agency authorized by Congress to implement and enforce" the 1946 RHA. *Id.* at 75a. The court also concluded that the Corps' authority to accommodate water supply under the 1946 RHA was independent of the

later-conferred authority under the Water Supply Act, and thus that the "authority under the WSA will be in addition to the Corps' authority under the RHA" and the 1956 statute authorizing contracts for storage with Gwinnett County. *Id.* at 76a. The court gave the Corps one year on remand to arrive at a "well-reasoned, definitive, and final judgment as to its authority under the [1946] RHA and the [Water Supply Act]." *Id.* at 85a.

ARGUMENT

The issues in this case do not warrant further review at this time. The court of appeals' interpretation of the 1946 RHA does not conflict with any decision of this Court or another court of appeals, and the implications of that interpretation are not yet clear. Although the court of appeals erred in reading the 1946 RHA as unambiguously establishing downstream water supply as an authorized purpose of the Buford Project, the court of appeals did not hold that the Corps must grant the Georgia Parties' water-supply request. Rather, the court held only that the Corps must re-examine that request, and it left the Corps significant discretion on remand to stake out the precise scope of its authority. It would be premature for this Court to review that question now, before the agency brings its judgment and discretion to bear on the pending request for agency action.

The remainder of the court of appeals' decision is correct and does not warrant further review. The court did not definitively pronounce on the scope of the Corps' authority under the Water Supply Act or on the merits of SeFPC's challenge to nonfinal agency action. And even if the court of appeals had ruled more definitively on those issues, petitioners would still be incorrect in

suggesting that this Court grant certiorari to settle the States' respective rights to the water in the ACF basin. The Corps does not own that water or decide who has a right to use it. Questions of that nature are properly addressed to Congress, which may approve an interstate compact, or to this Court in the exercise of its original jurisdiction, which may permit one or more States to seek an equitable apportionment of an interstate river.

1. Alabama (11-1006 Pet. 17-22) and SeFPC (11-1007 Pet. 20-27) both take issue with the court of appeals' interpretation of the 1946 RHA as unambiguously providing authority to accommodate downstream water supply needs in at least some amounts. Although the court of appeals erred in holding that the 1946 RHA admits of only one permissible construction, its error does not warrant this Court's review.

a. The text of the 1946 RHA authorized the Corps to build the Buford Project "in accordance with the plans and subject to the conditions recommended by the Chief of Engineers." 60 Stat. 634-635. The report by the Chief of Engineers, in turn, incorporated the Division Engineer's report. Those two reports therefore are the relevant documents for determining the original purposes of the Buford Project.[6]

The court of appeals incorrectly concluded that the 1946 RHA *unambiguously* made downstream water supply an authorized purpose of the Buford Project, rather than an incidental benefit as the Corps concluded. Based on that incorrect reading of the statute, the court failed to defer to the Corps' contrary interpre-

[6] Florida incorrectly describes (Pet. 24) the court of appeals' review of those documents as an exercise in "legislative history"; the 1946 RHA incorporates those documents as the terms of the congressional authorization.

tation. But as the Corps explained in 2002, neither the text of the statute nor the reports it incorporates unambiguously resolve how much downstream water supply may be accommodated under the 1946 RHA.

The Corps' reports describe the relevance of water supply to the Buford Project in various ways. The reports characterize the project as "mak[ing] available an adequate water supply for the Atlanta area," 1946 Corps Report 6; "assur[ing] an adequate supply of water," 11-1006 Pet. App. 200a; "producing considerable incidental benefits by reinforcing and safeguarding the water supply of the metropolitan area," *id.* at 205a; "ensur[ing] an adequate water supply for the rapidly growing Atlanta metropolitan area," *id.* at 207a; and "[i]ncidentally * * * ensur[ing] an adequate municipal and industrial water supply," *id.* at 211a. Those statements make clear that the Corps, and Congress, contemplated that the operation of the Buford Project would have some beneficial effect on downstream water supply, and the Corps has never disagreed with that reading. But the reports' characterization of those benefits as "incidental" left the place of water supply in the hierarchy ambiguous. The court of appeals concluded that "incidental" could not mean subordinate to other purposes such as hydropower, because the reports listed at least one circumstance in which municipal water-supply considerations precluded giving maximum effect to hydropower. Pet. App. 50a-51a & n.20. But the court of appeals over-read the reports as clearly and unambiguously establishing that water supply is an authorized purpose in its own right; as the reports stated, the effect on system power value from off-peak releases to accommodate downstream water supply needs would be "slight" and "not material[]." *Id.* at 48a (quoting 11-1006 Pet. App. 209a).

b. Although the court of appeals' reasoning was flawed, the court's judgment remanding the case to the Corps does not require this Court's review. The court of appeals did not conclude that the Corps is compelled to grant Georgia's water-supply request, nor did it even conclude definitively that the Corps has authority to grant that request in full. Rather, as the court explained in ordering the remand, the Corps' 2002 decision rested on a premature assessment of Georgia's request, and "the Corps' authority to grant the request may [depend] on the precise size and effect of the request." Pet. App. 66a. The court has held that "the [1946] RHA authorizes some storage reallocation to water supply," but has not specified how much, and has invited the Corps to set forth its own view. *Id.* at 67a. The court thus did not definitively resolve the scope of the Corps' authority and discretion. And whatever that scope may be, the Corps has not yet made any decision to *exercise* that authority and discretion by granting Georgia's request. The Corps now has the opportunity to address the proper balance among all of the Project's purposes, properly understood. This Office has been informed by the Corps that it intends to complete its legal analysis by June 2012, in accordance with the court of appeals' remand instructions. See *id.* at 84a-85a.

Indeed, some reconsideration of several aspects of Georgia's water-supply request apparently would be warranted irrespective of the court of appeals' decision. For example, in denying Georgia's request, the Corps did not distinguish between downstream withdrawals and withdrawals directly from Lake Lanier, a distinction that may be required whether water supply is properly described as an authorized purpose or as an incidental benefit. The court of appeals left that issue open. See

Pet. App. 75a-76a n.35. The Corps also did not take into account either its authority under the 1956 statute allowing it to contract with Gwinnett County, see p. 6, *supra*, or the significance of Georgia's projected return flows. Thus, even in the absence of the decisions below, it would be appropriate for the Corps at this point to exercise its independent discretion, reconsider its initial denial of Georgia's request, and set forth a more complete interpretation of its various authorities with respect to water supply.

After the Corps completes its reconsideration, any resulting final agency action will be subject to judicial review. Petitioners err in suggesting (Pet. 21 n.5; 11-1006 Pet. 29 n.4) that the court of appeals' decision will merit this Court's review no matter what happens on remand to the Corps. If, for example, the Corps denies Georgia's request, petitioners give no reason to think that they would continue to be aggrieved by the court of appeals' interpretation of the 1946 RHA.

c. The court of appeals' misreading of the language of the Corps reports does not rise to the level of a significant methodological holding that might warrant this Court's review at this premature stage. Contrary to Alabama's suggestion (11-1006 Pet. 17), the court of appeals' "analytical approach" does not conflict with the approach used by other courts of appeals or this Court. The court of appeals correctly stated this Court's *Chevron* test; all parties agree that if Congress unambiguously spoke to the question at issue, the court need not defer to a contrary interpretation by the Corps. The court of appeals concluded that the statute is unambiguous because of language in the Corps reports that, in the court's view, foreclosed the Corps' construction of the term "incidental." A term may have more than one dic-

tionary definition and yet, in the context of a particular statute, be unambiguous because the context makes clear which meaning Congress intended to use. See, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330-1331 (2011) (term had multiple "dictionary definitions" and, "considered in isolation, m[ight] be open to competing interpretations," but "only one interpretation [wa]s permissible" in light of the statutory purpose and context). Alabama's *Chevron* question depends on the premise that, in this case, multiple meanings of the term "incidental" were permissible, but the court of appeals did not accept that premise. Rather, it held that the *text* of the incorporated Corps reports unambiguously foreclosed the reading with which Alabama agrees. Pet. App. 49a-51a. The court of appeals thus set no circuit precedent on how to treat an agency's interpretation of an ambiguous statute, because it held that the statute was not ambiguous. That highly context-specific parsing of a single appropriations statute and the 66-year-old reports it incorporates does not independently warrant this Court's review.

d. SeFPC contends (11-1007 Pet. 20-27) that the court of appeals erred by not considering Corps interpretations of the 1946 RHA that were presented to Congress after that statute was enacted, during the appropriations process for the Buford Project. This Court has held that such post-enactment expressions of an agency's own view may shed "some light" on Congress's authorization if those expressions are presented to Congress and reflected in later appropriations legislation. *United States ex rel. Chapman* v. *Federal Power Comm'n*, 345 U.S. 153, 163-164 (1953). But the court of appeals did not decline to consider any expression of the Corps' views based on when it was submitted to Con-

gress; to the contrary, the court of appeals was aware of that legislative history and considered it. Pet. App. 8a-14a. Rather, the court simply did not find those post-enactment statements probative, in light of the significance the court attributed to certain statements in the text of the 1946 Corps reports. *Id.* at 49a-55a.[7] That fact-bound interpretive judgment does not warrant this Court's review at this time.

2. SeFPC and Florida both contend that the court of appeals' decision creates a conflict with *Southeastern Federal Power Customers* v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008) (*SeFPC*), cert. denied, 555 U.S. 1097 (2009), which involved the same parties and the same project, but a different statute—the Water Supply Act. Those contentions provide no ground for further review.

a. SeFPC contends (11-1007 Pet. 32-35) that in *SeFPC* the D.C. Circuit held that zero storage in the reservoir was initially allocated to water supply under the 1946 RHA, and that the court of appeals here disagreed and held that some storage had been initially allocated to water supply. SeFPC misreads both opinions.

In *SeFPC*, the D.C. Circuit considered only whether the Water Supply Act, standing alone and without respect to any other source of authority, provided sufficient authority for the Corps to reallocate a portion of the reservoir's storage to water supply. The D.C. Circuit reviewed a settlement agreement that might have

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[7] To the extent the court considered other statements by the Corps that were not presented to Congress, see 11-1007 Pet. 23, 24, it did so as support for the notion that inconsistencies in the Corps' position would preclude giving it deference even at the second step of *Chevron*. See Pet. App. 61a-62a & n.29. Dictum on an alternative ground does not warrant this Court's review.

led to a reallocation of a maximum of 240,858 acre-feet of storage, or 22% of total conservation storage in the Buford Project, to water supply. 514 F.3d at 1319-1320, 1322 (Pet. App. 194a, 198a); Pet. App. 23a-24a. Although the settlement agreement recited several possible sources of authority for the Corps to execute the water supply storage contracts contemplated under the agreement, the settling parties agreed that the Water Supply Act provided sufficient authority for the settlement agreement and, to preserve the settlement, expressly defended the agreement as authorized by the Water Supply Act while reserving their disagreement over the purposes of the Buford Project under the 1946 RHA. In their joint brief to the D.C. Circuit, the settling parties made this limitation clear, stating: "The Court need not reach a final determination as to whether water supply was included as a 'project purpose' in the original authorization for the Buford Project to resolve this appeal—and the Settling Parties expressly request that the Court reserve judgment on this issue." Joint Br. of Appellees at 5-6, *SeFPC*, *supra* (Nos. 06-5080, 06-5081), 2007 WL 917350.[8]

In accordance with the settling parties' request, the D.C. Circuit then did address only the Water Supply Act, and the Corps' authority under that statute was the only issue actually litigated and decided. 514 F.3d at 1318 (Pet. App. 191a). The D.C. Circuit did not address, much less decide, whether water supply was among the original congressional purposes of the Buford Project under the 1946 RHA, or whether any part of the pro-

[8] SeFPC, which now contends (11-1007 Pet. 32-35) that the D.C. Circuit decided that zero storage was initially allocated to water supply, joined that brief, including the express reservation of the question of the Corps' authority under the 1946 RHA.

posed reallocation could be made under the authority of the 1946 RHA. *Id.* at 1324 n.4 (Pet. App. 203a n.4). Rather, in assessing the Corps' authority under the Water Supply Act, which is limited by the obligation to obtain congressional approval for "major operational changes," the court concluded that the "initial allocation[] of water storage" to water supply was zero, which it viewed as a "more limited issue" than the original authorization of the Buford Project under the 1946 RHA. *Ibid.* The D.C. Circuit thus declined to consider whether the 1946 RHA would *allow* the Corps to *re*-allocate storage to water supply—only that the 1946 RHA did not itself allocate storage to water supply at the outset of the project. Instead, the D.C. Circuit examined whether the Water Supply Act, standing alone, provided sufficient authority for the interim reallocation to water supply. Because, following the reallocation, water for municipal consumption would have increased from 0% of storage to 22%, the D.C. Circuit concluded that the reallocation would be a "major operational change," and that the Water Supply Act therefore did not authorize that reallocation without congressional approval. *Id.* at 1324-1325 (Pet. App. 202a-205a).[9]

In this case, by contrast, the court of appeals considered the question reserved by the settling parties in the D.C. Circuit—whether the 1946 RHA authorized the Corps to operate the Buford Project to accommodate future water supply demands. The court of appeals concluded that the 1946 RHA, properly understood, autho-

[9] As the government has previously explained, that holding was based on a misunderstanding of the size of the proposed reallocation, and in any event, the D.C. Circuit should not have measured an *operational* change according to the percentage of storage reallocated. See Gov't Br. in Opp. at 5-7, *Georgia* v. *Florida* (No. 08-199).

rized the Corps to allocate storage to water supply as the Atlanta area grew and required such storage. SeFPC contends (11-1007 Pet. 32-35) that in reaching that conclusion the court of appeals' decision conflicted with the observation in *SeFPC* that zero storage in the Project had been initially allocated to water supply. But the court of appeals recognized, as had the D.C. Circuit, that *initially* no storage in the Project was allocated to water supply. Pet. App. 55a-56a. The court of appeals held that "the lack of initially allocated storage for water supply is not at all inconsistent with the Congressional intent that water supply was an authorized purpose" that would require *future* allocations of storage as the Atlanta area grew. *Ibid.* The D.C. Circuit was expressly asked not to consider the Corps' authority to make future allocations to water storage under the 1946 Act, and it did not do so.

b. Florida also contends (Pet. 18-21) that the court of appeals' decision conflicts with *SeFPC*. Florida reads *SeFPC* as holding that the Water Supply Act limits the Corps' ability to allocate storage to water supply regardless of the statutory authority under which such an allocation is made. But as just explained, the settling parties in *SeFPC* had asked the court to approve the settlement agreement as authorized by the Water Supply Act, without regard to any other source of authority. Thus, in holding that the settlement was not authorized by the Water Supply Act absent congressional approval, the D.C. Circuit had no occasion to consider whether the limitations on the Corps' authority under the Water Supply Act also limit the authority granted by other

statutes. The decision below, holding that they do not, does not conflict with *SeFPC*.[10]

Moreover, the court of appeals correctly concluded that the Water Supply Act provides a supplemental grant of authority. The exceptions to that supplemental grant do not override separate, pre-existing sources of authority in other statutes.[11]

The Water Supply Act authorizes the Corps to "include" storage for municipal and industrial water supply in its projects. 43 U.S.C. 390b(b). Congressional approval is needed only when doing so would require a "[m]odification[]" of an already-authorized project "to include storage" for water supply *and* when that modification would either "seriously affect the purposes for which the project was authorized" or "involve major structural or operational changes." 43 U.S.C. 390b(d). When storage is already authorized, there is no need to invoke the Water Supply Act to "include" such storage

[10] Even if there were such a conflict, Florida's contention (Pet. 20-21) that such a circuit split is "fully articulated and is unlikely to deepen or disappear" is misplaced. The question Florida presents is not limited to the Buford Project and instead goes to the relationship between the Water Supply Act and other statutory sources of authority to accommodate water supply at a federal reservoir. As Florida itself recognizes (Pet. 17), the Water Supply Act applies nationally to reservoirs operated by either the Corps or the Bureau of Reclamation. See 42 U.S.C. 390b(b). Yet no other court of appeals has considered the Water Supply Act's relationship to other statutory authorities; indeed, outside the context of the Buford Project, no court of appeals has yet interpreted the exception to the Water Supply Act (Section 390b(d)) at all. Even if the D.C. Circuit were read to have taken sides on this question, the issue would not be suitably developed for this Court's review.

[11] The district court reached the same conclusion: it expressly stated that "[t]he [Water Supply Act] inquiry is academic if water supply was an authorized project purpose of the Buford project." Pet. App. 162a. It therefore analyzed the two potential sources of authority separately.

in the project. Florida asserts (Pet. 21) that the Water Supply Act imposes a limitation on every "storage reallocation," but that is not what the statute says: the requirement to obtain congressional approval for a major operational change applies only to "[m]odifications * * * to include storage" for water supply. 43 U.S.C. 390b(d). To the extent water supply is already an authorized purpose, then reallocating storage to water supply to that extent is not a "modification" of the project "to include storage" for water supply at all.

Moreover, Florida's reading of the Water Supply Act (generally applicable to all federal water projects, see note 9, *supra*) would impliedly repeal express congressional authorizations (applicable to specific projects) to provide water-supply storage. See generally, *e.g.*, *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1853 (2010) (explaining the presumption that a general statute does not impliedly repeal pre-existing, more specific statutes). If Florida's reading of the Water Supply Act were correct, then the Corps would be required to obtain congressional approval to provide water supply storage that Congress had already specifically approved in another statute. The court of appeals properly rejected such an over-reading of the exception to the Water Supply Act. Pet. App. 79a & n.38.

3. SeFPC also takes issue (11-1007 Pet. 27-31) with the court of appeals' conclusion that SeFPC had not challenged a final agency action reviewable under the APA. In its petition (*id.* at 29-30), SeFPC claims that the final agency action it seeks review of is the Corps' failure to identify "the statutory basis for its actions." That is an entirely new argument not made in the court of appeals. See SeFPC C.A. Br. 31-34 (arguing that the "Corps' failure to seek the required Congressional

reauthorization and, absent that, its failure to operate the Project in accordance with the original authorized purposes, as well as its decision to shift Project operations from on-peak to off-peak hydropower generation, constitute final agency action reviewable under the APA"). The argument is therefore waived in this Court and provides no basis for this Court to grant a writ of certiorari. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("We do not decide in the first instance issues not decided below.").

In any event, the court of appeals correctly concluded that SeFPC had not challenged final agency action. The court of appeals' decision is a straightforward application of this Court's test for final agency action as articulated in *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). First, the court considered whether anything the Corps had done could be said to represent the consummation of the agency's decisionmaking process. See Pet. App. 36a (citing *Bennett*, 520 U.S. at 177-178). As the court concluded, the Corps has not formally and finally reallocated storage in the reservoir to water supply and therefore has not consummated a decision as to water-supply storage. *Id.* at 36a-37a. SeFPC therefore challenged the ongoing operations of the reservoir; essentially, SeFPC contended that the Corps has delayed formal reallocation for so long—while still accommodating municipal and industrial users—that the Corps can now be said to have consummated its decisionmaking process with respect to water supply at the Buford Project. The court of appeals disagreed, and correctly concluded that the ongoing litigation had resulted in a series of agreements, stays, court orders, and injunctions that expressly *prevented* the Corps from consummating a deci-

sion on water-supply storage at the Buford Project. *Id.* at 37a-42a.

The court went on to conclude that, under *Bennett*'s second prong, the Corps' ongoing operations had not determined any of the parties' rights or obligations, nor did the operations have legal consequences. Pet. App. 36a, 42a-43a (citing *Bennett*, 520 U.S. at 177-178). Because the Corps has not made a formal reallocation of storage, neither the Georgia nor any local interest has acquired any right to storage in the Buford Project. No legal consequences have therefore flowed from the Corps' operation of Lake Lanier. *Franklin* v. *Massachusetts*, 505 U.S. 788, 796-797 (1992). The court of appeals correctly decided that SeFPC had not challenged final agency action.

That intensely fact-based decision does not conflict with any other appellate decision. The court of appeals' decision expressly relies exclusively on "the constraints imposed on [the Corps] by the specific circumstances of the ongoing litigation," Pet. App. 43a, which included various "legal and practical barriers to administrative action," *id.* at 40a.

SeFPC seeks to establish a conflict with the D.C. Circuit's decision in *SeFPC* on the merits of the "major operational change" issue. But the question whether an operation must be enjoined as embodying a "major operational change," when the agency has provisionally agreed to undertake that operation in a settlement agreement subject to judicial review, is quite different from the question whether non-formalized ongoing operations are reviewable in the first place.

Finally, SeFPC ignores the court of appeals' holding in the alternative that even if the Corps had taken final agency action, "we would still be required to vacate the

[district court's] order and remand the case to the Corps" because of, in particular, the district court's "overarching error in conducting *de novo* factfinding of issues that must be considered by the Corps in the first instance." Pet. App. 44a-45a n.16; see *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (per curiam); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941). SeFPC does not challenge that alternative holding in its petition. Thus, even if this Court were to grant certiorari and conclude that the Corps has taken final agency action that is subject to review under the APA, on remand to the court of appeals the remedy would be to remand to the Corps to make the necessary factual findings and render a decision formalizing its operations—which the Corps is already doing under the remand already in effect. For that reason as well, this Court's review of the final agency action question is not warranted.

4. Alabama (11-1006 Pet. 22-28) and Florida (Pet. 27-30) contend that this Court's review is warranted because of the importance of this case to the region. But Florida and Alabama do not focus on one significant underlying cause of the impacts they complain of—the lack of an apportionment of the waters of the ACF basin among the three States, either by a congressionally approved compact or by a decree of this Court. Whether or not an original action in this Court would be warranted (Pet. 30; 11-1006 Pet. 27), neither Florida nor Alabama has sought the necessary leave to file one. Reviewing *this* action, which does not present underlying issues that would be the subject of an original action, would be unlikely to move the overall dispute towards resolution. The Corps does not own the water in the

ACF basin. If Florida and Alabama believe that Georgia is using, or storing, more than the equitable share of the waters of the ACF basin to which it is entitled, then their remedy is to pursue a new interstate compact or to seek leave to file an original action in this Court to resolve that issue. The congressional approval of the Buford Project could be given appropriate weight in those endeavors. If Florida and Alabama were successful in obtaining relief, then the harms they contend warrant this Court's review in this case would be addressed, as Georgia could not use or store water in excess of its apportioned share.

If, on the other hand, this Court were to grant review and reverse the court of appeals, it would not necessarily prevent the economic and environmental harms Alabama and Florida contend warrant review. Georgia would still legally be able to withdraw the water it seeks, depriving Alabama and Florida of flows downstream; it just would not be able to use the Buford Project to store the water. Because the economic and environmental impacts flow from uncertainty concerning the States' respective rights to use the waters of the ACF basin, granting review in this case would not resolve the underlying conflict that is the source of what Alabama and Florida say is of importance to the region. Such a resolution would likely require action by Congress, in a compact, or this Court, in an original action for equitable apportionment.

Moreover, even if the court of appeals' decision threatened economic and environmental harm as Alabama and Florida contend, any such harms are uncertain at this point, and Alabama and Florida will have ample opportunity to protect their interests during the administrative process and subsequent judicial review

on a proper administrative record. On remand the Corps will first decide the scope of its authority with respect to water supply at the Buford Project and only then make a decision about how to operate the project and whether to grant Georgia's storage request. See pp. 19-20, *supra*. The court of appeals' conclusion that the Corps has the legal *authority* to operate the project to accommodate water supply interests, without defining the scope of that authority, does not mean that the Corps must, should, or will exercise its judgment and discretion to operate the project in any particular way. Before making any decision about the future operation of the Buford Project, the Corps will be required by the National Environmental Policy Act of 1970, 42 U.S.C. 4321 *et seq.*, to examine the impacts of adopting that operation on the human environment and to examine reasonable alternatives to doing so. During that public process, Alabama and Florida may bring to the Corps' attention any adverse impacts such operation would have on downstream users. And any resulting final agency action with respect to the operation of the project will be subject to judicial review at the appropriate time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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