



Florida Department of Environmental Protection

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Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

April 30, 2008

Ms. Gail Carmody
Supervisor, Ecological Services
U.S. Fish and Wildlife Service
1601 Balboa Ave.
Panama City, FL 32405-3721

Mr. Curtis M. Flakes
Chief, Planning and Environmental Division
Mobile District
U.S. Army Corps of Engineers
P.O. Box 2288
Mobile, AL 36628-0001

RE: Endangered Species Act Section 7 Consultation on Proposed Revision to the
Interim Operations Plan

Dear Ms. Carmody and Mr. Flakes:

The State of Florida strongly opposes the U.S. Army Corps of Engineers' ("Corps") proposed revision to the Interim Operations Plan ("Revised IOP") as articulated in Mr. Flakes' letter dated April 15, 2008. The Revised IOP suffers many of the same flaws as the Extraordinary Drought Operations ("EDO") Florida earlier opposed in November 2007, and under some conditions, this latest IOP will be far worse. Florida rejects any proposal that reduces minimum flows below 5,000 cfs and so dramatically compromises spawning on the River. While the Corps' stated goal is to minimize adverse impacts to federally listed species, the Corps proposes an unprecedented reduction in spring spawning flows that are absolutely critical to the long-term health of the Apalachicola River ecosystem. Not only do such flows support Gulf sturgeon spawning, they are key to mussel host-fish reproduction and to salinity regulation in Apalachicola Bay. As currently configured, the Revised IOP will jeopardize and take Gulf sturgeon and mussels, and will adversely modify critical habitat of both species. The Fish and Wildlife Service ("Service") must impose a reasonable and prudent alternative to the Revised IOP. Information included herein is designed to assist in that endeavor.

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If implemented, the Revised IOP, like the EDO, would starve the Apalachicola River and Bay of freshwater flows needed to sustain those ecosystems and the species and economies dependent on them. By allowing the Corps to store *all* Basin Inflow above 5,000 cfs (or 4,500 cfs in some cases) in Georgia any time Composite Storage is in Zone 4, and to continue storing all flows above 5,000 until Composite Storage Zone 2 is reached, the Revised IOP will dramatically reduce downstream river flows. Moreover, even when Composite Storage is in Zone 1, the Revised IOP would reduce the frequency and magnitude of higher flows needed for floodplain inundation key to the vitality of the Apalachicola River floodplain. This would continue unprecedented declines in River levels and cause irreparable harm to Gulf sturgeon and federally protected mussel populations.

The past month has provided a prime example of the problem presented by the Corps' decision to capture all available Basin Inflow above minimum flow requirements. From April 12 - 14, in compliance with the EDO, the Corps dropped River flows from over 35,000 cfs to less than 13,000 cfs just as Gulf sturgeon had initiated their spawn.¹ In all likelihood, many sturgeon eggs were lost during that operation. The only thing that prevented the Corps from dropping flows even further appears to be the timely intervention of biologists from the Service and Florida Fish and Wildlife Conservation Commission who convinced the Corps to protect extant eggs as they were hatching out.

Gulf sturgeon require a stable flow to ensure spawning success. Operations that rapidly reduce flows over spawning grounds during the spawn strand eggs and kill larval fish. Historically, the Corps and Service have taken the position that the Corps would not be culpable for such events, provided the Corps was releasing to the River all Basin Inflow required to support spawning.² Florida strongly disagrees with that position. Beyond that dispute, however, under the Revised IOP, the Corps will actively retain Basin Inflow (e.g., any time Composite Storage is in Zone 4 and under certain

¹ To the extent the Corps' "Standard Operating Procedure" limited the Corps' ability to provide higher flows, Florida continues to object to the implementation of any such "procedure" designed expressly to maintain static reservoir levels to accommodate sport fish at the expense of threatened Gulf sturgeon.

² The Service has indicated it believes the Corps may only be found liable for "take" when it is increasing storage and flows in the River are reduced below Basin Inflow. *See, e.g.*, 2006 Biological Opinion at 140 ("Take of listed species due to the IOP may occur when the Corps is increasing total storage in ACF reservoirs while releasing a discharge that either exposes listed mussels or isolates them from flowing water."); *Id.* at 142 ("Take of listed species due to the IOP may occur when the Corps is using a portion of basin inflow to increase ACF reservoir storage."). Florida consistently has opposed this narrow and erroneous interpretation of the Corps' obligations under the Endangered Species Act and continues to do so. However, the Revised IOP moots the debate. The Corps has stated its unequivocal intent to increase storage by reducing River flows below Basin Inflow whenever Composite Storage is in Zone 4. Such operations result in an impermissible take under any possible interpretation, including the Service's prior interpretation.

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inflow sharing provisions) and prevent access to spawning grounds and/or lower River elevations at key spawning habitats to the detriment of the species. This radical departure from long-held practice places legal responsibility for resulting "take" squarely on the Corps.

Turning to the low flow parameters of the Revised IOP, Florida does not support any reduction below 5,000 cfs simply because models demonstrate Composite Conservation Storage *may* be depleted. The Corps lacks authority to operate Lake Lanier principally for water supply purposes. *Southeastern Federal Power Customers, Inc. v. Peter Geren, Secretary of the U.S. Department of the Army et al.*, No. 06-5080, slip op. at 16-17 (D.C. Cir. Feb. 5, 2008) (motion for rehearing pending). Moreover, the Corps recently concluded that water quality in the Inactive Pool of Lake Lanier would support drinking water uses. *See Environmental Assessment, Georgia Environmental Protection Division Proposal for a Temporary Reduced Minimum Water Quality Flow Requirement in the Chattahoochee River at Peachtree Creek for Drought Contingency Water Management Operation in the ACF River Basin and Temporary Waiver from ACF Water Control Plan* (March 2008) at EA-42 - 43. Bottom line, nearly half of Lake Lanier stored water is currently available, but is not being factored in, and therefore there is no threat to municipal and industrial demands.

Accordingly, there is simply no legitimate (and certainly no legal) basis for curtailing Apalachicola River flows to unprecedented lows, just to maintain Lake Lanier elevations above 1035' (the top of the Inactive Pool). The only relevance of elevation 1035 at this time is hydropower support. Yet, the Corps' Memorandum of Understanding with the Southeastern Power Administration makes very clear that the Corps is not responsible for generating or delivering hydropower during times of "drought" or when doing so would "conflict with the statutory requirements for the operation of said projects with regard to fish and wildlife[.]" MOU §§ 3(c)(2); 8. Certainly, any time the Corps is prepared to "take" threatened and endangered mussels by cutting Apalachicola River flows to unprecedented levels, Florida assumes the Corps will have determined the Basin to be in "drought" sufficient to excuse a temporary interruption of hydropower production. In short, there is no requirement to generate hydropower during droughts, and more of the 1.8 million acre feet historically preserved in Composite Storage should be made available for minimum flow support.

Florida's concerns about the Revised IOP extend beyond its impact on the River to its potentially disastrous effects on Apalachicola Bay. Florida biologists observed high salinities and corresponding oyster mortality throughout the summer of 2007 - at a flow of 5,000 cfs. As you know, salinity and temperature in the Bay are a function of freshwater inflow; the higher the freshwater inflow, the lower the salinity and temperature. The salinity charts attached as Exhibits A, B, C, D, and E show the extraordinarily high salinities experienced last summer, along with a pattern of

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increasing salinities corresponding to the Corps implementation of the IOP in spring 2006. You also will see that salinities declined significantly in the early part of 2008 as spring rains returned to the lower ACF Basin. Although it is too early to know, we anticipate these reduced salinities aided the oysters' plight. Yet, a swift reduction in flows for another prolonged period, as dictated by the Revised IOP, would set oyster populations back on a path to decimation. This would starve the Apalachicola River and Bay of freshwater flows needed to keep the ecosystems, species, and economy alive.

The Bay also provides habitat for juvenile Gulf sturgeon, which overwinter in lower salinity sections of the Bay. The Service has recognized "Corps operations affect freshwater flow into the bay, which affects salinity regimes and habitat conditions for Gulf sturgeon and their estuarine feeding habitats." 2006 BiOp at 40. "Research ... indicates that subadult Gulf sturgeon show a preference for ... salinity less than 6.3 parts per thousand." See *Biological and Conference Report on the U.S. Army Corps of Engineers, Mobile District, Interim Operations Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River* (Sept. 5, 2006) ("2006 BiOp") at 21 (citations omitted); *Id.* at 23. The Revised IOP will increase salinities in this important zone and compromise the availability of these habitats, which have been designated, along with the River, as "critical" under the ESA. "Juvenile Gulf sturgeon cannot survive direct transition from fresh water into salinities greater than 30 parts per thousand (ppt)" 2006 BiOp at 112. As shown in the attached salinity charts, operations under the IOP and EDO during 2007 resulted in elevated salinities well over 30 ppt. The Service's earlier conclusion that the IOP would not "worsen" the status of estuarine habitats was incorrect, and the Service cannot continue to overlook the adverse impact of extreme low flows on the Bay resulting from recent and planned Corps operations.

Finally, your agencies continue to disregard the loss of 400-600 cfs occasioned by its shifting the point of flow measurement from Woodruff Dam downstream to the Chattahoochee gauge. The Service never has analyzed the real impact of this loss, perhaps because the Corps refuses to view this as a significant issue. However, as Florida has repeatedly stated, the loss of 400-600 cfs resulted in the disconnection of key habitats the Corps previously committed to protect (e.g., Swift Slough). See, e.g., *U.S. Fish and Wildlife Service, Recovery Plan for Endangered Fat Threeridge, Shinyrayed Pocketbook, Gulf Moccasinshell, Oval Pigtoe and Threatened Chipola Slabshell, and Purple Bankclimber* (2003) at 88 (discussing Corps' assurance that 5,000 cfs - measured at Woodruff Dam - would maintain a connection between the River and Swift Slough). It is time the Service evaluated the impact of this discretionary change by the Corps.

For the reasons outlined above, the Revised IOP is not considered to provide a balanced operational regime that addresses the needs of Florida's ecology and economy during

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routine operations, nor does it establish an equitable shared adversity during times of drought. It should be revised to incorporate the concerns that Florida repeatedly has brought before your agencies. Should you have any questions or wish to discuss these issues further, I will make myself or my staff available as needed.

Sincerely,

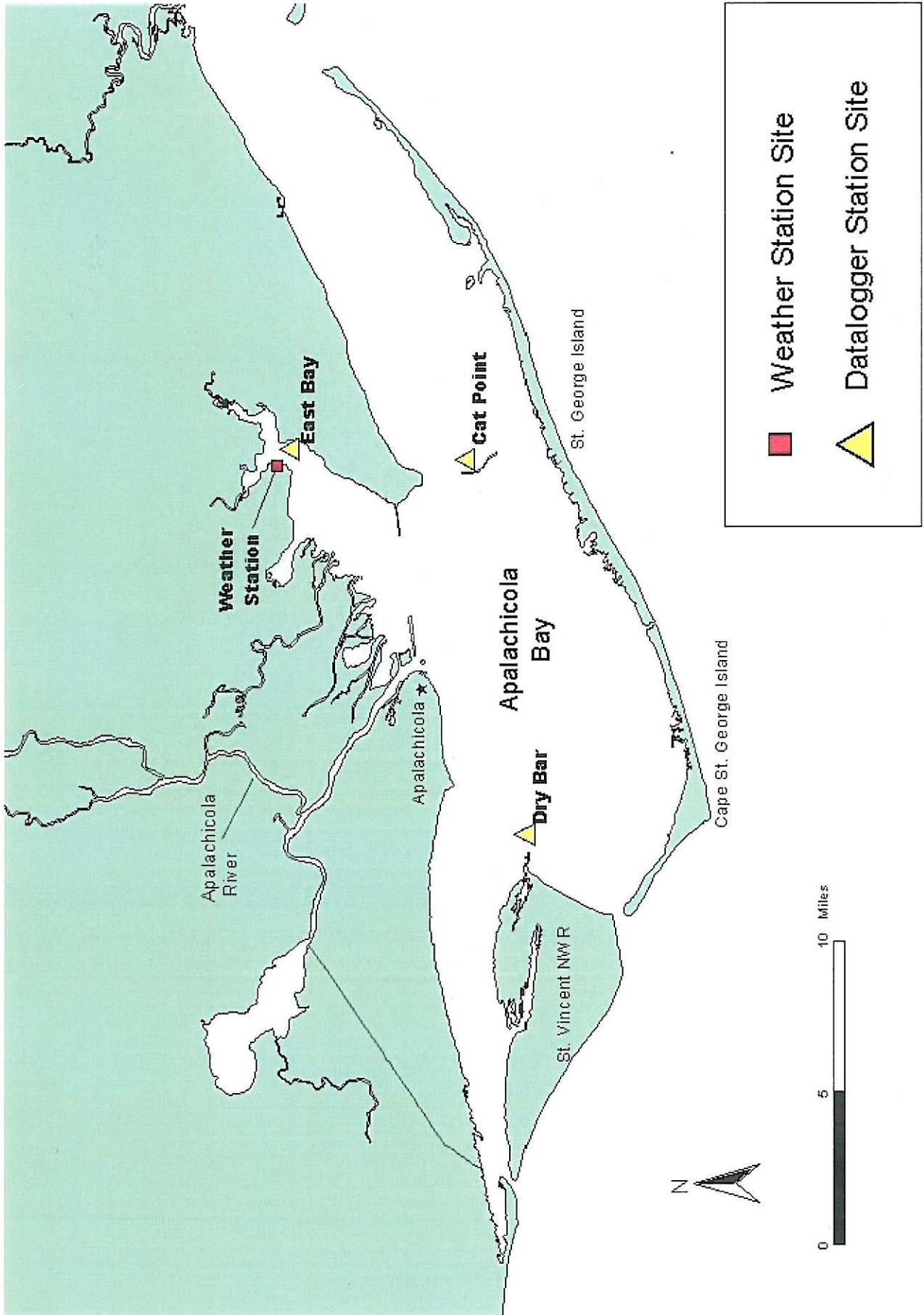


Michael W. Sole
Secretary

MWS/tb

Enclosures (5)

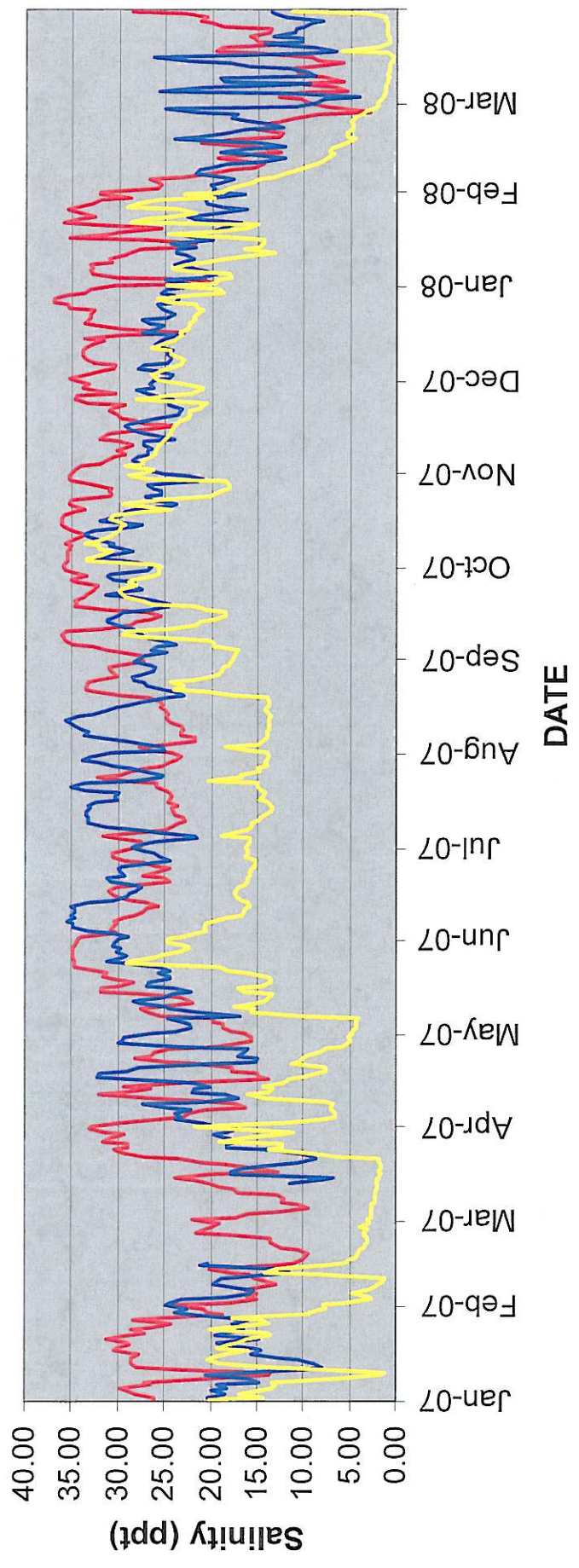
cc Hon. Dirk Kempthorne, Secretary, U.S. Department of Interior
Lt. Gen. Robert L. Van Antwerp, Commander, U.S. Army Corps of Engineers
Col. Byron Jorns, District Commander, U.S. Army Corps of Engineers
Mr. Dale Hall, Director, U.S. Fish and Wildlife Service
Mr. Sam Hamilton, Regional Director, U.S. Fish and Wildlife Service
Brig. General Joe Schroedel, U.S. Army Corps of Engineers



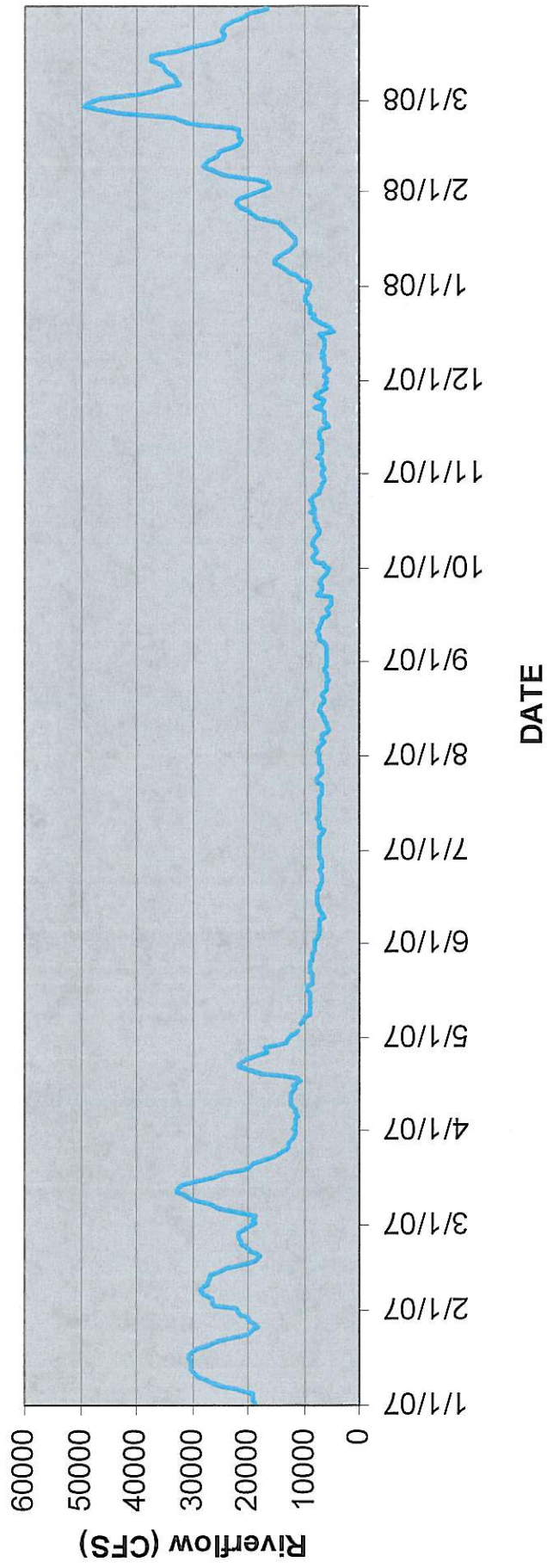
Location of datalogger deployment sites and weather station site.

Daily Average Salinity at 3 Stations in Apalachicola Bay

— Cat Point — Dry Bar — East Bay

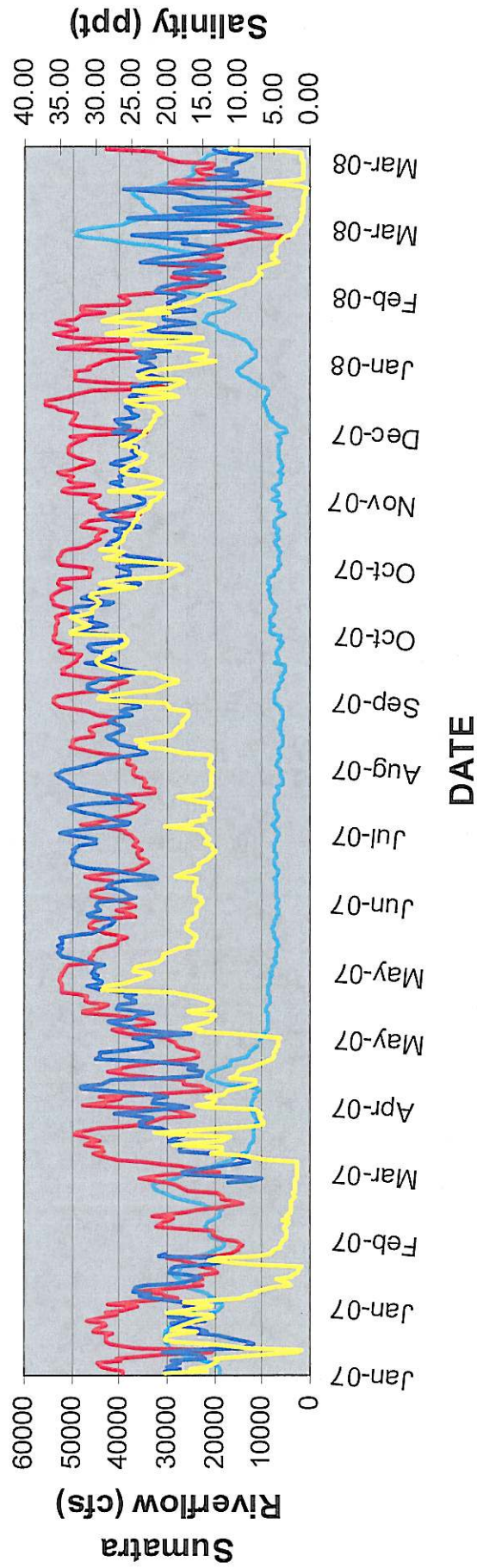


Sumatra Daily Average Riverflow (2007-2008)



Daily Average Salinity at 3 Stations In Apalachicola Bay (2007-2008)

Sumatra Riverflow — Cat Point — Dry Bar — East Bay



Monthly Average Salinity at 3 Apalachicola Bay Stations (2005-2008)

— Cat Point
 — Dry Bar
 — East Bay B
 — Sumatra Riverflow

