



Florida Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

May 15, 2008

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

RE: ESA Section 7 Consultation on Proposed Revision to the Interim Operations Plan

Dear Ms. Carmody:

Enclosed is a letter that I am forwarding from Douglas E. Barr, Executive Director of the Northwest Florida Water Management District. Mr. Barr's letter addresses a series of flaws in the U.S. Army Corps of Engineers' ("Corps") discretionary actions under the Interim Operations Plan ("IOP"). These flaws are perpetuated in the Corps' proposed revision to the IOP ("Revised IOP") as articulated on April 15, 2008.

As the letter explains, through retroactive application of highly problematic accounting, the Corps has effectively rendered the IOP's minimum flow requirements meaningless. The Revised IOP will allow the Corps to reduce and maintain River flows at unprecedented levels and exacerbate the damage inflicted on the Apalachicola River and Bay ecosystem.

The State of Florida believes that the Corps continues to ignore the impact of upstream depletions on its ability to meet downstream flow requirements. Some of these depletions are referenced in the enclosed letter from Mr. Barr. The Fish and Wildlife Service has not addressed the cumulative impact of increasing depletions. In addition to those mentioned by Mr. Barr, and others well-known to you, this week, Georgia has enacted a Water Conservation and Drought Relief Act of 2008, which is designed to facilitate construction of new reservoirs in Georgia. Additional upstream depletions are thus certain to occur, and must be acknowledged during the ongoing consultation. *See* 50 CFR § 402.14(g)(3). Specifically, when determining whether the Revised IOP will "jeopardize" species or "adversely modify" their critical habits, your agency must account for

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the fact that increasing upstream depletions result in lower "Basin Inflow" calculations and corresponding reductions in outflow from Jim Woodruff Dam under the Revised IOP. Additional mitigation may be required to offset the impact of the Revised IOP when "taken together with" upstream depletions. 50 CFR § 402.14(g)(4).

Please consider Mr. Barr's letter a supplement to the comments in my letter of April 30, 2008. The State of Florida urges you to address these in the ongoing consultation and asks that the anticipated biological opinion clearly articulate the operations, and potential additional mitigation measures, required of the Corps in order to avoid a violation of the Endangered Species Act.

Sincerely,



Michael W. Sole
Secretary

Enclosure

cc: The Honorable Dirk Kempthorne, Secretary, U.S. Department of Interior
Mr. Dale Hall, Director, U.S. Fish and Wildlife Service
Mr. Sam Hamilton, Regional Director, U.S. Fish and Wildlife Service
Tom Beason, General Counsel, Florida Department Environmental
Protection
Colonel Byron Jorns, District Commander, U.S. Army Corps of Engineers
Ms. Carol A. Couch, Director, Environmental Protection Division, Georgia
Department Natural Resources
Mr. Trey Glenn, Director, Alabama Department Environmental
Management



Douglas E. Barr
Executive Director

Northwest Florida Water Management District

81 Water Management Drive, Havana, Florida 32333-4712

(U.S. Highway 90, 10 miles west of Tallahassee)

(850) 539-5999 • (Fax) 539-2777

May 12, 2008

Mr. Michael Sole, Secretary
Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

RE: COE Performance Under the "Interim Operations Plan" and Concerns with the "Proposed Modification to the Interim Operations Plan for Jim Woodruff Dam"

Dear Secretary Sole:

On April 15, 2008 the COE proposed its "Modification to the Interim Operations Plan at Jim Woodruff Dam" (Modified IOP). Related to this, I was also recently provided with a copy of a letter dated November 6, 2007 from Curtis M. Flakes, Mobile District Corps of Engineers (COE) to Gail Carmody, Panama City Field Office of the U.S. Fish and Wildlife Service (FWS) with review comments on Florida's letter of August 2, 2007 regarding the accounting procedures used by the COE for determining compliance with the releases to the Apalachicola River under the Interim Operations Plan (IOP).

Without exception, all changes in the release requirements under the Modified IOP result in less flow to Apalachicola River in comparison to the original IOP. The problems and shortcomings of the original IOP as previously identified by Florida, therefore, are significantly magnified under the Modified IOP. The November 6, 2007 letter is the last in a sequence of correspondence among the COE, FWS and Florida regarding documented instances in which minimum releases required by the IOP were not met, the procedures used to account for "storage credits" under the so-called Volumetric Accounting provisions of the IOP, and the ease with which these have been changed and/or the credit balance modified. As outlined below, the November 6, 2007 letter leaves Florida with no objective means of independently determining compliance with minimum release requirements called for in the IOP (or the proposed Modified IOP, for that matter). At this juncture, therefore, I can conclude only that: 1) the releases for the Apalachicola River are further reduced under the Modified IOP from the already inadequate levels provided under the original IOP, and 2) that compliance with the IOP's minimum release requirements and accounting provisions has become progressively more subjective and dependent on the exercise of vaguely defined COE "discretion" to extent that even the minimum releases to Apalachicola River are not assured.

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J LUIS RODRIGUEZ
Pensacola

Inadequacies of Original IOP

The original IOP was based on the flawed determination that a 5,000 cfs minimum release to Apalachicola River is adequate to protect federally threatened and endangered species. This misconception must be corrected to avoid permanent damage to the ecosystem and biota of Apalachicola River and Bay. In regard to the original IOP, Florida raised a number of objections. An abbreviated description of these is provided below.

1. In February 2007, Florida notified the FWS that even under past hydrologic conditions the IOP would result in a much higher frequency and duration of flows at the minimum level of 5,000 cfs than has been experienced at any time in the past. In an unsuccessful effort to provide for higher flows, the federal agencies added a provision to the IOP (known as RPM 3) setting a "desired" release to Apalachicola River of 6,500 cfs when the composite storage in Lake Lanier, West Point Lake and Lake Walter F. George was in zones 1 or 2. This provision had little practical impact, and the 6,500 cfs desired flow was eliminated by the COE in the Modified IOP.

2. Water held in storage in Lake Lanier, West Point Lake and Lake Walter F. George is never used to support flows to Apalachicola River. At most, releases to the Apalachicola River are capped at basin inflow or some percentage of basin inflow at all times of year and regardless of elevation of the reservoirs or the volume of water held in storage in the reservoirs (individually or collectively). Under the original IOP, the only exception was when basin inflow fell to less than 5,000 cfs. Only under this extreme low flow, therefore, were the reservoirs to be used to support inflows to Apalachicola River. This is true regardless of the impact falling basin inflow might have had on threatened and endangered species and critical habitats.

3. The COE methodology for computing basin inflow (BI), as approved by the FWS, apportions the basin inflow AFTER 100% of all Georgia consumptive demands in the basin have been met. Even on a proportional basis, Florida never receives the benefit of the actual basin inflow, but rather only receives that portion of the basin inflow that remains after all Georgia withdrawals and needs have been satisfied. Even during extreme droughts when releases to Apalachicola River are at record lows, the COE methodology ensures that 100% of Georgia consumptive demands from the Chattahoochee River and Flint River are met without limitation. Further, the methodology ensures that all future increases in Georgia demands are met without constraint before the remaining basin inflow is allocated as provided in Jim Woodruff Dam release schedule.

4. In 2006, the COE changed the measuring point for determining releases to Apalachicola River. Previously, releases had been measured based on the discharge from Jim Woodruff Dam. In 2006, the COE began using the U.S. Geological Survey gage located downstream of the dam at Chattahoochee. Some measure of the combined impact of these provisions and operational changes can be made by comparing the minimum releases during the 2007 drought (post-IOP) to the minimum releases during the 2000 drought (pre-IOP). In 2000, continuous low flows occurred over a period of approximately 5 months. During this period the Woodruff releases were used as the point of measurement for the minimum flow of 5,000 cfs and the actual releases averaged 5,190 cfs.

During this same period the Chattahoochee gage flow averaged 5,530 cfs. During the 2007 drought, there was a period of approximately 5.5 months during which the minimum release requirement under the IOP was 5,000 cfs. During this period the Woodruff release averaged 4,770 cfs and the Chattahoochee gage flow averaged 5,190 cfs. The impact of the change in measuring point, therefore, was a reduction in releases of 340 to 420 cfs depending on whether the Woodruff release or the gage flow is used to determine the loss. For approximately one month near the end of 2007, the minimum required flow was reduced to 4,750 cfs. During this period the gage flow averaged 4,860 cfs and the Woodruff releases averaged 4,460 cfs. In 2007, therefore, the combined impact to the change in measuring point and reduction of the minimum flow requirement was a decline of 670 cfs (based on gage) to 730 cfs (based on Woodruff release) in comparison to the 2000 drought.

As outlined above, the original IOP was obviously biased towards retaining water in reservoir storage to the detriment of releases to Apalachicola River. Further, the failure to account for consumptive withdrawals in the determination of the basin inflow clearly benefits upstream users to the detriment of releases to Apalachicola River. Finally, the change in the method of measuring outflow from Woodruff combined with the reduction of the release requirement to 4,750 cfs reduced the minimum required release by approximately 700 cfs in comparison to the 2000 minimum releases.

The April 15, 2008 Modified IOP

The Modified IOP includes several changes that will result in decreases in releases to the Apalachicola River while simultaneously increasing water retained in the federal reservoirs.

1. Under the Jim Woodruff Dam release schedule in the original IOP, at least 70% of the basin inflow was to be released to Apalachicola River for flows in the general range of 8,000 cfs to 39,000 cfs, depending on the time of year and composite reservoir storage zone. Under the Modified IOP this is reduced to 50% of the basin inflow. Therefore, flows to Apalachicola River will be reduced by up to 20% of the basin inflow under the Modified IOP in comparison to the original IOP.

2. The "desired" release of 6,500 cfs to the Apalachicola River that was added to the original IOP as part of RPM 3 has been removed in the Modified IOP.

3. The COE has added an "Exceptional Drought Trigger Zone" that allows the COE to cut the release to the Apalachicola River to 4,500 cfs as measured at the Chattahoochee gage. This reduces the minimum flow by an additional 250 cfs below the FWS approved levels in 2007. This along with the reduction associated with the change in the point of measurement of releases will result in a net reduction of up to 900 to 1,000 cfs in comparison to minimum continuous releases during the 2000 drought. As noted above, the average continuous minimum flow as measured at the Chattahoochee gage was on the order of 5,500 cfs (rounded). Under the Modified IOP, flows as measured at the Chattahoochee gage are set at a minimum of 4,500 cfs or approximately 1,000 cfs below the minimum continuous flows that actually occurred in 2000.

4. Based on the COE graph included in the Modified IOP materials, the new "Exceptional Drought Trigger Zone" in the Modified IOP is set at composite storage levels ranging from approximately 2.35M acre-feet of total storage (=550,000 acre-feet of active storage) in the winter to approximately 2.72M acre-feet (= 920,000 acre-feet of active storage) in April through June (inclusive). Under the Modified IOP, therefore, releases to Apalachicola River could be reduced to unprecedented minimums and durations during the spring spawning period even though composite storage in the reservoirs is at up to 60% of FULL conservation pool volumes.

5. Under the original IOP, releases during the spring spawning period occurred regardless of the level of composite storage. The modified IOP changes the required releases during the spawning period based on the level of composite storage.

Like the original IOP, the Modified IOP continues the practice of computing basin inflow without accounting for consumptive withdrawals in Georgia. In the context of the Modified IOP, therefore, consumptive demands are unconstrained. Further, Florida receives less basin inflow under the Modified IOP, the minimum releases to Apalachicola River is reduced, more water is retained in storage rather than released, releases for the spring spawning period are more constrained and the Chattahoochee gage will continue to be the point of measurement for releases with no adjustment for the loss of inflow to the Apalachicola River resulting from changing the measurement from the Woodruff Dam outflow to the Chattahoochee gage.

Minimum Flow Compliance and Accounting of Storage Credits

Recently I was provided with a copy of a letter dated November 6, 2007 from Curtis M. Flakes, Mobile District, COE to Gail Carmody, Panama City Field Office of the FWS with review comments on Florida's letter of August 2, 2007 regarding the accounting procedures used by the COE for determining compliance with the releases to the Apalachicola River required by the IOP. The letter of August 2, 2007 was signed by Janet Llewellyn of the Florida Department of Environmental Protection (FDEP), however, the letter and underlying analysis were prepared by me.

1. The subject letter addresses violations of the minimum release requirements required under RPM 3, which became effective on March 1, 2007. The sequence began when Florida observed that COE releases to the Apalachicola River were less than the IOP minimum for more than 20 days in March and April of 2007. These findings were provided to the COE and FWS by letter dated April 19, 2007 under your cover. Further, the under-releases ranged up to 3,000 cfs below the required levels under the IOP.

2. The COE and FWS have not disputed that the releases were below the IOP minimums. Instead, by letter dated May 16, 2007 to the FWS, the COE claimed storage credits that pre-dated the effective date of the IOP. According to the COE letter, storage credits had accumulated in a previously undisclosed "volumetric balancing account" since September 2006 (up to six months before the approved effective date of the IOP). This allowed the COE and FWS to ignore the more

than 20 violations of the IOP minimum flows in March and April 2007. Having claimed retroactive storage credits and used these to offset the violations, the COE and FWS then reset the volumetric balancing account to zero and "restarted the accounting" on May 1, 2007. At this relatively early juncture, therefore, the COE and FWS had created, added and subtracted storage credits as needed to circumvent the IOP requirements. Substantively, therefore, this nullified the minimum flows specified in the IOP. Obviously, these actions were to the detriment of Florida and the Apalachicola River and Bay.

3. Florida examined the basis for the retroactive credits claimed by the COE for the period from September 2006 to February 2007. Specifically, Florida applied the IOP criteria for storage credits to this period to determine if the retroactive credits were valid. This was based on the assumption that the COE and FWS would surely apply all the IOP balancing and minimum flow requirements to the subject time period to ensure that Florida and, specifically the Apalachicola River and Bay received both the benefits and adversity of the IOP requirements during the retroactive period. The results of the Florida review were provided by letter from FDEP to the FWS dated August 2, 2007.

Earlier this year, in the context of the ongoing litigation, Florida obtained a previously undisclosed letter dated November 6, 2007 from the COE to FWS which addressed the issues raised in Florida's August 2, 2007 letter. The technical substance of the COE letter is that Florida had misunderstood or misinterpreted the volumetric balancing. We neither misunderstood nor misinterpreted the volumetric balancing. Instead, at each step the release rules and operating procedures have been changed or modified to provide after-the-fact justification for under-releases.

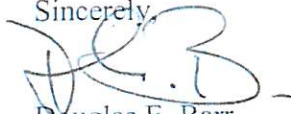
In the November 6, 2007 letter, for example, we now find an assertion that "the IOP provides for a certain degree of smoothing of releases." No such statement appears in the IOP and this new rule is so vague and imprecise that it allows the federal agencies to make releases at levels below the IOP requirements under the guise of smoothing the releases. Further, the letter confirms that the rules used to claim retroactive storage credits to offset the May 2007 violations were determined using a different set of rules. Sadly, it appears that we should not have assumed that the COE and FWS would equitably apply the IOP requirements to the retroactive period used to justify the violations.

Rather than adding clarity and accountability, the COE/FWS consultations, letters and actions have made the release requirements for the Apalachicola River progressively more vague. We are left with no objective means of determining if the minimum release requirements above 5,000 cfs are being met. While the IOP appears to link basin inflow to releases from Jim Woodruff Dam, the combination of release "smoothing", claiming of storage credits and claimed discretion in performing volumetric balancing substantively allows the COE to limit releases to the Apalachicola River while maximizing retention of water in the federal reservoirs. This lack of accountability and objective measures is carried forward into the Modified IOP.

The original IOP placed a disproportionate share of the detrimental impacts of drought on Florida and the Apalachicola River. The Modified IOP clearly makes matters even worse for

Florida by effectively transferring additional drought impacts to Florida. Simultaneously, the COE/FWS have preemptively claimed and exercised discretion in determining storage credits to the point that credits were claimed for periods pre-dating the effective date of the original IOP, the volumetric storage account was changed and some unspecified level of release smoothing is now being anticipated by the COE. This makes it possible for the COE/FWS to release less than the minimums under the guise of smoothing or through use of storage credits. Thus, Florida has no assurance that the minimum daily releases will actually be received.

Sincerely,



Douglas E. Barr
Executive Director