



# Florida Department of Environmental Protection

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June 19, 2008

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**Re: 60-Day Notice of Intent to Sue Pursuant to the Endangered Species Act**

Dear Federal Officials:

This is the fourth in a series of letters notifying you of Florida's intent to sue the U.S. Army Corps of Engineers ("Corps") for violations of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, arising from the Corps' management of reservoirs in the Apalachicola-Chattahoochee-Flint ("ACF") River Basin. The Corps' operations continue to jeopardize the threatened Gulf sturgeon, endangered fat threeridge and threatened purple bankclimber (collectively, the "Apalachicola River Species"). Those operations also result in unlawful take of individual members of the Apalachicola River Species and destruction and adverse modification of the species' designated critical habitat. The Corps' operations violate Sections 7 and 9 of the ESA, 16 U.S.C. §§ 1536 and 1538, and Florida intends to pursue a civil action pursuant to Section 11(g)(1)(A) of the ESA, 16 U.S.C. § 1540(g)(1)(A), and the Administrative Procedure Act, 5 U.S.C. §§

701 *et seq.*, for injunctive or other relief against the Corps to prevent or redress the Corps' ESA violations.

Since November 2004, Florida has objected formally under the ESA to the Corps' unlawful retention of water in upstream reservoirs, its interruption of flows needed to support riverine spawning activities and its refusal to provide minimum flows needed to sustain populations of the Apalachicola River Species. Since that time, the Corps has made multiple, sequential adjustments to its operations, always within the confines of the 1989 Draft Water Control Plan ("Draft Plan"). While this particular letter is prompted by the Corps' recently adopted Revised Interim Operations Plan ("RIOP"),<sup>1</sup> revising one more time the initial Interim Operations Plan, you are hereby on notice that Florida will consider the Corps' operations unlawful so long as they remain rooted in the Draft Plan. All recent operations, such as the original Interim Operations Plan, the Extraordinary Drought Operation, and now the RIOP, are unlawful because the Draft Plan on which those operations are based has never been subjected to Section 7 consultation and harms the Apalachicola River Species. Furthermore, Florida views its first letter objecting to the IOP, dated April 19, 2007, as covering all the subsequent modifications of it, including the RIOP, as well as to its continued modification in the future, and providing the Corps adequate legal notification of its intent to sue for violations of the ESA by reason of the contents of such IOP, as so modified.

### **Background on Florida's Interests and Concerns**

Florida repeatedly has explained its interests in the ACF River Basin and its threatened and endangered species. *See, e.g., State of Alabama v. United States Army Corps of Engineers*, CV-90-H-01331-E (N.D. Ala.), Florida's Motion for Preliminary Injunction on Endangered Species Act Claims (filed Jan. 31, 2006) and related papers; Letter dated February 22, 2008 from Secretary Sole to various federal officials (Florida's third notice of intent to sue); Letter dated April 19, 2007 from Secretary Sole to various federal officials (Florida's second notice of intent to sue); Letter dated August 18, 2006 from then DEP Secretary Castille to Ms. Carmody regarding Section 7 consultation on the original IOP; Letter dated November 5, 2004 from D. Blankenau, Esq., to federal officials (Florida's original notice of intent to sue). Reference is made to those various documents, in which Florida has shared with the Corps and the Service copious data and information concerning the needs of the Apalachicola River Species.

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<sup>1</sup> The parameters of the RIOP are articulated in the *Finding of No Significant Impact and Supplemental Environmental Assessment; Modifications To The Interim Operations Plan For Support Of Endangered And Threatened Species And Temporary Waiver From ACF Water Control Plan; Jim Woodruff Dam Gadsden And Jackson Counties, Florida And Decatur County, Georgia* (June 1, 2008) ("EA").

Florida has provided the Corps and Service detailed public comments and criticisms concerning the Corps' so-called "interim" operations. *See, e.g.*, Letter dated April 30, 2008, from Secretary Sole to Ms. Carmody and Mr. Flakes; Letter dated May 2, 2008 from Mr. Theodore Hoehn to Ms. Carmody and Mr. Flakes; Letter dated November 8, 2007, from Secretary Sole to Ms. Carmody and Mr. Flakes; Letter dated November 7, 2007, from Theodore Hoehn to Ms. Carmody. In those letters, Florida explained the problems presented by the Corps' recent operations, particularly the storage of all Basin Inflow above certain minimum flow thresholds and the reduction in historic minimum flows occasioned by the Corps' discretionary decisions since 2006.

### Violations of ESA Section 7

Section 7(a)(2) of the ESA provides that the Corps shall "... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species..." 16 U.S.C. § 1536(a)(2). The term "action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: ... (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (definition of "action"). The Corps' ongoing dam and reservoir operations constitute an "action" subject to the ESA. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 631 (8th Cir. 2005) ("Because the Corps is able to exercise its discretion in determining how best to fulfill the purposes of the reservoir system's enabling statute [the Flood Control Act], the operation of the reservoir system is subject to the requirements of the ESA."). *See also, id.* at 626 ("The [Corps'] operation of the reservoir system also brings the Corps within the provisions of the [ESA].").

As explained in the Corps' EA:

The [RIOP] does not represent a new Water Control Plan for Jim Woodruff Dam or a new Master Operating Manual for the ACF. The proposed action is a modification of the current IOP, which is a definition of temporary discretionary operations within the limits and rule curves established by the existing water control plan (1989) for Jim Woodruff Dam. The [R]IOP describes minimum releases and maximum fall rates for releases from the dam to the Apalachicola River in order to minimize or avoid adverse impacts or provide support to the [Apalachicola River Species and critical habitats].

EA-2. The RIOP, thus, constitutes only a portion of the overall action subject to ESA Section 7(a)(2), not the entire action subject to the consultation obligation.<sup>2</sup>

The Corps may not “engage in a series of limited consultations without ever taking a comprehensive assessment of the impacts of their overall activity on protected species.” *Am. Rivers v. U.S. Army Corps of Eng’rs*, 271 F.Supp.2d 230, 255 (D.D.C. 2003); compare *Pacific Coast Federation of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001); *Conner v. Burford*, 836 F.2d 1521, 1534 (9th Cir. 1988). By limiting its consultation to the RIOP, the Corps has unlawfully segmented its dam and reservoir operations, isolating from ESA review the fundamental discretionary decisions that ultimately result in the flows represented by the RIOP. The RIOP is driven by a host of operational decisions, articulated in the Draft Plan and elsewhere, including the protection of municipal and industrial water supplies in Lake Lanier, an operating principle that is not viable in light of the court’s decision in *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).

Florida recognizes the U.S. Fish and Wildlife Service (“Service”) has condoned the RIOP in its *Biological Opinion on the U.S. Army Corps of Engineers, Mobile District, Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River* (“RIOP BiOp”). Florida will challenge the RIOP BiOp in due course (a challenge for which no notice under 16 U.S.C. § 1540(g) is required), in large part because it suffers the same flaws leading to the Ninth Circuit’s decision in *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008) (affirming lower court rejection of NOAA Fisheries biological opinion regarding the effects of the Federal Columbia River Power System). In the meantime, the Corps may not rely on a facially invalid biological opinion and “cannot abrogate its responsibility to decide whether it has taken all possible action to insure that [its project] is not likely to jeopardize the continued existence of the [species].” *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1460 (D. Hawaii 1984) citing *Nat’l Wildlife Fed’n v. Coleman*, 529 F.2d 359, 371 (5th Cir.) cert. denied, 429 U.S. 979 (1976). See also *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 75-76 (D.C. Cir. 2006) (“the action agency must not blindly adopt the conclusions of the consultant agency, citing that agency’s expertise.”); *Resources Ltd, Inc. v. Robertson*, 35 F.3d 1300, 1305 (9th Cir. 1993). Ultimately, the duty to comply with the ESA’s substantive mandates lies with the Corps.

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<sup>2</sup> For example, while the entire RIOP is based on the so-called “Action Zones” established by the Corps consistent with the Draft Plan and by which the Corps currently operates the Chattahoochee River reservoirs, these Action Zones never have been subjected to the ESA’s consultation requirements. The Corps’ continued adherence to a flow regime based entirely on Action Zones never themselves subjected to ESA Section 7 violates the ESA.

Under the RIOP, the Corps will reduce Apalachicola River levels to unprecedented lows, exposing various populations of threatened and endangered mussels and precluding any chance that those populations might recover. For example, the Service has identified just 101 individual purple bankclimbers in the entire Apalachicola River, but under the RIOP (as approved in the RIOP BiOp), the Corps will kill all documented purple bankclimbers. RIOP BiOp at 181 (authorizing take of 200 individuals). Extirpation of purple bankclimbers from the Apalachicola River is not consistent with ESA Section 7's mandate to avoid jeopardizing listed species. This is particularly true since the species is facing "possible widespread reproductive failure" and considering the Service's assessment that "the purple bankclimber may be declining throughout its range." RIOP BiOp at 177.

Nor can the RIOP be squared with the Corps' duty to avoid the destruction and adverse modification of critical habitat, which is certain to occur under the RIOP. Under the RIOP, the Corps will provide at most 5,000 cfs at the Chattahoochee gage until Composite Storage recovers to Zone 2. Yet, the Corps predicts drought conditions to continue throughout the summer. Unless Basin Inflow conditions improve dramatically, there is little reason to believe that Composite Storage will recover to Zone 2 in the near future.

At 5,000 cfs, the Corps has restricted the Apalachicola River to its mainstem, and virtually none of the floodplain is connected to the River. If 5,000 cfs were maintained as a flow *ceiling*, 80% of the Apalachicola River fish species normally reliant on the floodplain for one or more life cycle functions will be unable to access those vital habitats, severely hindering reproduction. This translates to a significant loss of riverine fishes, many of which are hosts to threatened and endangered mussels. Stated alternatively, the presence of host fish - a "primary constituent element" of mussel critical habitat, *see* RIOP BiOp at 29 - will be altered, and the value of that habitat for survival and recovery reduced appreciably. Barring an unexpected surge in Basin Inflow (most likely from the Flint River), mussel reproduction may be severely limited, if not precluded entirely.

Similarly, at a flow of 5,000 cfs, approximately five total acres (or just 25%) of known Gulf sturgeon spawning habitat remains available at appropriate spawning depth. Gulf sturgeon rely on Apalachicola River flow and temperature variations. RIOP BiOp at 22. Again, given Corps projections, there is little reason to believe Composite Storage will reach Zone 2 in the foreseeable future. If Composite Storage remains below Zone 2 through spring 2009, the RIOP will impede Gulf sturgeon spawning by suppressing such variations and severely limiting river stage over the so-called "Race Shoals", the Gulf sturgeon's primary documented spawning ground.



In light of the foregoing, the RIOP results in "jeopardy" to Apalachicola River Species and "adverse modification" of critical habitat designated for these species.

### **Violations of ESA Section 9**

Section 9 of the ESA prohibits the "taking" of any endangered species. 16 U.S.C. § 1538(a)(1)(B). "'Take' is defined in ... the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.A.A.N. 2989, 2995. Taking includes the concepts of "harm" and "harassment." 16 U.S.C. § 1532(19). Harm may occur through significant habitat modification that actually kills or injures a protected species by impairing essential behavior patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chap. of Communities for a Greater Oregon*, 515 U.S. 687, 691 (1995).

Under the RIOP, the Corps will kill Gulf sturgeon by capturing Basin Inflow or reducing river stage during the Gulf sturgeon spawn, and by increasing salinity in Apalachicola Bay to lethal levels. See, e.g., Letter dated April 30, 2008, from Secretary Sole to Ms. Carmody and Mr. Flakes (enclosing salinity data demonstrating elevated salinities resulting directly from Corps operations during 2006 - 2007). The Corps will kill protected mussels by reducing Apalachicola River flows to as little as 4,500 cfs - a level not seen in the post-dam era. While the Corps may contend it is insulated from liability for this take by virtue of the RIOP BiOp, as noted above, the Corps may not rely on a patently unlawful incidental take statement like that contained in the RIOP BiOp.<sup>3</sup>

### **Florida's Demands**

In sum, the Corps has committed both procedural and substantive violations of the ESA. The purpose of this letter is to put the Corps on notice of those violations and provide it with an opportunity to take corrective measures. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1210 (D. Idaho 1993), *aff'd*, 42 F.3d 1399 (9th Cir. 1994). Thus, while Florida presently

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<sup>3</sup> While a complete explication of the RIOP BiOp's shortcomings is beyond the scope of this letter, Florida notes that the RIOP BiOp's Reasonable and Prudent Measures ("RPM") and its related terms and conditions, are little more than a request for clarification of the Corps' proposed action. The Service's RPMs contain no meaningful requirements that will minimize the effect of take on purple bankclimbers. In contrast, the Service's Section 7 Consultation Handbook (March 1998) at 4-52 specifically calls, for example, for species salvage where practicable. By failing to impose meaningful RPMs, the RIOP BiOp's incidental take statement violates the ESA and provides no coverage for the Corps' take of mussels under the RIOP.

Pete Geren, et al

June 19, 2008

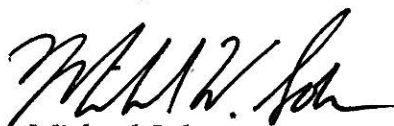
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intends to pursue an action pursuant to ESA Section 11(g), the Corps may avoid the litigation if it immediately takes the following actions:

- 1) Initiate formal consultation on all of its discretionary dam and reservoir operations. Florida understands that the Corps' current operations are described in a variety of materials including reservoir regulation manuals, the Draft Plan, interim drought management plans for the ACF Basin (1985) and an Emergency Drought Management Strategy (1986). See *Water Allocation Formula for the ACF Basin, Draft Environmental Impact Statement* (1998), Appendix D at 39. All of these materials collectively "document the reservoir regulation procedures and furnish guidance in the operation [of the reservoirs]." *Id.*
- 2) Until formal consultation has been completed:
  - a) Do not interfere with Basin Inflow during the riverine spawning season;
  - b) Provide flow support, using upstream reservoir storage when necessary, sufficient to ensure that river stage does not decline over known Gulf sturgeon spawning areas during a documented spawn;
  - c) Provide flow support necessary to ensure known mussel populations are not desiccated, and that mussel critical habitat remains inundated.

Should you wish to discuss this notice, please contact me.

Sincerely,



Michael Sole  
Secretary

MWS/tb