



Jeb Bush
Governor

Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
November 1, 2006

Colleen M. Castille
Secretary

Col. Peter F. Taylor, Jr.
Department of the Army
Mobile District, Corps of Engineers
Attention: CESAM-DE
Post Office Box 2288
Mobile, Alabama 36628-0001

RE: Plans to Comply with RPM 3 (Drought Provisions)

Dear Col. Taylor:

The U.S. Fish and Wildlife Service ("FWS") issued its *Biological and Conference Report on the U.S. Army Corps of Engineers, Mobile District, Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River* ("BiOp") on September 5, 2006. The BiOp provided the U.S. Army Corps of Engineers ("Corps") an incidental take statement for the taking of mussels in the Apalachicola River. BiOp at 140-147. Among the reasonable and prudent measures contained in the incidental take statement is "RPM 3 Drought Provisions." The purpose of this letter is inquire regarding the status of the Corps' efforts to comply with RPM 3 and to request a meeting to discuss implementation of that requirement of the incidental take statement.

The Corps must implement the "reasonable and prudent measures" enumerated in the incidental take statement to maintain authority to take mussels in the Apalachicola River. *See, e.g.*, 16 U.S.C. § 1536(b)(4)(ii); 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(1)(ii). RPM 3 provides: "**RPM3. Drought provisions.** Develop modifications to the IOP that provide a higher minimum flow to the Apalachicola River when reservoir storage and hydrologic conditions permit." BiOp at 142. The BiOp elaborates on the rationale for this requirement:

Rationale. 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. The Corps can minimize mussel mortality due to low-flow conditions by supporting a higher minimum flow when total reservoir storage and/or hydrologic conditions permit. As proposed, the IOP uses reservoir storage to support a 5,000 cfs minimum flow. *The available data indicates that higher minimum flows are supportable during normal and wet hydrologic periods, and during dry periods when the reservoirs are relatively full.* Conversely, during extended drier than normal conditions, it may

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be prudent to store more water than allowed under the IOP during certain times of the year to insure minimum water availability later. Possible components and triggers of the drought plan could be, but are not limited to: Corps reservoir action zones, cumulative reservoir storage remaining, total basin inflows, indicators of fish spawn, climatic condition indices, and flow levels at gages downstream of the Chattahoochee gage, such as the gage at Wewahitchka.

Id. (Emphasis supplied).

Reasonable and prudent measures like RPM 3 are implemented through compliance with mandatory "terms and conditions." 16 U.S.C. § 1536(b)(4)(iv); 50 C.F.R. § 402.14(i)(1)(iii). Accordingly, the Corps' incidental take statement contains the following terms and conditions to implement RPM 3:

7.4.3 Drought provisions (RPM3).

a. The Corps, with Service concurrence, shall initiate by January 30, 2007, IOP drought provisions that identify the reservoir, climatic, hydrologic, and/or listed species conditions that would allow supporting a higher minimum flow in the Apalachicola River, and that identify recommended water management measures to be implemented when conditions reach the identified drought trigger point(s).

b. If modifications to the IOP parameters for the months of March through May are adopted as part of the drought provisions, the Corps shall assess potential affects to Gulf sturgeon spawning and floodplain inundation. The Corps shall provide the models and a biological assessment of the effects of the drought provisions on listed species at least 135 days in advance of implementing the drought provisions in order to reinstate this consultation relative to any proposed changes in the IOP.

BiOp at 144 (Emphasis supplied).

Florida has challenged the BiOp in *State of Florida v. U.S. Fish & Wildlife Serv.*, 4:06 CV 410 RH-WCS 9 (N.D. Fl.). Nevertheless, unless and until the BiOp is set aside, the Corps is obligated to comply with the forgoing RPM 3 to retain its authority to take mussels. Florida is modeling various scenarios under which the Corps can readily provide increased flows to the mussel species as contemplated by RPM 3 without seriously compromising reservoir storage on the Chattahoochee River. Florida assumes the Corps is engaged in similar analyses in furtherance of its obligations under RPM 3.

Florida hereby requests the courtesy of a written response from you not later than November 5, 2006 explaining the Corps' progress in complying with RPM 3 to date. Further, Florida requests an update on any modeling activities you have undertaken. In addition, Florida

would like to meet with appropriate representatives from the Corps not later than November 15, 2006 to discuss the Corps' future plans concerning RPM 3. I look forward to your timely response.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. M. Munson', written over a horizontal line.

Gregory M. Munson
General Counsel