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January 29, 2007

Ms. Gail Carmody
Supervisor
United States Fish and Wildlife Service
1601 Balboa Avenue
Panama City, Florida 32405-3721

RE: Response to Georgia and ARC *et al.*'s Comments on Reasonable and Prudent Measure No. 3 (Drought Provisions)

Dear Ms. Carmody:

Florida has reviewed comments offered by the State of Georgia and the Atlanta Regional Commission *et al.* ("ARC") regarding implementation of "Reasonable and Prudent Measure (RPM) 3" set forth in the Fish and Wildlife Service's ("Service") *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") (September 5, 2006). Neither proposal reflects an appreciation of the capacity of upstream reservoirs to augment Apalachicola River flows over and above the 5,000 cubic foot per second ("cfs") floor identified in the Corps of Engineers' ("Corps") Interim Operations Plan. These comments are intended to illuminate the fundamental problems with Georgia's and ARC's proposals and, again, highlight the Corps' ability to provide additional water to the River. This can be accomplished without adversely impacting flows needed to support Gulf sturgeon and host-fish spawning activities, provided all interests share the adversity presented by extraordinary drought.

1. Problems with the Georgia Entities' Proposals

(a) Georgia's Proposal

Georgia's proposal, in short, involves storing additional water during the spring riverine fish spawn with the professed intent of making that increment of stored water available later during the year. Of course, Georgia's proposal stops at the point of storing additional water, and never actually explains how - or if - the additional

storage would be used for the benefit of mussels. In other words, Georgia's proposal fails entirely to address the point of RPM 3 - *minimization* of the impact of take on the mussels by increasing flows to members of that species. 16 U.S.C. § 1536(b)(4)(C)(ii).

In reality, the Georgia proposal eliminates any benefit the Apalachicola River species might receive from the Interim Operations Plan as currently written.¹ Specifically, under the Georgia proposal, the Corps would store 100% of all Basin Inflow above 10,000 cfs any time the upstream reservoirs (principally Lake Lanier) were not full - even in the middle of the spring spawning season. If the reservoirs actually filled, then the Apalachicola River would receive the "spill water" that could no longer be contained due to limits on storage capacity. In short, whereas the River currently receives 100% of Basin Inflow during the spring spawn whenever flow is below 20,400 cfs, under the Georgia proposal the River would receive *nothing* over 10,000 cfs *unless and until* the reservoirs were overflowing.

Florida, in its initial comment on RPM 3, explained the conceptual problem with storing more water in the spring than the Interim Operations Plan already allows. There is simply no basis in the BiOp from which to conclude that the Gulf sturgeon can tolerate less water than is provided currently during the spawn. Georgia criticizes the Service for utilizing data collected in 2005 to justify the "higher-end" flows called for in the BiOp (e.g., 20,400 - 37,400 and above) because they are allegedly based on one year's data. Georgia then, justifies its call for reduced spring flows entirely on the back of a one time collection of nine Gulf sturgeon eggs at RM 99 in 2006.² As Florida previously stated, that collection data cannot reasonably justify a three-fold reduction in Apalachicola River flow during the spring spawning season. To the extent there is biological uncertainty surrounding the minimum flow requirements of the Gulf sturgeon, the Service must "give the benefit of the doubt to the species." *Ctr. for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1127-28 (N.D. Cal. 2006) quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (quoting H.R. Conf. Rep. No. 96-697, 1st Sess. 12, reprinted in 1979 U.S.C.C.A.N. 2572, 2576); 51 Fed. Reg. at 19,952 citing H.R. Conf. Rep. No. 697 at 12 ("In formulating its biological opinion, the Service must provide the 'benefit of the doubt' to the species concerned.")

¹ It is, of course, no secret that Georgia actively is attempting to invalidate the Interim Operations Plan in at least one judicial forum. See *Georgia v. Army Corps of Engineers*, 1:06-cv-01473-CAP (N.D. Ga.).

² Georgia relies heavily on Figures 3.6.1.4.C and 3.6.1.4.D of the BiOp to validate its recommendation. However, the quality of habitat at RM 105 and 99 are not comparable. Simply put, RM 99 is not the habitat equivalent of the rough limestone spawning site at RM 105 where egg collection success was 10 times greater than that of RM 99 in 2006.

Any such approach, moreover, entirely ignores the fact that reduced floodplain inundation during the spring will compromise the health and productivity of fish species that act as reproductive hosts for the mussels. The Apalachicola River mussels rely entirely on those fish for reproduction, and the importance of the host-fish connection is well documented in the BiOp. *See, e.g.*, BiOp § 2.2.3.3. (Reproduction); *id.* § 3.3.3. (Seasonality); *id.* § 3.6.2.3 (Permanently Flowing Water); *id.* § 3.6.2.5 (Fish Hosts). Taking additional water from key floodplain habitats during the spring will not only further imperil the Gulf sturgeon, but will also compromise the spawn of multiple fish species, many of which play host to threatened and endangered mussels.

Georgia's proposal contains no discussion whatsoever of these critical issues. It should be rejected as counterproductive to the spirit and intent of RPM 3.

(b) ARC's Plan

ARC's plan suffers the same fundamental flaw inherent in Georgia's. At base, it directs its energy to ensuring that the Corps keeps "significantly more water in storage" so that upstream reservoirs are full on June 1, each year. ARC Plan at 1, 8. This too is done under the auspices of ensuring that water will be available in a "5,000 cfs Carryover Storage" pool. *Id.* at 8. ARC's so-called "Maximum Sustainable Release Rule" or MSRR would set a target flow of 10,000 cfs and a base flow of 5,000 cfs. *Id.* at 9. The MSRR would "restrict[] releases to 5,000 cfs whenever there is not enough water in the system to sustain [higher] flow over a repeat of the worst historical drought and still have a margin of safety." *Id.* Like so many flawed Corps operations, it sets operational parameters based on worst-case scenarios rather than realistic projections.

ARC's proposal, like Georgia's accepts 5,000 cfs as a proper minimum flow and attempts to maximize storage in the critical spring months so that a "sustainable flow" above 5,000 cfs might be maintained on occasion. While ARC is unclear about what it views as "sustainable" from a downstream flow standpoint, some insight can be gleaned between the lines. First, it is clear ARC's overriding goal is to protect at all times the 2030 water supply demands of the Atlanta metropolitan area. ARC Plan at 11. Second, this block of dedicated water would be insulated, in part, by a "margin of safety" designed to protect against an unprecedented hypothetical drought scenario. *Id.* at 12, 13 and Figure 3. Third, the needs of the Apalachicola River species come after

Atlanta's 2030 demands are fully satisfied. This, without any apparent consideration of conservation potential that might reduce that strain on the reservoir system.³

Finally, and perhaps most telling is ARC's analysis of the impact its plan might have on Lake Lanier. ARC Plan at 40, Figure 25 Frequency of Stages at Lake Lanier. It is clear from this Figure ARC views any scenario that reduces the elevation of Lake Lanier to less than 1059' as one that must be avoided. ARC's analysis concludes that *even in the worst case scenario*, Lake Lanier would remain at or above this elevation. Such a floor has no foundation in law, is well over the historic low elevation of 1053' and is 11' above municipal and industrial supply intakes. Clearly, ARC's fundamental objective is to elevate recreational and municipal and industrial uses above the needs of the Apalachicola River species. But, ARC has it backwards. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978), the Supreme Court emphatically explained that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities"

Setting aside for the moment these fundamental problems, even ARC concedes that mussels will be exposed for more consecutive days at the lowest flows of 5,000 cfs (or less)⁴ than under the existing Interim Operations Plan. *Id.* at 28, Figure 10. ARC justifies this on the basis that "it is better for the mussels if the flows fall only once as opposed to several times." *Id.* This unsupported finding is contradicted by ARC's analysis of the frequency of sustained low flows, wherein it argues that "mussels can survive short periods of dewatering." *Id.* at 30. ARC cannot seriously contend that it is good for mussels to experience long duration flow events and yet acknowledge that mussels can survive out of water for only a short time. Such cursory biological analyses hardly constitute the "best scientific and commercial data available." *Nat'l Wildlife Fed'n v. Norton*, 332 F.Supp. 2d 170, 175. (D.D.C. 2004); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir.1992).

³ Florida already explained the potential for conserved water to accommodate the 2030 demands of metro-Atlanta. See Pacific Institute for Studies in Development, Environment and Security, *A Review of Water Conservation Planning for the Atlanta, Georgia Region* (prepared for Florida DEP) (August 2006).

⁴ Notably, under ARC's plan, even this modest flow apparently would not be sustained in some undefined period of "severe drought." The true bottom flow is apparently "to be determined" at a later date. Proposal at 10, Figure 1. It is impossible to reconcile this approach with the Service's obligation to minimize the impact of take on the mussels.

2. The Corps Can Provide More Water to the Apalachicola River

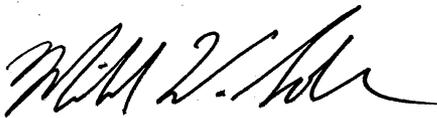
As Florida already has explained, there is no need to accept the 5,000 cfs flow floor identified in the Interim Operations Plan. By maximizing reservoir refill in the less biologically significant months of December, January and February, and relying on the volume of Basin Inflow in the January - March timeframe as a predictor of likely hydrologic conditions, the Corps can easily sustain 5,700 cfs in the worst case scenario and 6,300 cfs 95% of the time. *See generally*, Florida's Comments on Reasonable and Prudent Measure No. 3 (Drought Provisions) (January 16, 2007). While the simulated minimum Lanier elevation is 1,050.49' under Florida's proposal, that level remains 2.5' above intakes of concern, and Lake Lanier is *at or above 1,051' in all but 10 days* of the 63-year period.

3. Conclusion

In the end, Georgia's and ARC's proposals undercut what little benefit the Interim Operations Plan affords the River and elevate the functions served by reservoir storage (*e.g.*, recreation and municipal and industrial use) over and above the needs of the Apalachicola River species. They simply perpetuate the kind of worst-case planning that has resulted for years in unnecessary (and mitigated) destruction of mussel populations in the Apalachicola River. Again, 2006 provides the best example of the problem: The Corps refused to release more than 5,000 cfs, except under Florida's court order, and thousands of mussels died unnecessarily as a result. Yet even with augmentation releases to support 6,300 cfs at Chattahoochee, Lake Lanier would have declined only to elevation 1,058'. Continuation of such poor operational choices will not minimize the impact of take on the mussel species, and it is incumbent on the Service to demand more.

Florida appreciates the opportunity to provide this review. Should you have any questions about this analysis or Florida's conclusions, do not hesitate to contact me.

Sincerely,



Michael W. Sole
Secretary