

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re: Tri State Water Rights Litigation

Case No. 3:07-MD-1-PAM

**GEORGIA PARTIES' REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT ON PHASE 2 ISSUES**

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SUMMARY OF REPLY

The Georgia Parties seek summary judgment on two claims: (1) that Fish and Wildlife exceeded its legal authority under the Endangered Species Act by finding that the Corps' reservoir operation plan (known as the RIOP) would likely result in the incidental take of certain threatened and endangered species; and (2) that the Corps violated the National Environmental Protection Act by failing to prepare an Environmental Impact Statement addressing the Corps' reservoir operations in the ACF Basin. The arguments made in response to the Georgia Parties' claims are built largely on a series of misconceptions or distortions of applicable law and fact.

As to the ESA claim, Fish and Wildlife erred by equating any and all mussel mortality resulting from low flows with "incidental take" caused by the RIOP. Fish and Wildlife made a similar mistake by equating the loss of sturgeon eggs due to receding flood conditions with "incidental take" without determining whether the Corps' reservoir operations caused such conditions to occur. The Federal Defendants and Florida have made various arguments to defend the finding that "take" will occur, but these all fail. Indeed, there are three key reasons why the Georgia Parties' motion for summary judgment should be granted.

First, the fundamental fact is that reservoir operations—before and after the RIOP—have been good, not bad, for the species. The reservoirs augment the lowest flows, which Florida concedes are "all that matter." Fl. Resp. Br. at 39 n.42.

Second, the Corps cannot be held legally responsible for "take" it did not cause, as Judge Bowdre has already held, twice, in this very case. The Federal Defendants and Florida both argue, to varying degrees, that Fish and Wildlife is not required to prove causation to

establish that an “incidental take” will occur. Florida even goes so far as to argue that causation has “no place” in the Section 7 analysis. Both theories are mistaken. Indeed, the cases Florida cites affirmatively establish that traditional causation principles apply to Section 7. Beyond that, Florida is simply wrong in asserting that the ESA imposes a duty on the Corps to prevent mortality—regardless of the cause—“to the full extent of its discretion to act.” The ESA imposes no such duty. Its central mandate is to do no harm: do not take, do not cause jeopardy, do not destroy or adversely modify critical habitat. Fish and Wildlife committed clear legal error by requiring the Corps to minimize “take” in the absence of any evidence that the RIOP will in fact *cause* take.

Third, Fish and Wildlife used the wrong “environmental baseline” in the Biological Opinion as the reference point for studying the effects of the RIOP. The ESA regulations, the Consultation Handbook, and the Eleventh Circuit all require the effects of a proposed action to be determined by reference to the environmental baseline. The error with respect to the environmental baseline goes to one particular component—the “baseline flow regime,” meaning the flows in the Apalachicola River that would result in the absence of discretionary control by the Corps. Fish and Wildlife used the historical flow record from 1975 to 2007 as the baseline flow regime. Using historical flows as the basis of comparison was legal error because the flow record from 1975 to 2007 is the product of the Corps’ discretionary reservoir operations, which substantially augmented natural low flows. By using the regulated condition as the “baseline flow regime,” Fish and Wildlife effectively imposed an artificially high standard for the Corps’ discretionary operations—erroneously assuming that

any decrease in the *benefits* provided by past discretionary operations would result in “take.” That simply is not the law.

Instead of using the regulated condition, Fish and Wildlife should have used a “run-of-river” model as the baseline flow regime. The run-of-river model shows what the flow of the river would be in the absence of discretionary control by the Corps. It assumes that the dams remain in place but that the Corps exercises no further control over the flow of the Apalachicola River. In other words, the dams remain standing but neither store water nor augment flows. Use of the run-of-river model as the baseline flow regime in this case is required under the reasoning of the only two court decisions that have addressed this issue. When the run-of-river model is used as the point of comparison, as the law requires, it simply cannot be disputed that the Corps’ discretionary reservoir operations have been good, not bad, for the species, and hence that Fish and Wildlife erred by concluding that the RIOP will result in any “take.”

Finally, these same three principles also explain why Florida’s motion for summary judgment should be denied. In the context of the jeopardy analysis under Section 7(a)(2) of the ESA, the effect of using the wrong baseline was to impose a more stringent standard on the RIOP than is authorized by law. When the correct environmental baseline is used, it becomes even more apparent that the RIOP is beneficial to the species and thus not contributing to jeopardy. Fish and Wildlife’s no jeopardy finding should therefore be upheld.

As to the Georgia Parties’ NEPA claim, it is undisputed that the Corps failed to prepare an Environmental Impact Statement for its reservoir operations within the ACF Basin. The Federal Defendants essentially admit, as they must, that this failure constitutes a violation of

NEPA. Contrary to the Federal Defendants' response, this violation has not been cured, as the Corps still, to this date, has not prepared an EIS. Furthermore, although the Corps has initiated the process of preparing an EIS for the next water control plan, it has already made a public commitment to exclude reasonable alternatives from its NEPA analysis. Binding regulations require the agency to consider all reasonable alternatives to the proposed water control plan, including alternatives that exceed the agency's current jurisdiction. The decision-makers in the ACF Basin deserve and require a full analysis of alternatives, as any fair analysis will reveal that there is more than enough water in the ACF Basin to meet the reasonable needs of all stakeholders if the reservoirs are operated properly.

Accordingly, the Georgia Parties respectfully request that the Court grant their Motion for Summary Judgment on both the ESA and NEPA claims.

I. The Court Should Grant Summary Judgment for the Georgia Parties on the Endangered Species Act Claim

There are three primary reasons why summary judgment should be granted on the Georgia Parties' ESA claim, each discussed below.

A. Reservoir Operations in the ACF Basin Have Been Good, Not Bad, for the Species

First, as demonstrated in the Georgia Parties' opening brief, the Corps' reservoir operations have a beneficial effect on the flow regime of the Apalachicola River by increasing the lowest flows. *See, e.g.*, Ga Br. at 31. That is not to say that the dams have had no adverse effects—they have, by blocking access to upstream habitat, for example—but these adverse effects are not subject to consultation under Section 7 and are not part of the

action at issue in this case,¹ which concerns the Corps' *operation* of the dams and the resulting effect on flows in the Apalachicola River. Far from causing or contributing to any adverse effects on the species or their habitat, flow control by the reservoirs has had a beneficial effect on the flow regime by *increasing* the lowest flows. As Florida itself acknowledges, "[t]he negative impacts on the Apalachicola Species, as all know, occur at times of low flow, so low flow impacts are all that matter." Fl. Resp. Br. at 39 n.42.

Because the RIOP improves the flow regime in the only way that matters to the species, Fish and Wildlife erred by finding that the RIOP will cause "take," and the Georgia Parties' motion for summary judgment on that issue should be granted. Further, because the same facts show that Fish and Wildlife correctly concluded that the RIOP will not result in jeopardy or adverse modification, Florida's motion for summary judgment should be denied.²

Florida's assertions that the RIOP will cause adverse effects in the Apalachicola River are largely conclusory, and its few purported proofs fail. For example, Florida asserts that it is "beyond doubt that the Corps' discretionary reservoir operations . . . rank among the principal causes of" the decline of the federally listed species. Fl. Resp. Br. at 10.

Elsewhere, Florida states that the Corps' "operation of the ACF reservoirs are among the primary causes of the Apalachicola Species' decline." *Id.* at 31 (emphasis omitted). The

¹ Woodruff Dam and the other dams in the ACF Basin, with the exception of West Point, were all constructed prior to enactment of the ESA. Section 7 of the ESA does not apply retroactively to actions that preceded the enactment of the statute. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 186 n.32 (1978).

² The Georgia Parties also reject Florida's arguments that the Corps has illegally held water in the reservoirs in support of recreation. Just as Florida has failed to establish a causal link between the Corps' general operations and jeopardy or take under the ESA, there is no basis for a finding that the Corps' operations in support of recreation have violated the ESA.

documents cited by Florida, however, at best suggest that extremely *low flows* can harm the species. *See, e.g.*, Doc. 295, FWS AR Pages 6709 (“Extremely low-flows are likely among the most stressful natural events faced by river biota.”).

At most, then, Florida might be able to prove that extremely low flows may have an adverse effect on the species. It has utterly failed, however, to establish the required causal connection between extremely low flows and the Corps’ discretionary reservoir operations. In fact, Florida’s own response confirms the opposite: “Dams, including those on the Chattahoochee River, are built to control flows so as to impound and store water at times of high flows and *to augment low flows* when needed.” Fl. Resp. Br. at 32 (emphasis added). A comparison of low flow conditions under the RIOP to conditions without any flow control by the Corps demonstrates that the Corps’ operations are actually ameliorating any harm to the species that would otherwise occur. Doc. 510, FWS AR 013493 & 013640; Ga. Br. at 28.

Florida’s other attempts to prove that the Corps has caused harm to the species similarly fall short. For example, Florida cites a graph in the Biological Opinion showing that municipal and industrial (“M&I”) water withdrawals throughout the ACF Basin deplete unimpaired flows by 15% during the month of June. Florida implies, without stating, that M&I water withdrawals depleted the flow of the Apalachicola River by the same amount. Fl. Resp. Br. at 39 n.42 (citing Doc. 510, FWS AR Page 013638). Ironically, however, this very chart demonstrates the opposite: even though unimpaired flows had fallen to 4,491 cfs in June 2000, the Corps maintained a flow in the Apalachicola River of 5,000 cfs. In other words, the Corps released water from storage in its reservoirs to maintain a flow in the Apalachicola River that was 500 cfs *greater* than the natural, unimpaired flow. Even if the

provision of the RIOP reducing the minimum flow to 4,500 cfs had been triggered, the Corps *still* would have been providing more flow to the Apalachicola River than nature was providing at that time (4,491 cfs). *See* Doc. 510, FWS AR Page 013638.³

Florida also attempts to prove causation by comparing flows under the RIOP to “natural flows”—which are the same in concept as the “unimpaired flows” discussed in the Georgia Parties’ opposition to Florida’s motion for summary judgment. Ga. Resp. Br. at 8-9.

Although Florida purports to compare run-of-river flows with natural flows in its Figure 1, this is an apples-to-oranges comparison because “natural flows” are shown only from 1929 to 1955, while run-of-river flows are shown only from 1975 to 2007. This is a false comparison because the latter period was much drier than the former. Ga. Resp. at 8-9. Also, while Florida’s *discussion* refers to “authentic natural flows,” its *charts* actually depict “90th Percentile Exceedence” flows, which are in no sense natural, and are actually much drier than any that have ever occurred in the history of the basin. Ga. Resp. Br. at 8-23.

Florida’s next figure is an attempt to address the problem noted above by showing “90th percentile exceedence flows” for all three flow regimes for the period from 1975 to 2007. Noting that “natural flow” was higher than run-of-river flow during this time period, Florida asks the Court to make two leaps of faith: first, to credit Florida’s assertion that its synthetic hydrology based on “90th Percentile Exceedence” flows provides a meaningful basis for comparison; and second, to conclude that the RIOP is to blame for any and all impairments

³ In its response, Florida also rehashes numerous arguments from its opening brief to claim that the Corps has caused harm to the species, all of which the Georgia Parties discredited in their response. *See* Ga. Resp. Br. at 48-49 (responding to Florida’s argument about Swift Slough); *id.* at 59-61 (responding to Florida’s argument about alternations to mussel habitat); *id.* at 54-59 (responding to Florida’s argument regarding impacts to Gulf sturgeon habitat).

to the natural flow. Fl. Resp. Br. at 24. Florida actually contradicts itself on this point, as it explains in its brief that the “natural flow” of the Apalachicola River has been impaired by many factors completely unrelated to the RIOP—including agricultural water usage in the Flint River Basin and evaporation from the reservoirs. Fl. Resp. Br. at 24. The RIOP did not cause these impairments.

As discussed further below, the right way to identify the effects of the Corps’ discretionary operations is to compare the RIOP to the run-of-river flow regime. This comparison, as even Florida’s Figure 1 shows, demonstrates that reservoir operations have been beneficial to the species. *See* Fl. Resp. Br. at 23; Doc. 510, FWS AR Page 013640.

B. The Corps Is Not Responsible for “Incidental Take” It Does Not Cause

The second fundamental reason the Court should grant summary judgment on the Georgia Parties’ ESA claim is that the Corps cannot be held legally responsible for “take” that it did not cause. Ga. Br. 18-22 & 29-32. Fish and Wildlife erred by issuing an Incidental Take Statement when there was no evidence that flow regulation by the RIOP will cause adverse effects for the protected species in the Apalachicola River. Cognizant of this problem, the Federal Defendants and Florida both argue, to varying degrees, that ordinary principles of causation do not apply to the analysis under Section 7.

Florida asserts the more extreme version, arguing that the analysis of causation simply has “no place” in the analysis under Section 7. There is no legal support whatsoever for this theory, and Florida’s own cases establish firmly that ordinary principles of causation do apply to Section 7. Similarly, as Judge Bowdre has already held in this case, the ESA does not impose upon the Corps an affirmative duty to augment flow to protect the species.

For its part, the United States agrees that causation is required but argues that an expansive understanding of causation should apply in the Section 7(b)(4) context to enable Fish and Wildlife to impose regulations to benefit threatened and endangered species. Yet this very theory was advanced by the United States and soundly rejected by the Ninth Circuit in *Arizona Cattle Growers' Ass'n v. USFWS*, 273 F.3d 1229, 1239-43 (9th Cir. 2001). Because the flow regulation of the RIOP does not cause take, Fish and Wildlife erred by issuing an Incidental Take Statement that imposes conditions on the Corps.

1. Judge Bowdre Has Ruled that the ESA Does Not Obligate the Corps to Take Action to Shelter the Species from the Effects of Drought

Florida's argument that the ESA makes the Corps liable for low flows without regard to whether the Corps caused those low flows has already been rejected twice in this case. *See Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1132-35 (N.D. Ala. 2006) (Doc. #506); *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-1331-KOB, slip op. at 1 (N.D. Ala. Apr. 17, 2006) (Doc. #443). Florida first made this argument when seeking a preliminary injunction to compel the Corps to make whatever releases were necessary to keep a portion of the Gulf sturgeon's spawning habitat wet during the spawning season. FA ¶¶ 252-55. Florida made the same argument later when it sought a temporary restraining order to require the Corps to make whatever flows were necessary to keep mussel habitat in Swift Slough connected to the main channel during drought. FA ¶¶ 276-79. Judge Bowdre rejected Florida's argument both times. Judge Bowdre ruled that drought, not the Corps, was the cause of the deaths to the species, and, furthermore, that the Corps does not have an affirmative duty to use its reservoirs to prevent or mitigate effects that occur as a result of drought:

[N]o controlling authority . . . requires the Corps to do more than what it is currently doing. . . . The Corps . . . has already taken affirmative action to provide *more* protection to the mussels than the natural flow of unhindered water would provide the mussels during this drought period. . . . [A] court cannot hold the Corps responsible for the absence of rain.

Alabama, 441 F. Supp. 2d at 1134-35; accord *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 77 (D.C. Cir. 2006) (ESA duties limited to providing the level of natural “inflow”).

2. Florida’s Radical Argument that Causation Has “No Place” in the Section 7 Analysis Must Be Rejected

Recognizing the problems posed by these holdings, Florida attempts to distinguish them by asserting that Judge Bowdre’s rulings apply only to Section 9. Florida further posits a distinction between Section 7 and Section 9, and goes so far as to argue that causation has “no place” under Section 7. Fl. Resp. Br. at 7. These contentions have no merit.

a. Florida Key Deer Establishes that Both Causation-in-Fact and Proximate Cause Are Required Under Section 7

Florida’s argument is based on a misreading of two cases—*Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008), and the case it follows, *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). Florida interprets *Florida Key Deer* as having established a brand new standard of causation “for Section 7” that is specifically “founded on the extraordinarily strong policies underlying the statute itself.” Fl. Resp. Br. at 30. Under this alleged new standard, Florida asserts that “an agency’s discretion is the controlling factor, and to the extent a ‘causation’ test exists for Section 7, the only issue is whether a discretionary agency action is *a* cause of direct or indirect effects on listed species.” Fl. Resp. Br. at 29. An analysis of *Florida Key Deer* and *Public Citizen* directly contradicts this argument, however.

Far from setting up a new standard of causation specifically for Section 7 of the ESA, these cases actually hold that ordinary principles of causation apply. The cases also illustrate, however, that “traditional principles” of causation vary widely in their application depending upon the particular facts of each case. *See, e.g., Public Citizen*, 541 U.S. at 767. Specific doctrines developed to address specific problems include the “but for” test, the “substantial factor” test, and “proximate cause,” and any or all of these tests may be applied in an appropriate case. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 700 n.13 (1995) (“but for” rule); *Florida Key Deer*, 522 F.3d at 1143-44 (cause-in-fact and proximate cause); *Cox v. Administrator, U.S. Steel & Carnegie*, 17 F.3d 1387, 1399 (11th Cir. 1994) (substantial factor rule). Thus, although some cases present difficult questions about which specific test should apply, none supports Florida’s position that such principles play “no part” in the analysis of causation under Section 7. *Public Citizen* and *Florida Key Deer* establish just the opposite.

Public Citizen was a NEPA challenge to rules promulgated by the Department of Transportation to implement certain provisions of the North American Free Trade Agreement, which provided for Mexican trucks to be allowed to operate in the United States subject to safety rules promulgated by DOT. 541 U.S. at 772-73. The petitioners alleged that DOT was required by NEPA to prepare an EIS to study the environmental impact of allowing Mexican trucks to operate in the United States before promulgating these rules. Because NAFTA established the promulgation of safety rules as a necessary precondition to allowing Mexican trucks to cross into the United States, all parties acknowledged that DOT’s promulgation of the safety rules could be considered the “but for” cause of any such

environmental impacts. The Supreme Court determined, however, that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.” *Id.* at 767. The court held that NEPA requires a “reasonably close causal relationship” between the environmental effect and the alleged cause. *Id.* The court analogized this requirement to the “familiar doctrine of proximate cause from tort law,” *id.*, thus establishing that the traditional principles apply.

In *Florida Key Deer*, the Eleventh Circuit held that the *Public Citizen* standard also applies to Section 7 of the ESA because the Section 7 framework is “materially indistinguishable” from the NEPA framework. 522 F.3d at 1143. Therefore, far from supporting Florida’s argument, *Florida Key Deer* establishes firmly that ordinary causation principles apply to Section 7. Under *Public Citizen* and *Florida Key Deer*, actual but-for causation remains a necessary, but not sufficient, element of a Section 7 claim; Section 7 also requires proximate cause—a “reasonably close causal relationship” between the environmental effect and the alleged cause. *See Florida Key Deer*, 522 F.3d at 1143-44 (following *Public Citizen*, 541 U.S. at 767).⁴

Where Florida went wrong in its reading of these cases is in focusing entirely on distinguishable facts in *Florida Key Deer*. In that case, the defendant, FEMA, did not contest its status as the cause-in-fact of adverse effects leading to jeopardy. Its sole claim, instead,

⁴ Although these principles are fully developed in *Public Citizen* and *Florida Key Deer*, those cases do not break any new ground. *See, e.g., Center for Biological Diversity v. HUD*, 541 F. Supp. 2d 1091, 1098-101 (D. Ariz. 2008), *aff’d*, No. 08-16400, 2009 WL 4912592 (9th Cir. Nov. 29, 2009); *Pacific Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 538 F. Supp. 2d 242, 260 (D.D.C. 2008) (proposed federal action not the “cause” of ESA “takes” by “dogs” or third parties).

was that it lacked discretion to mitigate or prevent those effects—FEMA invoked *Public Citizen* to argue that, although it was a cause-in-fact of jeopardy, it was not legally responsible for the effects of its action. The Eleventh Circuit rejected this argument upon finding that FEMA had sufficient discretion to take ESA considerations into account in its administration of the flood insurance program. The major distinction between *Florida Key Deer* and the present case is that causation-in-fact was not an issue in *Florida Key Deer*, but it is here. Thus, Florida skips a crucial step in its causation analysis.

b. Section 7 Does Not Impose a Duty on the Corps to Take Affirmative Action to Prevent Natural Mortality

Florida’s causation argument boils down to an argument that the ESA imposes a duty on the Corps to take affirmative action to prevent any and all impairments to the species—without regard to causation—“to the full extent of its discretion to act.” Fl. Resp. Br. at 18. Florida argues: “As long as conservation storage remains available in those reservoirs, the Corps is making discretionary decisions to retain it or release it, and the Corps’ decision to retain that storage upstream so as to reduce releases at Woodruff Dam below 5,000 cfs must be seen as *a* cause of resulting mussel mortality.” Fl. Resp. Br. at 8. Absent a specific legal duty to take the affirmative action that Florida requests, however, this claim fails. *See, e.g.,* PROSSER AND KEATON ON TORTS 274 (5th ed. 1984) (“[E]very question which arises in connection with ‘proximate cause’ [can be stated] in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?”).

The ESA imposes no such duty.⁵ The operative provisions of the ESA are almost entirely prohibitory: do not take, do not cause jeopardy, do not destroy or adversely modify critical habitat. Neither Section 7 nor Section 9 creates a duty requiring the Corps to take affirmative action to shelter the species by augmenting low flows “to the full extent of its discretion to act.” *See Alabama*, 441 F. Supp. 2d at 1134.⁶

To be sure, Florida does mention in a footnote that Section 7(a)(1) imposes certain affirmative duties. Fl. Resp. Br. at n.30. This is irrelevant, however, because Section 7(a)(1) clearly does not require the Corps to benefit the species “to the full extent of its discretion to act”—and Florida does not even allege that it does. Section 7(a)(1) merely requires federal agencies to consult with Fish and Wildlife to identify ways to “utilize their authorities in furtherance of the purposes of the” ESA. 16 U.S.C. § 1536(a)(1). Federal agencies retain broad discretion to determine how to comply with this mandate. *See Florida Key Deer*, 522 F.3d at 1146 (citing cases). Indeed, the regulations explicitly state that conservation

⁵ Florida quotes an exchange between the United States’ attorney, Mr. Maysonett, and Judge Bowdre in which Mr. Maysonett stated, “what Section 7 requires is that the Corps do whatever is required to avoid jeopardy.” Fl. Resp. Br. at 27. It is true that agencies must do whatever is required to avoid *causing* jeopardy through their own actions, but avoiding negative effects of agency action and requiring an agency to affirmatively act to improve conditions are distinct.

⁶ *See also Swan View Coalition v. Barbouletos*, No. CV 06-73-M-DWM, 2008 WL 5682094, at *10 (D. Mont. June 13, 2008) (Section 7(a)(2) “does not confer upon the action agency the affirmative obligation to promote the recovery of a listed species”); *see also Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (agency not required to pick the alternative “that would most effectively protect the Flycatcher from jeopardy”); *Sierra Club v. Glickman*, 67 F.3d 90, 97 (5th Cir. 1995) (if the Forest Service satisfies the minimum required by ESA §§ 7 and 9, “the district court is not to substitute its judgment” on whether other “features might be most desirable”); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (“far-fetched” and unpersuasive to argue that the ESA compels federal agencies to do “whatever it takes” to conserve listed species).

recommendations offered by Fish and Wildlife in the context of a Biological Opinion are discretionary and do not “carry any binding force.” 50 C.F.R. § 402.14(j).⁷ *See also WaterWatch of Oregon v. U.S. Army Corps of Eng’rs*, No. 99-861-BR, 2000 WL 1100059, at *11 (D. Or. June 7, 2000) (holding that it was clearly beyond the court’s authority to order any specific conservation measure be taken). Perhaps this is why Florida does not even argue that Section 7(a)(1) is the source of any duty that has been violated or that is otherwise relevant to this case.

3. Fish and Wildlife Cannot Issue an Incidental Take Statement Just Because It Might Help the Species

Although their argument is not as extreme as Florida’s, the Federal Defendants also argue that Fish and Wildlife should be allowed to use a more relaxed standard of causation to regulate “incidental take” under ESA Section 7. Fed. Def. Resp. Br. at 134-35. The Federal Defendants argue that the “word ‘incidental [take]’ connotes a looser connection than ‘but for’ causation”—one that is met if the federal action is a “minor accompaniment” in producing take. Fed. Def. Resp. Br. at 134. Thus, they assert that the Court should reject the Georgia Parties’ challenges to the Incidental Take Statement because “it is undisputed that mortality of listed mussels could occur if the Corps temporarily reduces flow to 4,500 cfs

⁷ As stated in the preamble: “We do not believe that it was intended that section 7(a)(1) require developmental agency actions to be treated as conservation programs for endangered species and threatened species. We also do not believe that all of the conservation recommendations of the Secretary have to be followed for this requirement to be met. Such an interpretation would render the much debated provisions of section 7(a)(2) redundant and essentially meaningless and bring about endless litigation.” 51 Fed. Reg. 19,926, 19,954 (June 3, 1986).

during drought conditions.” Fed. Def. Resp. Br. at 133.⁸ This argument, however, confuses “mortality” with “take” and ignores clear law in this very case that, for a take to occur, the Corps must cause it. *Alabama*, 441 F. Supp. 2d at 1134.

To the extent Fish and Wildlife argues that it is permitted to regulate activities that “accompany take,” but do not *cause* take, this is plainly wrong. Indeed, the Ninth Circuit rejected precisely this argument in *Arizona Cattle Growers’ Ass’n v. USFWS*, 273 F.3d 1229 (9th Cir. 2001), which held that “the definition of ‘taking’ in Sections 7 and 9 of the ESA are identical in meaning and application.” *Id.* at 1237. The Federal Defendants seek to distinguish *Arizona Cattle* by arguing that the court in that case set aside reasonable and prudent measure (“RPM”) restrictions primarily because the listed species were not shown to be present in the action area, whereas listed species are present in the Apalachicola River. *See* Fed. Def. Resp. Br. at 133-34. But this is a distinction without a difference. The key determination to be made by Fish and Wildlife is not merely whether the species is present, but whether the proposed agency action will result in mortality. *See Pacific Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 538 F. Supp. 2d 242, 259 (D.D.C. 2008). If not, Fish and Wildlife is not authorized to use the issuance of an Incidental Take Statement to justify imposing conditions to benefit the species. *Id.*

⁸ The Federal Defendants failed to discuss the Georgia Parties’ challenges to the Incidental Take Statement for the Gulf sturgeon on the grounds that Fish and Wildlife did not issue an Incidental Take Statement for the sturgeon at all. *See* Fed. Def. Resp. Br. at 119. However, as discussed below and in the Georgia Parties’ Response, Fish and Wildlife’s determination that the RIOP could cause take of Gulf sturgeon under certain circumstances did require the Corps to take specific actions regarding flows during the Gulf sturgeon spawning season. *See* Ga. Resp. Br. at 69-71.

C. Fish and Wildlife Used the Wrong Environmental Baseline to Conclude the RIOP Will Cause Take

The third fundamental reason the Court should grant summary judgment as to the Georgia Parties' ESA claim is that Fish and Wildlife used the incorrect environmental baseline in issuing the Incidental Take Statement.

1. ESA Regulations Require the Effects of the Proposed Action to Be Assessed by Reference to the Environmental Baseline

The ESA Regulations, the Consultation Handbook, and the Eleventh Circuit all require the effects of a proposed action to be determined by reference to the “environmental baseline.” As the Eleventh Circuit noted in *Miccosukee Tribe of Indians of Florida v. United States*, 566 F.3d 1257 (11th Cir. 2009), Section 7(a)(2) requires Fish and Wildlife to “‘[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat.’ That requires the Service to define an environmental baseline.” *Id.* at 1268 (citing 50 C.F.R. §§ 402.14(g)(3) & 402.02). The environmental baseline plays a critical role in the causation analysis by helping to determine whether the proposed action will cause “some new jeopardy.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (“*NWF v. NWFS*”). The Georgia Parties have shown, however, that Fish and Wildlife erred in selecting the most important component of the environmental baseline: the “baseline flow regime.”

The Federal Defendants do not deny that the environmental baseline plays an important role in the effects analysis, and merely suggest in a footnote that Fish and Wildlife’s analysis of the baseline was correct. Fed. Def. Resp. Br. at 66 n.19. Florida asserts that “quibbles over comparisons to hypothetical baselines have no place” in the Section 7 analysis. *Id.* at

18. This is based in part on a misreading of *NWF v. NMFS*, which Florida contends prohibits comparisons to the environmental baseline to establish causation.

In that case, NMFS had issued a “no-jeopardy” opinion despite finding that the action agency’s actions would contribute to jeopardy. NMFS justified this decision by asserting that its proposed action, while adverse, was not so adverse as to have caused jeopardy all by itself because the baseline conditions were mostly to blame. 524 F.3d at 930. NMFS thus argued that its new action should be allowed to proceed, even though it would tend to contribute to jeopardy, because it would not make the pre-action condition “ ‘appreciably’ worse.” *Id.* The court rejected use of the environmental baseline in this manner to assign comparative fault, reasoning that it would allow listed species to be “gradually destroyed, so long as each step on the path to destruction is sufficiently modest.” *Id.* Thus, although the court did criticize NMFS’s use of a “comparative approach” to the baseline analysis, the problem was not in performing a comparison to the environmental baseline, as is required, but in using the comparative-fault approach to allow a project to go forward even though it would contribute to jeopardy. As the court explained: “The proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts.” *Id.* (emphasis omitted). The court was also quite clear, however, that an agency action “can only ‘jeopardize’ a species’ existence if that agency action causes some deterioration in the species’ pre-action condition.” *Id.* By restating its focus on the “effects of the agency action,” the court emphasized that Section 7(a)(2) does require a comparison to the environmental baseline.

2. The Run-of-River Model Must Be Used as the Baseline Flow Regime to Exclude the Effects of Discretionary Reservoir Operations

As discussed in more detail below, applicable case law and regulations establish that the effects of future ongoing discretionary federal actions must be excluded from the environmental baseline. As relevant here, that means that the baseline flow regime must be one that excludes the effects of the Corps' discretionary flow control. The run-of-river model is the only flow regime that satisfies this requirement.

In general terms, the environmental baseline represents the status of the species' health and habitat within the action area in the without-action condition. Doc. 510, FWS AR Page 013532. It is required to include the "past and present impacts" of all Federal, State, and private actions and other human activities in the action area, but it must specifically exclude the effects of ongoing Federal discretionary actions. *See* 50 C.F.R. § 402.02; *NWF v. NMFS*, 524 F.3d at 930-31; *In re: Operation of the Missouri River System Litigation*, 421 F. 3d 618, 632-33 (8th Cir. 2005); *see also* Ga. Br. at 23-28. The flow regime is the component of the environmental baseline "of greatest relevance to this consultation." Doc. 510, FWS AR Page 013535. The Biological Opinion defines "flow regime" as follows: "a river's flow varies in its magnitude, seasonality, duration, frequency, and rate of change, and collectively, this variability is called its flow regime." *Id.* Thus, although the environmental baseline is generally conceived as a "snapshot," the flow regime of the environmental baseline "is necessarily a 'video.'" *Id.* Fish and Wildlife, however, used the wrong video.

The requirement to exclude the effects of ongoing discretionary federal actions applies equally to all components of the environmental baseline, including the flow regime. Therefore, the flow "video" used for purposes of comparison should be one that excludes the

effects on flows of the Corps' discretionary operations. Notwithstanding this requirement, Fish and Wildlife used the regulated flow regime from 1975 to 2007 (the "Regulated Condition") as the flow regime for the environmental baseline. This was clearly erroneous because the regulated flow regime is the product of discretionary flow control.

Fish and Wildlife should have used the run-of-river model as the baseline flow regime because it is the only flow regime that excludes the effects of discretionary flow control. This model takes the river as it is—with the dams in place and the channel degraded from the effects of dredging operations and scour and flows reduced by water uses beyond the Corps' control—and shows what flows would occur if the Corps made no further effort to regulate the flow of the river. In other words, the run-of-river model depicts flows that would occur in the Apalachicola River if the Corps suddenly ceased its discretionary operations. The use of run-of-river as the baseline flow regime was required by *NWF v. NMFS*, 524 F.3d at 930-31, and was approved as a standard practice for Fish and Wildlife in *Missouri River*, 421 F.3d at 632-33. *See* Ga. Br. at 25.

Florida attempts to distinguish these cases, but its distinctions all fail. First, it contends that the Eighth Circuit in *Missouri River* "did not hold that ROR Model conditions always must serve as the baseline." Fl. Resp. Br. at 19. That is true—because the issue was presented in the context of a challenge to using run-of-river as the baseline flow regime. Because the Eighth Circuit rejected that challenge, the court had no reason to consider whether the run-of-river model must "always" serve as baseline flow regime. *Missouri River*, 421 F. 3d at 632-33. Nevertheless, the reasons the Eighth Circuit gave for affirming the use of run-of-river as the baseline flow regime would require its use here. As Florida

notes, the court's discussion focused on the need to exclude discretionary operations from the environmental baseline. Fl. Resp. Br. at 19. That is exactly what the run-of-river model does, and run-of-river is the only flow regime that satisfies this requirement.

Florida also asserts that it was appropriate to use run-of-river as the baseline flow regime in *Missouri River* because that case involved a consultation on the entire master manual, whereas Florida alleges that the Section 7 analysis in this case is improperly segmented. Florida fails to explain the relevance of this distinction. If it is proper to use run-of-river as the baseline flow regime when analyzing the effect of all discretionary reservoir operations, it is also proper to use run-of-river as the baseline flow regime when consulting on the RIOP. Indeed, as the Georgia Parties have already shown, the Section 7 analysis is the same in either case because the rules clearly require Fish and Wildlife to consider the effects of the action as a whole.

Florida's attempt to distinguish *NWF v. NMFS* fares no better. In that case, the Ninth Circuit reversed NMFS for having *failed* to use run-of-river as the baseline flow regime. Florida first admits that the Ninth Circuit held that discretionary operations must be excluded in the baseline flow regime. Fl. Resp. Br. at 20-21. Florida then states, "Contrary to the Georgia Parties' assertion, the Ninth Circuit did not sanction use of any run of the river model as the environmental baseline; it merely held that discretionary operations cannot be included in the baseline." *Id.* at 21. But if run-of-river is not the appropriate baseline under this test, then what is? By definition, the run-of-river model is the only model that satisfies the requirement to exclude discretionary operations.

3. Use of the Run-of-River Model as the Baseline Flow Regime Is Entirely Consistent with Including the Effects of Past Operations in the Environmental Baseline

The Federal Defendants all but concede that Fish and Wildlife erred by using the regulated flow as the baseline flow regime, limiting their response to a single footnote that says, “the Service was required by its regulations and the Consultation Handbook to include the effects of the Corps’s past operations in the environmental baseline (not just run-of-river).” Fed. Def. Resp. Br. at 66 n.19. While Fish and Wildlife is indeed required to include the effects of the Corps’ past operations in the environmental baseline, it is not entitled to include the effects of its ongoing discretionary operations. But that is exactly what it did by using the regulated condition as the baseline flow regime, and this was clear legal error.

To understand why, it is first necessary to explain how the baseline flow regime relates to other components of the environmental baseline. These components, in relevant part, include “past effects of the Corps’ actions” such as impacts on habitat resulting from the physical presence of the dams, the lowering of the streambed due to dredging and scour, siltation that has broken the connection between Swift Slough and the Apalachicola River at low flows, etc. The Georgia Parties agree that all such effects were properly included in the environmental baseline, as required by 50 C.F.R. § 402.02 and the Consultation Handbook. For example, past operations have substantially lowered the bed of the Apalachicola River at River Mile 105. This past effect is included in the charts and figures in the BIOP that show how much habitat is available at River Mile 105 at different flows based on the current condition of the riverbed (because the current condition of the river bed is the relevant past effect). Doc. 510, FWS AR Page 013641-42. The Biological Opinion then compares the

amount of habitat that would be available under various operating plans (*e.g.*, the RIOP) with the amount of habitat that would be available under the “baseline” flow regime. *Id.* at 013642.

Thus, although the effects of the historical flows that have resulted from the Corps’ past operations are included in the baseline. It is an entirely different matter, however, to use historical flows as the “video” to reflect the “without action” scenario. As shown above, the run-of-river model is the only model that satisfies the requirement to exclude the effects of discretionary actions while including all “baseline impairments,” thus providing the appropriate control against which to measure the effects of the Corps’ proposed action.

If the Federal Defendants really contend that the Regulated Condition constitutes an “effect of the Corps’ past operations,” this argument is precisely the opposite of the United States’ winning position in *Missouri River*. *See Missouri River*, 421 F.3d at 632-33. In that case, Fish and Wildlife correctly asserted that it was compelled by its regulations to use run-of-river as the baseline flow regime. Nebraska Public Power District (“NPPD”) challenged this determination, arguing that Fish and Wildlife should have used the then-existing master manual instead. NPPD argued—as the Federal Defendants do here—that the existing master manual should be used as the baseline flow regime because “it is a ‘past impact’ of a separate federal action and would continue to control operations absent the proposed action.” *Id.* at 632. The Eighth Circuit rejected this argument, agreeing with Fish and Wildlife that “hypothetical continued operation under the previous version of the Master Manual . . . does not in any sense constitute a ‘past impact’ of federal action.” *Id.* The court then noted that the argument is essentially a “twist” on prior arguments about the Corps’ discretion to

operate the system, noting that the run-of-river model appropriately excludes the effects of all discretionary actions on the flow regime. *Id.* at 633.

The Federal Defendants' other argument is that Fish and Wildlife did compare the RIOP model to run-of-river, and that this comparison was a "central part of its effects analysis." Fed. Def. Resp. Br. at 66 n.19. The Georgia Parties do acknowledge that Fish and Wildlife compared the RIOP to the run-of-river model. The fact remains, however, that Fish and Wildlife did not use the run-of-river model as the baseline flow regime. Under the particular facts of this case, where the regulated flow regime has been so much better for the species than run-of-river, this error caused Fish and Wildlife to attribute "adverse effects" to the RIOP that should have been attributed to other causes. This constitutes clear legal error.

4. The Run-of-River Model Is Not Intended to Represent "Natural" Flows

Florida criticizes the Georgia Parties for allegedly characterizing the run-of-river flow model as representing "natural" flows. Fl. Resp. Br. 3. The Georgia Parties did not intend to create any such impression, however, as the run-of-river model clearly is not intended to represent "natural" or "unimpaired flows." The run-of-river model must be used as the baseline, not because it represents "natural flows," but because it excludes the effects of the Corps' discretionary reservoir operations.

As Florida itself has pointed out, the run-of-river condition incorporates many impacts beyond the Corps' discretionary control. Indeed, the existence of these "baseline impairments" explains why the natural, unimpaired flow cannot be used as the environmental baseline: because it is supposed to be a video of the species and its habitat in the without-action condition, it should include all existing alterations to the natural condition other than

the effects of the Corps' discretionary reservoir operations. For example, the Corps exercises no control over consumptive uses that occur in the Flint River Basin; because these uses will continue no matter how the reservoirs are operated, they are a part of the baseline condition. The same is true of municipal and industrial uses outside of metropolitan Atlanta, as those users do not rely on the Corps to regulate their supply to any significant degree.⁹ If natural flow were used as the baseline, all of these impairments would be erroneously attributed to the RIOP—which is exactly the error that Florida made in its brief. Fl. Resp. Br. at 24.

5. Fish and Wildlife Erred by Including the Impact of Certain M&I Uses in the Baseline Flow Regime, But This Had No Effect on the Analysis

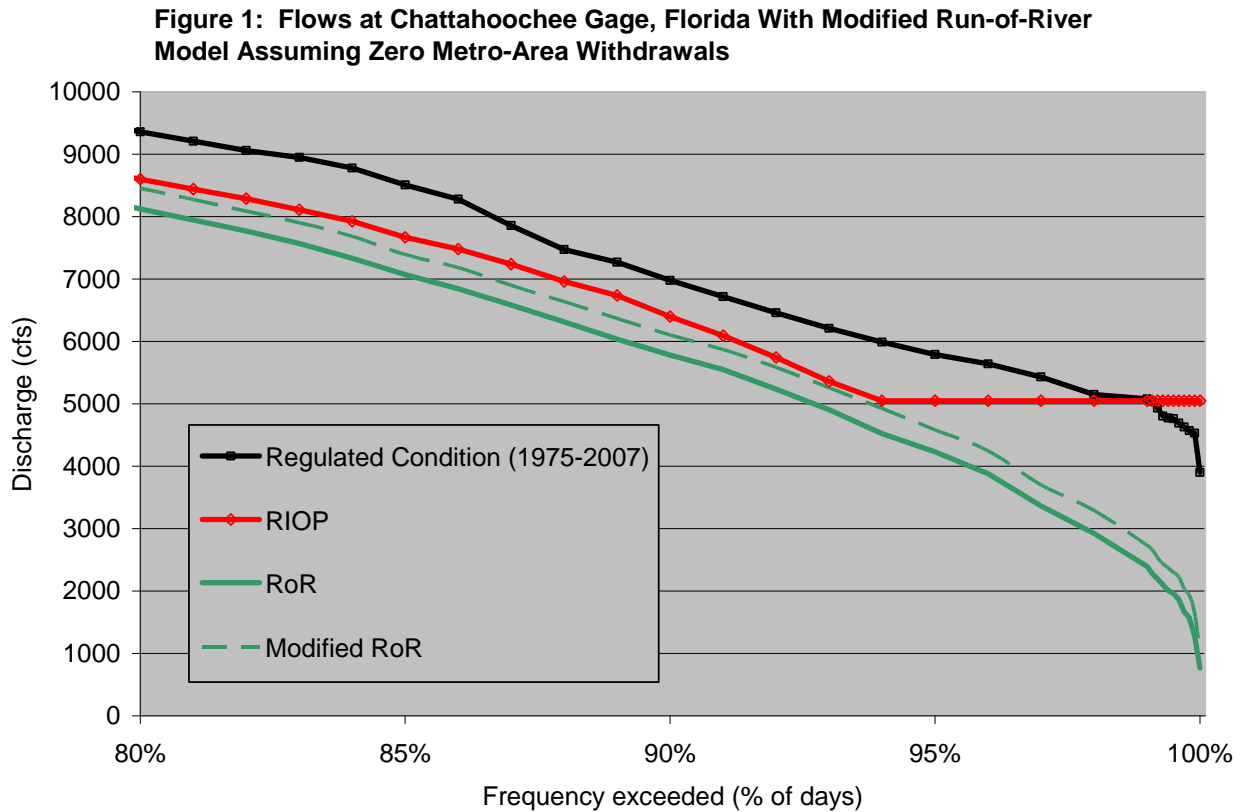
Florida asserts that, by advocating use of the run-of-river model as a baseline, the Georgia Parties ask this Court “to dictate that the Service effectively grandfather in all upstream water uses when the Basin’s water resources are strained.” Fl. Resp. Br. at 3-4. However, the Georgia Parties advocate no such thing. In fact, the Georgia Parties stated: “Florida is correct to note that certain water withdrawals should have been excluded from the baseline—namely, those withdrawals that constitute discretionary federal actions.” *See* Ga. Br. at 29. The Georgia Parties thus expressly agreed with Florida that this error “should be corrected on remand.” *Id.*

Florida has also missed the larger point, however, which is that the consumptive uses facilitated by the Corps are not large enough to have a significant effect on flow of the Apalachicola River. Even if the Corps is held responsible for *all* metro Atlanta withdrawals,

⁹ The situation is more complicated for metropolitan Atlanta because the Corps facilitates some but not all of the consumptive usage within this area. Some should be included in the environmental baseline (those outside the Corps' discretionary control), but others should be excluded (those within the Corps' discretionary control).

the effect on the baseline is small—and it is still clear that the overall effect of the Corps’ discretionary flow control is to improve the baseline condition. This is easily demonstrated by increasing the flow under the run-of-river model by an amount equal to metro-area withdrawals. To be conservative, the Georgia Parties have included all metro-area withdrawals, not just those within the Corps’ discretionary control. The results are shown in Figure 1 below, which is a modified version of the chart appearing as Figure 4.2.2.B in the Biological Opinion (Doc. 510 FWS AR Page 013640). As the Biological Opinion explains, this chart is constructed by counting the number of days in the historical record that flows at the Chattahoochee gage, Florida, would exceed a given flow under various operating scenarios.¹⁰ Results for the “Modified Run-of-River” scenario described above have been inserted into this chart. Note that the effect of zeroing-out metro-area withdrawals is to increase the run-of-river flow, but only slightly. Flows under the Modified RoR model, which assumes that metro Atlanta does not exist, are still lower than flows under the RIOP or the Regulated Condition from 1975 to 2007.

¹⁰ The date and methods used to prepare this chart are attached as Exhibit 2. Note that these charts are based on models that assume a repeat of the actual historical hydrology for the period of record. This should not be confused with Florida’s approach of using “90th Percentile Exceedence” hydrology as the input to its models. Because “90th Percentile Exceedence” hydrology is much drier than any that has ever occurred in the ACF Basin, Florida’s methodology consistently produces very low numbers that bear no relation to reality.



Thus, even when all metro-area withdrawals are removed from the run-of-river model, the Modified RoR shows that reservoir operations have provided higher flows than would have occurred in the absence of discretionary flow control.

D. The Georgia Parties Have Standing to Object to Conditions Imposed in the Incidental Take Statement

The ESA citizen-suit provision provides standing to the limits allowed by the Constitution. *Bennett v. Spear*, 520 U.S. 154, 161-66 (1997). The Supreme Court has established that Article III of the Constitution requires a plaintiff to show that it has suffered an invasion of rights that is concrete and particularized, and actual or imminent; that there is a causal relationship between the injury and the action complained of; and that it is likely

rather than speculative that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Only the Federal Defendants have challenged any aspect of the Georgia Parties' standing. The Federal Defendants do not challenge the Georgia Parties' interest in the waters of the Chattahoochee River, including the water that is stored in the federal reservoirs in the ACF Basin, nor do they contend that the Georgia Parties will suffer no injury if the water that is stored in the ACF Basin is depleted to maintain flow requirements in the Apalachicola River.¹¹ Instead, the Federal Defendants claim that the Georgia Parties lack standing to challenge the Incidental Take Statement because it does not cause them any injury, but allegedly benefits them by allowing the Corps to reduce flows during drought conditions. *See Fed. Def. Resp. Br.* at 131-32. What the Federal Defendants neglect to mention, however, is that the Incidental Take Statement contains RPMs that restrict the amount of water that the Corps can store in the ACF Basin reservoirs at certain times.

Specifically, RPM 2008-2 requires the Corps to establish conditions under which it will augment basin inflows to maintain a minimum flow of 5,000 cfs in the Apalachicola River even though conditions in the basin are so severe as to allow the flow to drop to 4,500 cfs. *See Zeng Decl.*, attached hereto as Exhibit 1, at ¶ 21. If the Corps does not reduce its augmentation when the conditions to do so have been triggered, the reservoirs throughout the ACF system will be seriously affected. *Id.* at ¶¶ 22-25. For example, under drought

¹¹ Even were this contested, the record is replete with evidence that the Georgia Parties are seriously harmed when flow requirements in the Apalachicola River deplete the water stored in the federal reservoirs upstream. *See e.g.*, ACF040673-04067; Decl. of Carol Couch, 3:07-cv-0251, Doc. 17-1; Doc. 82, USACE Pages 13209-10.

conditions similar to 2007, continuing to meet a flow of 5,000 cfs rather than 4,500 cfs would, if continued over a period of three months, require the Corps to release an additional 91,218 acre-feet of water that otherwise would be stored. *Id.* at ¶ 24. This amounts to 3.1 feet of water in Lake Lanier, 5.3 feet of water in West Point Lake, or 2.4 feet of water in Lake Walter F. George. *Id.* at ¶ 25. The Georgia Parties' interests are similarly threatened by RPM 2008-4, which requires the Corps to adjust its operations to prevent a specific drop in the elevation in the Apalachicola River during sturgeon spawning season. *Id.* ¶¶ 26-27.

These injuries, which are a direct result of the RPMs imposed under the Incidental Take Statement, fully satisfy the requirements of standing. *See Lujan*, 504 U.S. at 560-61; *see also Arizona Cattle Growers' Ass'n*, 273 F.3d at 1235.¹²

II. Fish and Wildlife Considered the Effects of Reservoir Operations As a Whole

Florida asserts that “all of the Georgia Parties’ ESA arguments are premised on the proposition that the Federal Defendants lawfully limited their consultation to the RIOP . . . rather than the Corps’ comprehensive, basin-wide reservoir operations conducted under the WCP.” Fl. Resp. Br. at 9. That is not correct. The Georgia Parties contend that the Corps and Fish and Wildlife properly focused the consultation on the RIOP while considering the “effects of the action as a whole,” meaning the sum total of all discretionary reservoir operations. As discussed in greater detail in the Georgia Parties’ response brief, this scoping of the consultation was perfectly proper under 50 C.F.R. § 402.14(c)(6). Ga.

¹² The Federal Defendants also argue that the Georgia Parties should not be allowed to challenge the Incidental Take Statement because it protects the Corps from liability resulting from the “take” of listed species. Fed. Def. Resp. Br. at 132-33. Because the RIOP will not cause “take,” however, the Corps does not need this protection.

Resp. Br. at 34-39. But even if it were not, any error in establishing the scope of the consultation would not affect the propriety of using run-of-river as the baseline flow regime.

Florida's one new argument is that the Georgia Parties somehow "confirm" that the scope of this ESA consultation was unlawfully narrow by asserting that the 1989 Water Control Plan and the RIOP must be "taken together" in the Environmental Impact Statement required by the National Environmental Policy Act. Fl. Resp. Br. at 11. Florida cites *Florida Key Deer* for the proposition that the statutory and regulatory framework under Section 7 of the ESA is exactly the same as that under NEPA. *Id.* Florida thus contends that, by observing that a comprehensive EIS is clearly required for the Corps' reservoir operating plans, the Georgia Parties have conceded that ESA consultation for those plans was likewise required. Fl. Resp. Br. at 11-12.

Florida is mistaken about the connection between Section 7 of the ESA and NEPA. Notwithstanding the general rule stated in *Florida Key Deer*, there is one important distinction between NEPA and Section 7 of the ESA: the ESA regulations expressly allow segmentation, 50 C.F.R. § 402.14(c)(6), while the NEPA regulations expressly forbid it, 40 C.F.R. § 1508.27(b)(7). The Eleventh Circuit had no occasion to comment on this distinction in *Florida Key Deer* because segmentation was not an issue in that case.

III. The Corps Violated NEPA by Failing to Prepare an EIS

A. Errors in Prior Environmental Assessments Are Perpetuated and Amplified in the June 2008 EA and FONSI for the RIOP

To begin, the Federal Defendants argue that any challenges to environmental assessments other than the June 2008 EA and FONSI are moot. Fed. Def. Resp. Br. at 136-38. This is

incorrect because the Corps still has not prepared an EIS for its operations in the ACF Basin, and an EIS is clearly required. Further, even if an EA were enough, the EA would have to have been prepared *before* the IOP was adopted and implemented. It is impossible to comply with NEPA by preparing after-the-fact documentation. Because the RIOP perpetuates the basic framework first adopted as part of the IOP, the RIOP is irretrievably tainted by this original sin. Indeed, the practice of rolling one EA into the next without ever analyzing the system as a whole is a clear example of the “bureaucratic steam roller” effect that NEPA is intended to prevent. *Cf. Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989).

B. The Corps Is Required to Prepare an EIS to Address the Full Range of Its Operations in the ACF Basin

The Federal Defendants next argue that the Corps was not required to prepare an EIS for the RIOP because the RIOP involved only minor changes to the Corps’ overall operations in the ACF basin. Fed. Def. Resp. Br. at 138-40. However, changes wrought by the IOP and its revisions were undeniably significant, resulting, among other things, in the loss of approximately 850,000 acre-feet of available water within the ACF system. *See* Ga. Br. at 39-40. And in any event, the Corps has never prepared an EIS covering the full range of reservoir operations outlined in the 1989 Draft Water Control Plan as NEPA requires.

C. The Corps Has Already Determined that It Will Not Consider All Alternatives in the EIS for the Revised Water Control Plan

Although the Corps has initiated the process of preparing an EIS for the next water control plan, it has already made a public commitment to exclude reasonable alternatives from its NEPA analysis, specifically stating that the EIS will not consider any alternatives to its “current operations,” except insofar as may be necessary to eliminate water supply as a

project purpose. 74 Fed. Reg. 59,965-67 (Nov. 19, 2009). This is a clear violation of NEPA, as the EIS must consider all reasonable alternatives, including alternatives that may exceed the Corps' current authority. 40 C.F.R. § 1502.14(c). As explained by the D.C. Circuit, federal agencies must consider reasonable alternatives that cannot be implemented by the agency itself because an EIS "is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972).

Alabama and SeFPC argue that water supply storage should not be considered as an alternative because operations to support water supply have been found to be outside of the Corps' current authority, *see* Al. Resp. Br. at 6-7; SeFPC Resp. Br. at 6, and because such operations may require additional legislation, *see* SeFPC Resp. Br. at 4-6. Decision-makers in the ACF Basin, however, deserve—and require—a full analysis of alternatives.

Finally, Alabama and the Federal Defendants argue that the Court cannot issue a ruling regarding the alternatives that the Corps must consider. *See* Al. Resp. Br. at 3-9; Fed. Def. Resp. Br. at 143-44. The Georgia Parties agree that it would be inappropriate for the Court to order the Corps to consider specific alternatives. The Georgia Parties ask only that the Court remand the matter to the Corps to prepare an EIS for the ACF system that includes a thorough evaluation of all reasonable alternatives, including those that may exceed the Corps' jurisdiction. *See* Ga. Br. at 48. Any fair analysis will reveal that there is more than

enough water in the ACF Basin to meet the reasonable needs of all stakeholders if the reservoirs are operated properly.

CONCLUSION

For these reasons, the Georgia Parties respectfully request that their motion for summary judgment be granted. The Georgia Parties urge the Court to correct the legal errors committed by Fish and Wildlife and the Corps and to remand these matters to the agencies in accordance with the request for relief set forth in the Georgia Parties' opening brief at pages 47-48.

Respectfully submitted this 3rd day of March, 2010,

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CERTIFICATE OF SERVICE

This is to certify that on March 3, 2010, a copy of the foregoing **GEORGIA PARTIES' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PHASE 2 CLAIMS** was electronically filed with the Clerk of Court by using the CM/ECF System and served to all counsel of record for all parties to this proceeding by means of electronic notification.

/s/ Lewis B. Jones _____
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