

ENVIRONMENTAL ADVOCATES

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*Via Email and US Mail
Return Receipt Requested*

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Re: Notice of Violation and Intent to File Suit under the Endangered Species Act

Dear Sirs:

I am writing on behalf of the South Yuba River Citizens League (“SYRCL”) to meet the requirements of Endangered Species Act (“ESA”) Section 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i) concerning providing notice of SYRCL’s intentions to file a civil action against the U.S. Army Corps of Engineers, John McHugh, Secretary of the Army, and Colonel William Leady, as District Engineer, Sacramento District, (collectively, “the Corps”) for violations of the ESA. This notice concerns violations of the ESA by the Corps at and around the Corps’ Daguerre Point Dam (“Daguerre”), Englebright Dam (“Englebright”), and water diversions licensed by the Corps on the lower Yuba River, including the South Yuba-Brophy Diversion (“the Brophy Diversion”) and the Hallwood-Cordua Diversion (collectively, “the Project”).

The operations of the Project are perpetuating “take” within the meaning of ESA Section 9, 16 U.S.C. § 1538, of three species of anadromous fish listed as threatened under the ESA: the Evolutionarily Significant Unit (“ESU”) of Central Valley spring run Chinook salmon (“spring Chinook”); the Central Valley steelhead ESU (“steelhead”); and the Southern distinct population segment of North American green sturgeon (“green sturgeon”) (collectively “the Listed

Species”). The Corps is perpetuating this take while failing to comply with the reasonable and prudent alternatives (“RPAs”) and reasonable and prudent measures and terms and conditions of the Incidental Take Statement (“ITS”) of the Biological Opinion dated February 29, 2012 (“February 2012 BiOp”) issued by the National Marine Fisheries Service (“NMFS”) for the Project described herein.

Most notably, the Corps is in ongoing violation of RPA and ITS requirements to: (1) develop and implement near-term and long-term actions to provide fish passage at Englebright for spring Chinook and steelhead; (2) develop and implement a fish passage program at Daguerre for the Listed Species; (3) implement gravel augmentation and channel restoration programs below Englebright; (4) implement a predator control program and new fish screens at the Brophy Diversion; (5) conduct channel dredging and fish ladder clearing at Daguerre; (6) implement a large woody material augmentation and riparian re-vegetation program; (7) install and maintain a fish barrier at Waterway 13; and (8) establish a green sturgeon conservation and management program. In addition the Corps is violating ITS requirements by exceeding the amount or extent of take authorized in the February 2012 BiOp. By failing to comply with the provisions of the RPAs and ITS, while perpetuating “take” of the Listed Species, the Corps is in ongoing violation of ESA Section 9.

In addition to these ESA Section 9 violations, the Corps is also in violation of its substantive ESA Section 7 duties. Under ESA Section 7(a)(2), the Corps has a substantive duty to “insure” that actions authorized, funded, or carried out by the Corps do not cause jeopardy to the Listed Species or cause destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Under ESA Section 7(a)(1), the Corps is required to use its authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered species and threatened species. 16 U.S.C. § 1536(a)(1). As noted, the February 2012 BiOp concludes that the Corps’ proposed project is likely to jeopardize the continued existence of the Listed Species and adversely modify the Listed Species’ critical habitat, and provides RPAs to the project that the Corps must comply with in order to avoid such jeopardy and adverse modification. However, the Corps has repeatedly stated its intention not to comply with many of these RPAs, and in fact the Corps is not complying with them. By failing to comply with the requirements of the RPAs, as well as the terms and conditions of the ITS, the Corps is in violation of ESA Sections 7(a)(1) and 7(a)(2).

ESA Section 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i), requires a citizen to give notice to the Secretary of Commerce (“the Secretary”) and to any alleged violator of his/her intent to file suit sixty (60) days prior to the initiation of a civil claim under ESA Section 11(g)(1)(A). This letter constitutes the required notice of the violations described below. As such, you are hereby placed on formal notice by SYRCL that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent To File Suit, SYRCL intends to file suit in federal court under ESA Section 11(g), 16 U.S.C. § 1540(g), against the Corps for violations of the ESA.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

SYRCL hereby gives notice of the names, address, and telephone number of the person giving notice, which is SYRCL.

SYRCL is a community-based educational non-profit corporation, established in 1983, and is located in Nevada City, California. SYRCL is committed to the protection and restoration of the Yuba River watershed. SYRCL works to fulfill its mission by seeking environmental solutions through the tools of education, stewardship, and advocacy. Since it was founded in 1983, SYRCL has become California's largest and most effective single-watershed organization. SYRCL has more than 3,500 members and volunteers engaged in river stewardship, restoration and monitoring programs including annual river cleanups, salmon tours, and educational events. SYRCL initiates numerous highly successful collaborations with businesses, property owners, and local, state and federal agencies in efforts to restore the Yuba Watershed generally with a variety of projects to improve ecosystem conditions on the lower Yuba River. SYRCL's members use the Yuba River for recreation, wildlife observation and study, aesthetic enjoyment, and commercial enterprise such as fishing and rafting trips. SYRCL's members particularly enjoy as a recreational, educational, and cultural pursuit observing the migration of anadromous fish in the lower Yuba River, including salmon, steelhead and green sturgeon.

SYRCL may be contacted at the following address:

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SYRCL has retained the following legal counsel to represent it in this matter:

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All communications should be addressed to legal counsel at the above address.

II. BACKGROUND

The below fact recitation is mostly taken from documents written by the Corps and/or NMFS and that are in the agencies' possession. Accordingly the agencies should already be well familiar with these facts. Furthermore, SYRCL has sent a number of previous notice letters to the Corps detailing violations of the ESA as part of the previous litigation between SYRCL and Friends of the River and the Corps, NMFS, and the Yuba County Water Agency ("YCWA"). All previous notice letters submitted by SYRCL are expressly incorporated herein by reference.

A. Location of the Violations

The Yuba River flows from the Sierra Nevada through Sierra, Nevada, and Yuba counties, until it meets the Feather River at Marysville, California. The Yuba River system once supported healthy runs of Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and Central Valley steelhead (*O. mykiss*). The Yuba River was also historic habitat for green sturgeon. Even after the environmental devastation of rivers during the gold rush, spring Chinook runs in the Central Valley as a whole were as large as 600,000 between the late 1880s and the 1940s, and steelhead runs reached 40,000 in the early 1960s. Spring Chinook and steelhead inhabited all three forks of the Yuba River before the construction of Englebright, Bullards Bar and later New Bullards Bar Dams, which serve as impassable barriers to all anadromous fish migration. Pacific Gas and Electric Company ("PG&E") workers caught spring Chinook as far upstream as Washington on the South Yuba River, California Department of Fish and Game ("DFG") personnel observed spring Chinook in the lower portions of the Middle Yuba during a 1938 survey, and people observed steelhead in the North Yuba River as far upstream as Downieville. Of the original 6,000 miles of salmon habitat in the Central Valley, at least eighty percent has been lost. The lower Yuba River provides sub-optimal spawning and rearing habitat for juvenile spring Chinook and for adult and juvenile steelhead. The lower Yuba River below Daguerre also continues to provide habitat for green sturgeon, although this habitat is of very limited value compared to potential habitat above Daguerre, which has deep pools and colder water suitable for green sturgeon spawning, to which Daguerre blocks the green sturgeon's access.

The Corps operates and maintains Daguerre and Englebright Dams, and has licensed or otherwise allowed for the diversion of Yuba River water flow on its land, at the Brophy Diversion and the Hallwood-Cordua Diversion, on the lower Yuba River. Daguerre is located approximately 11.4 miles upstream of the confluence of the Yuba and Feather Rivers, in Yuba County, California. Englebright is twelve miles upstream of Daguerre, in Yuba and Nevada Counties. Congress authorized both dams as part of the Yuba River Debris Control Project. Daguerre was authorized in the Rivers and Harbor Act of June 13, 1902. In 1986, Congress eliminated the California Debris Commission, and transferred the Debris Commission's powers, duties, lands and other interests, including Daguerre, to the Secretary of the Army. 99 P.L. 662 § 1106 (1986). Englebright was constructed in 1941, apparently without compliance with the Fish

and Wildlife Coordination Act of March 10, 1934 (Public Law 73-121, 48 Stat. 401). *See* February 2012 BiOp at 212.

Daguerre is an overflow concrete ogee spillway, 575 feet long and 25 feet high. Daguerre's purpose was to catch mining debris, preventing the debris from washing downstream into the Feather and Sacramento Rivers. It does not provide for flood control. Floods in 1963 and 1964 completely washed out Daguerre and mining debris stored behind it. The dam was replaced in 1965. The basin behind the dam, designed to collect the mining debris, has completely silted in, and water and sediment now flow past the dam.

B. Impacts of the Project on the Listed Species

Crude fish ladders were added to Daguerre in 1911, but washed out in 1927-1928 and were not replaced until 1938. The fish ladders were damaged several times in floods and the present fish ladders were constructed in 1964. The fish ladders are inadequate at all flows: at low flows, they provide insufficient attraction flows for salmonids; at high flows, they are ineffective and sometimes closed altogether. Sediment and debris often clog the ladders, rendering them impassable. In addition, the ladders' design is poor compared to newer ladders being used: the ladders are narrow, the flow is unmeasured and uncontrolled leading to less than optimum passage conditions, and the design is such that fish can jump out of the lower bays of the ladders to their death on dry land. Delays caused when the ladders are closed or fish cannot find the ladders causes the following adverse impacts on spring Chinook and steelhead: stress, injury, depletion of precious energy reserves and/or pre-spawning mortality. In addition, the pool below Daguerre subjects spring Chinook and steelhead to the threat of human poachers. Even if the fish manage to make it up the ladders, sediment buildup on the upstream side of the ladders may prevent them from reaching the river channel. All of the obstacles to passage posed by Daguerre results in injuries, stress, delays in spawning, and/or affects the egg viability of spring Chinook and steelhead. Alternatively, the fish may end up spawning downstream of Daguerre where reduced habitat and warmer temperatures adversely affect their chances of spawning success.

Daguerre creates a complete barrier to the passage of green sturgeon, as this large fish species is entirely unable to navigate Daguerre's fish ladders. The Yuba River habitat above Daguerre would provide suitable and valuable habitat for green sturgeon for spawning and other life cycle use, but Daguerre precludes all such habitat use of the Yuba River above the dam by green sturgeon.

In addition to the problems Daguerre poses to adult spring Chinook and steelhead migrating upstream to spawn, Daguerre and the Brophy and Hallwood-Cordua Diversions affect juvenile spring Chinook and steelhead migrating downstream. Daguerre itself injures and disorients juvenile spring Chinook and steelhead as they plunge over the face of the dam on their way downstream. The large pool at the base of the dam provides excellent habitat for predators, and the juvenile spring Chinook and steelhead are highly vulnerable to predation after their trip over the dam into the turbulent waters below. This unnatural advantage Daguerre gives to the predators increases the level of predation, thus decreasing the numbers of juvenile spring Chinook and steelhead making it to the ocean.

The Brophy Diversion diverts water through a channel, where it then flows through a gabion weir to a pool from which water is pumped to a diversion canal. The Brophy Diversion facility and weir do not meet DFG and NMFS screening criteria. The interstitial spaces in the rocks making up the weir are larger than those defined in the NMFS Fish Screening Criteria for Anadromous Salmonids. Juvenile spring Chinook and steelhead become entrained in the weir and a fine mesh fabric inside of the weir only adds to the problem. The Brophy Diversion rock weir provides the type of cover juvenile spring Chinook steelhead would seek in an ecosystem deficient large woody material and riparian overstory, such as the lower Yuba River. Out-migrating spring Chinook salmon and steelhead seek the cover of interstitial spaces along the rock weir at the Brophy Diversion and are impinged within the weir and killed. The BiOp estimates that between 90,900 and 229,800 juvenile and adult steelhead are entrained, impinged, or preyed upon at the Brophy Diversion annually.

In addition to impingement, flows into the Brophy Diversion give a false cue to out-migrating juveniles and attract them into the diversion pool. This pool is a predator field that causes the death of juvenile spring Chinook that cannot pass successfully. No predator control program is in place at the Brophy Diversion and salmonid loss at this facility is likely to have been a severe and chronic stressor on out-migrating salmonids. The 300 to 600 cfs flows coming into the diversion pool, with only five cfs returning to the river, does not allow for sweeping flows to let the out-migrating juveniles pass. Although YCWA is required to allow ten percent of diverted water to pass by the weir, YCWA has failed to meet this requirement and at times has allowed the outlet channel to become completely dry. The diversion pool and return flow channel provide foraging cover for predators and provide predators with easy access to exposed juvenile fish because they have clear open water, no riparian cover or aquatic large woody material, and steeply sloped sides. In addition, at high flows juvenile spring Chinook and steelhead are swept over the weir into the diversion pool on the other side of the weir, where the fish have no means of escape.

Water diversions in the upper Yuba River watershed and lower Yuba River reduce the amount of downstream outmigration habitat available for spring Chinook and steelhead. Water diversions of an average of 71,000 acre-feet per year are diverted out of the North Yuba River, and 410,000 acre-feet per year are diverted out of the Middle and South Yuba rivers. These annual exports reduce the ability of the Yuba River and its watershed to support native salmonids and sturgeon. Increased water exports lead to a reduction in flows within the mainstem of the river, and reduction in flows exacerbates the impacts of inadequate water depth and lack of access to the floodplain. Flows are generally below optimal conditions for all life-history stages of salmon, and the natural hydrograph is altered by hydropower and water delivery.

Water diversion at the Brophy Diversion removes water from the Yuba River that would otherwise be utilized by spring Chinook for basic life history behavior. These adverse impacts of the Brophy Diversion are being greatly exacerbated due to the increases in Yuba River flow diversion that are being implemented by YCWA as part of its "Wheatland Project." The Wheatland Project has been constructed and is beginning to divert water from the lower Yuba River. Under this program, water exported from the Brophy Diversion has increased to 75,647 acre-feet annually, a 114 percent increase over the delivery amounts in 2005. These increased exports have increased entrainment and impingement on the inadequate screens. The changes in flow levels associated with implementation of the Wheatland Project will be of sufficient

magnitude, timing, and duration to adversely affect the survival of juvenile spring Chinook and steelhead and the conservation value of certain primary constituent elements of critical habitat (i.e., freshwater rearing and migration habitat). The Brophy Diversion constitutes a chronic, long-term, high level-stressor for spring Chinook and steelhead populations and measurably contributes to the risk of extinction of these species.

Like the Brophy Diversion, the Hallwood-Cordua Diversion is also a substantial stressor to spring Chinook and steelhead through entrainment, impingement, and predation. The BiOp estimates that 36,144 and 91,113 steelhead were entrained at the Hallwood-Cordua Diversion in 1999 and 2000 respectively. Although the fish screen has been modified at the Hallwood-Cordua Diversion, the screen does not fully meet all DFG and NMFS criteria, and entrainment and impingement continue to adversely affect juvenile spring Chinook and steelhead at the diversion. Moreover, predation at the Hallwood-Cordua diversion is a significant source of losses of spring Chinook and steelhead. The BiOp refers to the Hallwood-Cordua Diversion canal and fish return pipe as “[h]igh-density predator fields,” and notes that “Sacramento pikeminnow are documented to forage heavily on salmonids approaching the Hallwood-Cordua fish screen.” February 2012 BiOp at 151. For these reasons, NMFS considers the overall estimated mortality to spring Chinook associated with the diversion to be substantially the same as before the diversion was modified.

Like Daguerre, Englebright was constructed to retain hydraulic mining debris from washing downstream. Englebright is 260 feet high and stores 70,000 acre-feet of water. Englebright has no fish ladders and is therefore a complete barrier to fish passage to the upper reaches of the Yuba River, which provide the highest quantity and quality of habitat to maintain self-sustaining populations for adult spawning and rearing juvenile spring Chinook and steelhead. The area above Englebright provides more suitable holding water for spring Chinook and spawning substrates and flows are more suitable for spring Chinook and steelhead than the main stem of the lower Yuba below Englebright.

In addition, Englebright serves as a barrier to gravel or large wood recruitment from upstream. Englebright offers only marginal flood control; following construction of New Bullards Bar Reservoir, the burden of flood control in the Yuba River watershed shifted to that reservoir. The Englebright reservoir provides the head for two hydroelectric facilities. The Corps issued easements to PG&E and YCWA for the construction and operation of the two hydroelectric facilities, Narrows I and Narrows II Powerhouses. The majority of releases from Englebright are through these powerhouses, although if the Englebright reservoir is full, water spills over the dam. The Corps retains responsibility for maintenance of the dam, while PG&E and YCWA administer water releases and operation and maintenance of the hydroelectric facilities.

C. Factual Background of the Violations

1. ESA Listing of the Species

NMFS listed spring Chinook as threatened effective November 16, 1999. 64 Fed. Reg. 50,394 (Sept. 16, 1999). The threatened status of spring Chinook was reaffirmed on January 5, 2006. NMFS listed steelhead as threatened effective May 18, 1998. 63 Fed. Reg. 13,347 (Mar.

19, 1998). The threatened status for spring Chinook and steelhead was reaffirmed in a combined status review on August 8, 2011, though NMFS noted that the status of the species had declined in the past five years and recommended a status reassessment in two to three years. NMFS issued final protective regulations for spring Chinook on June 28, 2005. 70 Fed. Reg. 37160 (June 28, 2005). NMFS listed green sturgeon as threatened effective June 6, 2006. 71 Fed. Reg. 17757 (April 7, 2006).

NMFS designated critical habitat for spring Chinook and steelhead in 2000 as including all occupied areas of the lower Yuba River, as well as two occupied tributaries, Deer and Dry Creeks. 65 Fed. Reg. 7764 (Feb. 16, 2000). However, several building associations challenged these initial designations and the United States District Court for the District of Columbia vacated the habitat designations and remanded to NMFS for new rulemaking. NMFS issued a new critical habitat designation in 2005, effective January 2, 2006. 70 Fed. Reg. 52488 (Sept. 2, 2005). In the later designation, NMFS excluded Deer Creek, despite the occupancy of that creek by spring Chinook and steelhead. NMFS deferred a decision on the designation of unoccupied areas above Englebright Dam that may be essential for the conservation of the spring Chinook and steelhead, pending the resolution of the Upper Yuba River Studies Program. On October 9, 2009, NMFS issued a final rule designating critical habitat for green sturgeon. On June 2, 2010, NMFS issued long-delayed protective regulations under ESA Section 4(d), 16 U.S.C. § 1533(d).

2. 2002 Biological Opinion

Following the listing of the spring Chinook and steelhead, SYRCL and the Yuba Goldfields Access Coalition (“YGAC”), sent the Corps a notice letter, stating that SYRCL and YGAC intended to sue the Corps’ over its violations of the ESA if the Corps did not take corrective action, including initiating ESA Section 7 consultation. NMFS also contacted the Corps requesting that the Corps initiate formal consultation pursuant to ESA Section 7(a)(2) for ongoing impacts on the species and their critical habitat in the Yuba River caused by Daguerre, Englebright, and the execution of rights of way and other agreements, contracts, and licenses. The Corps responded that because it was investigating improved fish passage over Daguerre, it did not think it was required to consult regarding Daguerre and Englebright. SYRCL and YGAC therefore filed suit on August 3, 1999 in the U.S. District Court for the Eastern District of California over the Corps’ violations of the ESA, including its failure to initiate consultation regarding the impacts of its activities on listed species under section 7(a)(2), its failure to avoid jeopardy, its failure to conserve listed species, and its violations of the Administrative Procedures Act. Once the Corps initiated consultation on March 8, 2000, and issued a Biological Assessment on June 29, 2000, the parties settled and the lawsuit was dismissed on November 2, 2000.

The Corps filed a Biological Assessment (“the 2000 BA”) with NMFS on June 29, 2000. The Corps amended the 2000 BA about six months later to include measures that it stated were to reduce the take of listed spring Chinook and steelhead by alleviating some of the adverse impacts associated with the Project, and asked that the NMFS’s biological opinion be based upon that additional information. In particular, the Corps stated that it planned to develop and implement a plan to routinely clear debris from Daguerre’s two fish ladders, that it planned to install a pressure/transducer device to monitor debris buildup in these fish ladders, that it planned to develop and implement a plan to remove sediment above Daguerre, and that it would work to

improve conditions for juvenile salmonids (i.e., spring Chinook and steelhead) at the Brophy Diversion. Additionally, the Corps asserted that it would attempt to ameliorate the effects of Englebright by working on a gravel injection program. The Corps also specifically stated that one of the most important measures that the Corps would take would be to assume a lead role in the ongoing efforts for the restoration of spring Chinook and steelhead populations on the Yuba River reflected in the Upper Yuba River Studies Program and the Lower Yuba River Technical Working Group including acting as the lead Federal agency in the National Environmental Policy Act (“NEPA”) process for improving fish passage at Daguerre.

On March 27, 2002, NMFS issued a Biological Opinion (“the 2002 BiOp”) for the Project, entitled “Operations of Englebright Dam/Englebright Lake and Daguerre Point Dam on the Yuba River, California.” The 2002 BiOp addressed only the impacts of the Project on spring Chinook and steelhead, and did not address the impacts on green sturgeon. In the 2002 BiOp, NMFS found that the Project would not jeopardize the survival or recovery of spring Chinook and steelhead. However, NMFS specifically limited that determination, as well as the attendant Incidental Take Statement, to a five year time period—meaning the 2002 BiOp and ITS expired on March 27, 2007. NMFS did not specify an exact number of allowable take of the species. Instead, NMFS set a level of permissible take based on the Corps’ compliance with three reasonable and prudent measures and their implementing terms and conditions. NMFS cautioned that compliance with the terms and conditions was nondiscretionary and that if the Corps failed to comply, the protective coverage of the ITS would lapse.

The terms and conditions in the 2002 BiOp were derived directly from conservation and restoration measures in the Corps’ project description. These terms and conditions required that the Corps: (1) “seek to improve the effectiveness and reliability of fish ladders on Daguerre Point Dam,” by clearing debris, installing a remote pressure/transducer device to monitor the accumulation of debris, and by controlling sediment on the upstream side of Daguerre so that it does not impede fish passage; (2) “implement interim as well as long term improvements to the South Yuba-Brophy diversion to reduce impacts of that facility on juvenile salmonids;” and (3) “develop and implement a gravel injection program in key areas on the Yuba River which have been deprived of adequate spawning gravels by the interruption of recruitment of gravel by the construction of Englebright.” The Project Description in the Biological Assessment, and the BiOp Effects Analysis reiterated the terms and conditions as well as referenced the Corps commitment to engaging in a NEPA process to consider alternatives for improved fish passage at Daguerre.

The Corps did not comply with the 2002 BiOp’s reasonable and prudent measures or attendant terms and conditions during the five-year term of the 2002 BiOp.

First, the Corps did not develop an implementation plan to clear debris from the Daguerre fish ladders during much of the five-year term of the 2002 BiOp. The Corps did not submit any such plan to NMFS by September 27, 2002, it did not implement such a plan by March 26, 2003, and did not add the plan to the requirements of the Corps Operation and Maintenance Manual for Daguerre, as required by the 2002 BiOp. The Corps did not install a remote pressure/transducer device by October 1, 2002 as required by the 2002 BiOp, and has not yet installed one to date. The Corps did not develop an implementation plan to routinely remove or otherwise manage sediments on the upstream side of Daguerre during much of the five-year term of the 2002 BiOp.

The Corps did not submit any such plan to NMFS by September 27, 2002, and it did not implement such a plan by March 26, 2003.

Second, the Corps did not during the term of the 2002 BiOp, and has not to date, required YCWA to implement interim or long-term improvements to the Brophy Diversion to reduce impacts of that facility on juvenile spring Chinook and steelhead, but instead has continued to allow YCWA to operate the Brophy Diversion without such improvements.

Third, the Corps did not develop or implement a gravel injection program in key areas on the Yuba River, which have been deprived of adequate spawning gravels due to the presence of Englebright Dam. The Corps did not submit any plan for gravel injection to NMFS by September 27, 2002, and it did not implement such a plan by March 26, 2003, as required by the 2002 BiOp.

Fourth, the annual reports on the Corps' implementation of the terms and conditions submitted by the Corps did not sufficiently detail the progress that the Corps was making towards the implementation of the above-listed measures and the effectiveness of those measures, as required by the 2002 BiOp and 50 C.F.R. § 402.14(i)(3).

Fifth, the Corps reneged on its commitment to be the lead agency in the National Environmental Policy Act ("NEPA") environmental review process for considering fish passage alternatives at Daguerre, failed to select a preferred fish passage alternative, and failed to complete an Environmental Impact Statement for any such preferred alternative.

3. April 2007 Biological Opinion

On April 27, 2007, NMFS issued another biological opinion for the Project, entitled "Operation of Englebright and Daguerre Point Dams on the Yuba River, California, for a 1-year Period" ("April 2007 BiOp"). NMFS stated that the April 2007 BiOp would be effective only for one year. The April 2007 BiOp addressed only the impacts of the Project on spring Chinook and steelhead, and did not address the impacts on green sturgeon. Although NMFS stated that the April 2007 BiOp did not include consultation for the green sturgeon, it provided no justification nor explanation for the failure to conduct or complete consultation on this species. The April 2007 BiOp concluded that the Project would not jeopardize the continued existence of spring Chinook and steelhead and that the Project was not likely to destroy or adversely modify the critical habitat of those species for the one-year period of the April 2007 BiOp. In the April 2007 BiOp, NMFS indicated that it was incorporating many sections of the 2002 BiOp by reference.

In the April 2007 BiOp, NMFS generally described the Project as the continued operation of Daguerre and Englebright as well as the issuance of any licenses or easements for water diversions for all reaches of the Yuba River affected by Englebright and Daguerre. NMFS's description of the Project further included six "conservation and restoration measures" that NMFS stated the Corps had committed to incorporate as part of its Project operations: (1) to coordinate with other agencies to manage flows from New Bullards Reservoir and Englebright Lake to enhance critical habitat and water temperature in the lower Yuba River; (2) to coordinate with other agencies to develop a gravel implementation program; (3) pending funding and approval, to coordinate with YCWA to construct a temperature control device on the intake for Narrows II Powerhouse on Englebright; (4) to continue to implement its plan of routinely

clearing debris from the Daguerre fish ladders; (5) to continue to implement its plan to routinely remove the sediment that occasionally blocks the north Daguerre fish ladder exit; and (6) to coordinate with other agencies to investigate, design, and implement an economical plan to improve conditions for juvenile spring Chinook and steelhead at the Brophy Diversion.

In the April 2007 BiOp, NMFS did not provide any information or analysis about whether the Corps' "conservation and restoration measures" are reasonably certain to occur. Furthermore, NMFS did not document, consider, or analyze the repeated delays and many continuing impediments toward the implementation of these measures, many of which involved the actions of third parties that are not subject to the Corps' control. For example, the first conservation and restoration measure was the Corps' coordinating with several agencies to manage flows from New Bullards Bar Reservoir and Englebright Lake. The April 2007 BiOp omitted any analysis or consideration of the fact that the Corps lacks the ability to impose flow requirements on water releases from these dams and may not otherwise be able to influence securing beneficial flow releases from these dams.

In the April 2007 BiOp, NMFS referred to and incorporated the Effects of the Actions section in the 2002 BiOp, wherein NMFS recognized the adverse impacts of the Project on spring Chinook and steelhead. The April 2007 BiOp also listed several changes to the effects of the Project, including measures that NMFS asserted have occurred as well as projects that have not yet been implemented.

In the April 2007 BiOp, NMFS stated that the overall status of spring Chinook and steelhead essentially remained the same as in the 2002 BiOp. NMFS observed that spring Chinook still faced a moderate to high risk of extinction and that steelhead populations had experienced substantial decline. NMFS stated that in the Yuba River, spring Chinook escapement was relatively low and greatly reduced from historic levels. NMFS asserted that it had very little information about population trends and overall abundance of steelhead in the Yuba River.

The April 2007 BiOp included an Incidental Take Statement ("April 2007 ITS") for the Corps' Project. The April 2007 ITS set three ecological surrogates as a measure of allowable take for the one-year period of the April 2007 BiOp, which included flow releases from Englebright, the availability of spawning gravel below Englebright, and the maintenance of clear passage through the ladders on Daguerre. The April 2007 ITS did not set any quantitative measure of these requirements, stating that NMFS's analysis of Project effects anticipates that the operation of a full-flow bypass on the Powerhouses associated with Englebright would prevent large flow fluctuations in the lower Yuba River, that the Corps would implement a gravel injection program in 2007, which would inject at least 500 tons of gravel, and finally that the Corps would keep the Daguerre fish ladders exits clear of sediment and that a clear channel would be maintained from ladder exits to the main channel of the Yuba River. The April 2007 ITS stated that if these ecological surrogates were not met, then the Project would be considered to have exceeded anticipated take levels, triggering the need to reinitiate consultation.

The April 2007 ITS also included one reasonable and prudent measure to minimize take of spring Chinook and steelhead, which required the Corps to implement the proposed pilot

gravel injection program within one year of the issuance of the April 2007 BiOp. The Corps did not comply with this one reasonable and prudent measure during the April 2007 BiOp's term.

NMFS revoked the April 2007 BiOp and April 2007 ITS on November 21, 2007, before the end of its scheduled one year life, as part of its issuance of yet another biological opinion.

4. November 2007 Biological Opinion

On November 21, 2007, NMFS issued another biological opinion for the Project, the November 2007 BiOp. Unlike its prior two biological opinions for the Project, NMFS did not set an expiration date for the November 2007 BiOp and the November 2007 BiOp ostensibly permanently addressed the impacts of the Project on spring Chinook, steelhead, and green sturgeon. The November 2007 BiOp concluded that the Project would not jeopardize the continued existence of the spring Chinook, steelhead and green sturgeon that the Project was not likely to destroy or adversely modify the critical habitat of those species.

In the November 2007 BiOp, NMFS again indicated that it was incorporating sections of the 2002 BiOp by reference. For example, NMFS indicated it was incorporating by reference the 2002 BiOp's description of baseline habitat conditions for spring Chinook and steelhead in the Yuba River.

In the November 2007 BiOp, NMFS again generally described the Project as the continued operation of Daguerre and Englebright as well as the issuance of any licenses or easements for water diversions for all reaches of the Yuba River affected by Englebright and Daguerre. The November 2007 BiOp further indicated that the Corps's description of the Project further included five "conservation and restoration measures" that NMFS stated the Corps had committed to incorporate as part of its Project operations: (1) to coordinate with other agencies to manage flows from New Bullards Reservoir and Englebright Lake to enhance critical habitat and water temperature in the lower Yuba; (2) to coordinate with other agencies to develop and implement a gravel implementation program; (3) to continue to implement its plan of routinely clearing debris from the Daguerre fish ladders; (4) to continue to implement its plan to routinely remove the sediment that occasionally blocks the Daguerre fish ladder exits; and (5) to coordinate with other agencies to investigate, design, and implement an economical plan to improve conditions for juvenile spring Chinook and steelhead at the Brophy Diversion. These five conservation and restoration measures were identical to five of the six conservation and restoration measures for the Project that NMFS identified in the April 2007 BiOp. NMFS, however, deleted from the November 2007 BiOp's list of conservation and restoration measures one of the conservation and restoration measures that NMFS had listed in the April 2007 BiOp: that pending funding and approval, the Corps would coordinate with YCWA to construct a temperature control device on the intake for Narrows II Powerhouse on Englebright. NMFS provided no explanation why it and the Corps had deleted this conservation and restoration measure from the list of environmentally beneficial measures that the Corps had committed to implement to reduce the impact of the Project on spring Chinook and steelhead.

In the November 2007 BiOp, NMFS provided little to no specific information or analysis about whether the Corps' conservation and restoration measures were reasonably certain to occur beyond very general recognition that implementation of flow enhancement in the Yuba River

and implementation of improvements to the Brophy Diversion required the actions of third parties that were not subject to the Corps' control and are not certain to occur. Beyond this, NMFS did not document, consider, or analyze the repeated delays and many continuing impediments toward the implementation of these measures. For example, NMFS provided no explanation why the Corps had been unable or unwilling to implement a gravel augmentation program in the lower Yuba River despite this being a term and condition of the 2002 BiOp issued five and a half years previously—and how and why this was going to change.

The November 2007 BiOp confirmed that the Project had caused and continued to cause the numerous different adverse impacts on spring Chinook, steelhead and green sturgeon discussed above.

In the November 2007 BiOp, NMFS stated that the overall status of spring Chinook and steelhead essentially remained the same as in the 2002 BiOp. NMFS observed that spring Chinook still faced a moderate to high risk of extinction and that steelhead populations had experienced substantial decline. NMFS stated that in the Yuba River, spring Chinook escapement was relatively low and greatly reduced from historic levels. NMFS asserted that it had very little information about recent population trends and overall abundance of steelhead in the Yuba River, other than that the steelhead have not substantially recovered and continued to be at risk of extinction.

The November 2007 BiOp indicated that the green sturgeon's survival was jeopardized by severe losses of its traditional spawning habitat, which was now limited to a portion of the Sacramento River due to various artificial barriers on the rivers it once utilized for spawning, by reductions of flows in the rivers it utilizes or once utilized for spawning due to water diversions, invasion of non-native species into its habitat, and accumulation of toxic pollutants in its habitat. The November 2007 BiOp confirmed that green sturgeon have been found in the lower Yuba River below Daguerre, but that Daguerre is a complete barrier to their passage above Daguerre.

The November 2007 BiOp included an Incidental Take Statement for the Corps' Project. The November 2007 ITS again set three ecological surrogates as a measure of allowable take of spring Chinook, steelhead, and green sturgeon: flow releases from Englebright, the availability of spawning gravel below Englebright, and the maintenance of clear passage through the ladders on Daguerre. The November 2007 ITS did not set any quantitative measure of these requirements, stating that NMFS's analysis of Project effects anticipates that the operation of a full-flow bypass on the Powerhouses associated with Englebright would prevent large flow fluctuations in the lower Yuba River, that the Corps would implement a gravel injection program in 2007, which would inject at least 500 tons of gravel, and finally that the Corps would keep the Daguerre fish ladders exits clear of sediment and that a clear channel would be maintained from ladder exits to the main channel of the Yuba River. The November 2007 ITS stated that if these ecological surrogates were not met, then the Project would be considered to have exceeded anticipated take levels, triggering the need to reinitiate consultation.

The November 2007 ITS also included five reasonable and prudent measures to minimize take of spring Chinook and steelhead and five terms and conditions implementing these five reasonable and prudent measures. The five terms and conditions were: (1), utilizing the information from its pilot gravel injection project, the Corps must develop and implement a

long-term gravel augmentation program within three years for adding gravel to the Yuba River below Englebright, (2), the Corps must complete a study to determine an effective method for replenishing into the Yuba River the supply of large woody material that is trapped by Englebright and upstream reservoirs and then develop and commence implementing a long-term program to replenish large wood in the River within 4 years, (3), the Corps must complete a study of implementing a feasible Daguerre fish passage improvement project within 5 years and then commence implementation of the Corps' preferred alternative for securing anadromous fish passage past Daguerre within ten years, (4), the Corps must continue to implement its Daguerre fish ladder clearing and maintenance programs and (5), the Corps must diligently pursue "the ongoing effort" for securing an improved fish screen at the Brophy diversion that meets all DFG and NMFS criteria.

5. The February 2012 Biological Opinion

Pursuant to Court order, the November 2007 BiOp was remanded to NMFS for issuance of a new biological opinion that fully complied with all ESA requirements. NMFS issued a new biological opinion on February 29, 2012 ("February 2012 BiOp"). Like the November 2007 BiOp, NMFS did not set an expiration date for the February 2012 BiOp, though it stated that the Corps should reinitiate consultation by January 31, 2020 to integrate ESA consultation with the Federal Energy Regulatory Commission ("FERC") relicensing proceedings for the hydroelectric facilities in the Yuba River watershed. Unlike all previous biological opinions for the Project, the February 2012 BiOp concludes that the Project will jeopardize the continued existence of spring Chinook, steelhead and green sturgeon, and that the Project is likely to destroy or adversely modify the critical habitat of those species.

The February 2012 BiOp describes the proposed action as the Corps' continued operation and maintenance of Englebright and Daguerre and recreational facilities on and around Englebright Reservoir. This operation includes the issuance and administration of new and existing permits, licenses, and easements to: (1) non-federal entities for their operations of water diversion and power generation facilities at the dams; (2) federal, state, and local agencies, commercial interests, and private individuals for maintaining public utilities and right-of-way purposes on some Corps lands around Englebright Reservoir; and (3) non-federal entities holding use and occupation easements for properties in the Yuba Goldfields.

The description of the proposed action contains three conservation and restoration measures proposed by the Corps: (1) to complete the monitoring of the November 2010 gravel placement downstream of Englebright and continue implementing the program described in the Gravel/Cobble Augmentation Implementation Plan if warranted; (2) develop a plan for management of large woody material, conduct a pilot program to place large in-stream woody material to increase cover and diversity of in-stream habitat for juvenile salmonids within one year of the biological opinion, and implement a long-term plan within one year of the pilot project; and (3) complete a Daguerre Point Dam Fish Passage Reconnaissance Study by November 21, 2012.

The February 2012 BiOp states that the overall status of the spring Chinook and steelhead has worsened since the last status review five years ago, while the status of green sturgeon is compromised by low abundance, limited distribution, and lack of population redundancy.

February 2012 BiOp at 200, 203, 205. NMFS underscores the severe impacts being caused by the Project. For instance, with respect to spring Chinook, the BiOp notes:

The Yuba River population of spring-run Chinook salmon is not likely to survive the conditions perpetuated by the proposed action. . . . Project effects continue the pattern of low abundance, variable/declining growth rate, insufficient spawning substrate, spatial structure overlaps with fall-run Chinook salmon, hatchery introgression, and lack of habitat diversity. The population may not survive climate change or even variable water years, so even minor adverse effects could cause the population to go extinct.

February 2012 BiOp at 201. The BiOp provides similarly dire statements of the impacts of the Project on steelhead and green sturgeon. *Id.* at 203, 205. NMFS described the numerous ways in which the Project is causing “take” of the Listed Species:

The expected effects of the proposed action in the Yuba River will result in potential death, injury, or harm to the freshwater life stages of spring-run Chinook salmon, Central Valley steelhead, and/or the Southern DPS of North American green sturgeon in the Yuba and occasionally the lower Feather River downstream from the confluence with the Yuba River. These effects are the result of continued operation of the proposed action. Anticipated effects of the proposed action are expected to include: (1) blocked upstream migration of anadromous fish in the Yuba River at Daguerre and Englebright dams due to impaired, ineffective or lack of fish passage facilities, and the compression of spawning and rearing to reaches of the Yuba River downstream from project dams; (2) generally limited habitat availability of impaired quality (lack of LWD, in-channel riparian, and spawning substrate) for spring-run Chinook salmon, Central Valley steelhead, and Southern DPS green sturgeon on the currently accessible portion of the Yuba River; (3) continued hybridization, through competition for limited spawning space and straying, between Central Valley spring-run Chinook salmon and fall-run Chinook salmon related to the effects described above.

Id. at 250. NMFS went on to summarize the effects of the action in tables contained in the ITS. *Id.* at 252-59. In light of the severely degraded status of the Listed Species and the environmental baseline, NMFS concluded that these numerous severe Project impacts are likely to cause jeopardy to the survival and recovery of the Listed Species, and destroy or adversely modify their designated critical habitat.

To avoid this jeopardy and adverse modification of critical habitat, NMFS ordered the implementation of Reasonable and Prudent Alternatives (“RPAs”) to the proposed Project. These RPAs include near-term and long-term actions relating to fish passage at Englebright and Daguerre and programs to augment gravel, restore the river channel, control predators, and monitor salmonids and green sturgeon, among other things.

The February 2012 BiOp also includes an Incidental Take Statement for the Corps' Project. The February 2012 ITS states that it establishes an amount of allowable take where possible and otherwise specifies a geographic and/or temporal extent of allowable take. The February 2012 ITS sets forth six reasonable and prudent measures and associated terms and conditions that NMFS deemed necessary and appropriate to minimize the effect of incidental take on the Listed Species. These are: (1) reducing entrainment and impingement of salmonids at the Brophy and Hallwood-Cordua diversions; (2) enhancing migration success through the Daguerre fish ladders through monitoring, clearing of debris in the fish ladders, inspection of the upstream channels, dredging when needed to maintain clear passage, and flashboard management activities; (3) enhancing juvenile salmonid rearing habitat by implementing programs for large wood augmentation and riparian re-vegetation; (4) minimizing adverse effects from Waterway 13 by ensuring that an effective fish barrier remains in place; (5) utilizing Corps authority to improve flow management by, for example, altering the terms of licenses to ensure beneficial flows are provided for the Listed Species; and (6) monitoring and reporting on implementation of the terms and conditions annually.

III. VIOLATIONS OF THE FEDERAL ENDANGERED SPECIES ACT

As discussed above, ESA Section 9, 16 U.S.C. § 1538, prohibits the unlawful "taking" of a threatened or endangered species. An incidental take statement, like the one contained in the February 2012 BiOp, serves as a limited safe harbor from liability under ESA Section 9 provided that the action agency complies with the terms and conditions of the ITS. The RPAs also contain measures that must be implemented to avoid causing jeopardy and adverse modification of critical habitat. Compliance with the ITS and RPA measures is needed to avoid violations of the ESA's substantive mandates of ESA Section 7(a)(1) and 7(a)(2), as well as ESA Section 9.

In issuing the RPAs, NMFS underscored the fact that the measures were carefully selected to include only those actions needed to avoid jeopardy to the Listed Species or adverse modification of critical habitat. NMFS stated:

NMFS recognizes that the RPA must be an alternative that is likely to avoid jeopardizing listed species or adversely modifying their critical habitats, rather than a plan that will achieve recovery. Both the jeopardy and adverse modification standards, however, include consideration of effects on an action on listed species' chances of recovery. NMFS believes that the RPA does not reduce the likelihood of recovery for any of the listed species. The RPA cannot and does not, however, include all steps that would be necessary to achieve recovery. NMFS is mindful of potential social and economic consequences of reducing water deliveries and electricity, and has carefully avoided prescribing measures that are not necessary to meet section 7 requirements.

Id. at 216. This shows that NMFS carefully considered each RPA measure and found it to be necessary to ensure that the Corps does not cause jeopardy or adverse modification of critical habitat. Indeed, the BiOp states: "This RPA is composed of numerous elements for each of the various project associated stressors and must be implemented in its entirety in order to avoid jeopardy and adverse modification." *Id.* at 215. A violation of any of these RPAs therefore

constitutes a violation of the substantive mandates of ESA Section 7(a)(1) and 7(a)(2) to “insure” that actions authorized, funded, or carried out by the Corps do not cause jeopardy or adverse modification, and to use the Corps’ authorities in furtherance of the purposes of the ESA.

The February 2012 BiOp notes the Corps has several bases for legal authority to implement the RPA measures, and admonishes the Corps to “not let any opportunities be lost through inaction.” *Id.* at 211. However, the Corps is not currently performing such actions as needed to comply with the RPAs and terms and conditions of the February 2012 ITS. In fact, contrary to the conclusion of NMFS that the Corps has full authority to implement the RPA measures, the Corps has stated its unequivocal view that the scope of many of the measures ordered by February 2012 BiOp exceeds the scope of the Project and the Corps’ implementation authority. In a July 3, 2012 letter to NMFS (“Corps letter” available at www.spk.usace.army.mil) the Corps states that it only “conditionally accepts” the February 2012 Biological Opinion. *See* Corps letter at 1. The Corps states that it will “continue to review the RPA actions to determine which actions are within the scope of the Corps’ existing authority and appropriations and which actions require additional authority or appropriations.” *Id.* The Corps has indicated it does not intend to implement those measures it considers beyond its authority, even though NMFS has found them necessary to avoid jeopardy and adverse modification of critical habitat. *Id.*

The BiOp states that “[i]n order to meet the requirements of the ESA the Corps must implement the [RPA] actions in the timeframes identified.” February 2012 BiOp at 211 (emphasis added). The Corps’ intention not to comply with RPA measures and terms and conditions it disagrees with is evidenced by its failure to meet at least two deadlines that have passed since the February 2012 BiOp was issued. As discussed further below the Corps did not comply with the following deadlines:

- Take “immediate corrective action to address potential biological concerns associated with Waterway 13 by August 15, 2012”; and
- Provide a predator reduction and monitoring plan to NMFS for approval by September 1, 2012, and implement the required plan by November 1, 2012.

Claims that the Corps is in violation of RPA measures and terms and conditions whose deadlines have not yet passed are ripe for review because the Corps has stated unequivocally that it intends to breach those requirements, and it has a track record and history of breaching numerous previously-issued ITS requirements dating back to the 2002 BiOp as described above. Because the Corps is not in compliance with the RPAs or ITS, it is in violation of ESA Section 9 as well as its independent ESA Section 7(a)(1) and 7(a)(2) duties.

A. Violations of ESA through Failure to Implement RPAs Requiring Fish Passage at Englebright

The February 2012 BiOp requires the Corps to implement fish passage at Englebright. Specifically, the BiOp contains an RPA calling for a “Yuba River Fish Passage Improvement Strategy and Plan,” which contains both Near-Term Fish Passage (“NTFP”) actions and Long-Term Fish Passage (“LTFP”) actions related to bringing about fish passage at Englebright. The NTFP actions are:

- NTFP 1: Formation of Yuba Interagency Fish Passage Committees: This requires the Corps by December 2012, to establish, chair, and staff the Yuba Interagency Fish Passage Steering Committee.
- NTFP 2: Evaluation of Salmonid Spawning and Rearing Habitat Upstream of Dams: This requires the Corps to begin immediately to compile and summarize the information about anadromous fish habitat between Englebright Dam and upstream natural barriers in each of the upstream forks of the Yuba river and their tributaries (to be completed by January 2013).
- NTFP 3: Development of Fish Passage Evaluation Plan: This requires the Corps to complete a Fish Passage Evaluation Plan between July 2012 and January 2014, which must include a schedule for completing a 3-year study upstream of Englebright, New Bullards Bar Dam, and Our House Dam, and a plan for funding the passage program.
- NTFP 4: Implementation of Fish Passage Evaluation Plan and Pilot Reintroduction Program: This requires the Corps from January 2014 through at least 2017 to begin to implement a Fish Passage Program to provide for fish passage design studies and pilot reintroductions of spring Chinook and steelhead to habitat upstream of Englebright using a phased approach.
- NTFP 4.1: Adult Fish Collection and Handling Facilities: This requires the Corps by March 1, 2014 to design, construct, install, and operate new fish collection, handling and transport facilities to pass fish upstream of Yuba dams and reservoirs, and by January 1, 2015 to complete facilities to provide safe and effective downstream fish passage.
- NTFP 4.2: Adult Fish Release Sites Upstream of Dams and Juvenile Sites Downstream of Dams: This requires the Corps to complete construction of all upstream adult and downstream juvenile release sites by March 1, 2014.
- NTFP 4.3: Capture, Trapping, and Relocation of Adults: Short-term Fish Passage Actions: capture, transport and relocation of adult anadromous salmonids: By March 1, 2014, this measure requires the Corps to implement upstream fish passage for adults via trap and transport facilities while the Corps analyzes volitional fish passage opportunities.
- NTFP 4.4: Interim Downstream Fish Passage through Reservoirs and Dams: Beginning in 2015, the Corps must carry out interim measures to pass downstream migrants around reservoirs and dams.
- NTFP 4.5: Juvenile Fish Collection Prototype: By the end of 2013, the Corps must identify a preferred location and design for construction for a prototype head-of-reservoir juvenile collection facility upstream of either New Bullards Bar Dam and/or Englebright. The Corps must plan, design, build, and evaluate a prototype with construction to be complete by September 2014. The Corps must issue a draft report, with a final report due by December 31, 2016.
- NTFP 4.6: Pilot Program Effectiveness Monitoring and Evaluation: From 2014-2017, the Corps must study and provide annual reports on the effectiveness of elements of the pilot program and determine the feasibility of long-term passage alternatives, with a final summary report due by February 15, 2017.

Id. at 220-29. In addition, the LTFP actions contained in the February 2012 BiOp are:

- LTFP 1: Long-term Funding and Support to the Interagency Fish Passage Steering Committee and Technical Committee: This requires the Corps to continue to convene, fund, and staff the Fish Passage Steering Committee and Fish Passage Technical Committee if the Comprehensive Fish Passage Report indicates that long-term fish passage is feasible and desirable.
- LTFP 2: Long-term Fish Passage Plan and Program: This requires the Corps to develop and submit to NMFS a Long-term Fish Passage Plan by December 31, 2017, and to implement a Long-term Fish Passage Program by January 31, 2020.
- LTFP 2.1: Long-term Adult and Juvenile Fish Passage Facilities: This requires the Corps to construct long-term fish passage facilities necessary for upstream and downstream migration at Englebright Dam and reservoir by 2020.
- LTFP 2.3 [sic]: Long-term Fish Passage Monitoring and Evaluation: This requires the Corps to monitor all elements of the Long-term Fish Passage Program and submit annual reports to NMFS by September 30 of each year.

Id. at 231-33.

In issuing these RPAs, NMFS pointed out that they were not only necessary to avoid jeopardy and adverse modification of critical habitat, but they were also technically and economically feasible. NMFS pointed to numerous other comparable fish passage projects implemented at Corps dams in the states of Oregon and Washington, including a current project to provide downstream fish passage at the Howard Hanson Dam, estimated to cost \$349 million. *Id.* at 248. NMFS indicated that cost estimates of fish passage projects at Englebright already exist and demonstrate that the costs are similar to the costs of fish passage projects the Corps has already implemented at other dams. *Id.* NMFS concluded: “Based on the existing economic analyses, the Corps should be able develop an economical and feasible solution to address fish passage at Englebright Dam and Daguerre Point Dam.” *Id.* at 249. Yet fish passage has not occurred on the Yuba River, as on the other rivers, for one primary reason: “Based on actions since the 2007 biological opinion, the Corps appears to be reluctant to pursue funding to address environmental issues on the Yuba River.” *Id.* at 248.

Despite the necessity and feasibility of implementing these fish passage RPAs, the Corps is once again failing to take the actions needed to comply. In fact, this time, the Corps is not only dragging its feet, but it is actively making public statements in which it expressly refuses to comply. In statements made to the press after the release of the February 2012 BiOp, Randy Olsen, Chief of Operations and Readiness in the Corps’ Sacramento District office, said: “Fish passage is not in our authorization at Englebright. It’s not part of the project purposes. It’s not something we’re going to be able to just do.” *See* Army Corps ordered to move fish above Yuba River dams, *The Sacramento Bee* (Mar. 1, 2012), *available at* <http://www.sacbee.com/2012/03/01/4304043/army-corps-ordered-to-move-fish.html>. The Corps repeated these statements on the Corps’ website announcing the February 2012 BiOp. The Corps’ website notes that the February 2012 BiOp “requires actions that are outside of the Corps’ authority.” *See* <http://sacramentodistrict.armylive.dodlive.mil/tag/yuba-river/> (last visited Nov. 12, 2012). The website also provides a Fact Sheet that makes similar statements: “Under federal law, measures required by jeopardy opinions must be ‘reasonable and prudent,’ meaning

they ‘can be implemented consistent with the scope of the action agency’s legal authority and jurisdiction (50 CFR §402.02).’ Neither dam removal nor fish passage at Englebright is currently authorized by Congress.”

In addition, the July 3, 2012 Corps letter states that the Corps does not have authority to evaluate fish passage upstream of New Bullards Bar, Log Cabin and Our House Dams as required by RPA 1, the Yuba River Fish Passage Improvement Strategy and Plan. *See* Corps letter at 15. Further, the Corps states that it will not meet the deadline to develop and implement the Plan. *Id.* at 16.

Because the Corps is once again failing to take the actions necessary to comply with the fish passage RPAs at Englebright, and in fact is unequivocally stating its refusal to comply with these measures, the Corps is in violation of ESA Section 9 and the substantive duties of ESA Section 7(a)(1) and 7(a)(2).

B. Violations of ESA through Failure to Implement RPAs Requiring Fish Passage at Daguerre

In order to avoid jeopardizing the survival and recovery of the Listed Species, and to avoid destruction or adverse modification of their critical habitat, the BiOp requires the Corps to implement a Reasonable and Prudent Alternative in the form of a Daguerre Point Dam Fish Passage improvement project. Specifically, the BiOp requires the following RPAs related to fish passage at Daguerre:

- NTEP 5: Fish Passage at Daguerre Point Dam: This requires the Corps to provide the best possible fish passage at Daguerre with the existing facilities while developing and implementing a long-term fish passage solution.
- NTEP 6: Daguerre Point Dam Fish Passage Improvement: This measure requires the Corps to complete the feasibility and preliminary engineering design (“PED”) phases of a fish passage improvement project at Daguerre by November 21, 2012. Following this preliminary step, the Corps must commence implementation of the preferred fish passage alternative developed through the feasibility and PED process by November 2017, and implement an operation and maintenance plan for the new fish passage system by July 2018.

February 2012 BiOp at 229-30. The BiOp also requires various measures related to fish passage at Daguerre as part of Term and Condition 2 of the ITS. *Id.* at 262-63.

These RPA and ITS actions were previously required by the November 2007 BiOp’s ITS. The deadlines were based on the schedule described in the Biological Assessment issued by the Corps as part of the consultation leading up to the November 2007 BiOp. In that BA, the Corps explained that the feasibility and PED phases of the fish passage improvement project would take a number of years to complete, which is why NMFS allowed the Corps until November 21, 2012 – five years from the issuance of the November 2007 BiOp – to complete them.

However, the Corps has stated unequivocally that it will not be able to meet the November 21, 2012 deadline. *See e.g.* Corps letter at 16. Despite having this requirement for the

last five years, the Corps today has not even begun to implement the feasibility and PED phases of the fish passage improvement project at Daguerre. *Id.* The Corps has not even complied with the commitment it made in the BA to complete the Daguerre Point Dam Fish Passage Reconnaissance Study (the first step of the feasibility study) by November 21, 2012. Even if the Corps were to begin working on the Daguerre fish passage improvement project immediately, since it will take several years to complete, the lack of progress to-date conclusively establishes that the Corps cannot comply with this RPA measure by the November 21, 2012 deadline.

Moreover, the Corps has repeatedly stated its position that it cannot begin to implement this action without a specific appropriation from Congress. *See, e.g.*, BA at 3-43 and Corps letter at 16. Yet the Corps has repeatedly failed to obtain any such appropriation. In filings made during the *SYRCL v. NMFS* litigation, Randy Olsen, Chief of Operations and Readiness in the Corps' Sacramento District office, testified under oath in the form of a declaration that the earliest the Corps could have obtained such an appropriation was October 2012. *See* Declaration of Randy Olsen ¶ 3 (ECF No. 321-3) (Aug. 6, 2010). The Corps' BA confirms that no funding was received for implementation in the 2012 budget. BA at 3-43. Since it will take several years to complete the feasibility and PED phases of a Daguerre fish passage improvement study, this lack of funding, and the Corps' stated unwillingness to proceed without it, conclusively establish that the Corps will not comply with the RPA deadline of November 21, 2012. These facts also show that the Corps will not comply with the November 2017 deadline for implementing the preferred fish passage alternative or the July 2018 deadline to implement an operations and maintenance plan for the fish passage system.

Because the Corps will not implement the requirements for planning and implementation of a program for fish passage at Daguerre, the Corps is in violation of ESA Section 9 and the substantive duties of ESA Section 7(a)(1) and 7(a)(2).

C. Violations of ESA through Failure to Implement RPAs Requiring Gravel Augmentation and River Channeling Measures Below Englebright

RPA 4 requires the Corps to implement a Gravel Augmentation Program to provide spawning habitat for spring Chinook and steelhead in the reach below Englebright, where gravel is depleted. This requires, among other things, that the Corps implement the terms of the Gravel Augmentation Implementation Plan ("GAIP") in 2012, place a minimum of 15,000 short tons of gravel into the Englebright Dam Reach annually until the gravel / cobble deficit of 63,000 to 101,000 tons is eliminated, and monitor the results of the augmentations and provide annual reports to NMFS. In a related measure, RPA 5 requires the Corps to implement a Channel Restoration Program to restore properly-functioning channel morphology and depositional surfaces to provide quality spawning habitat downstream of Englebright.

In June 2012, in response to RPA4, the Corps resubmitted the GAIP (which was first provided to NMFS in 2010). *See Lower Yuba River Gravel Augmentation Project, Supplemental Environmental Assessment, June 2012* available at www.spk.usace.army.mil. Despite the requirements in RPA4, the Corps reiterated that it would only perform the actions in the GAIP. However, implementation of the GAIP alone will not comply with the RPA because the GAIP

does not call for annual gravel augmentations of 15,000 tons. As noted in the BiOp: “This area has a deficit of 63,000 to 101,000 tons of spawning gravel (Pasternack 2010a). Gravel augmentation under the proposed action has provided a small incremental improvement above the baseline conditions that Englebright Dam is designed to maintain.” February 2012 BiOp at 177. This statement recognizes that the GAIP alone will provide only a small incremental addition of gravel, which is insufficient to comply with RPA 4 which, as noted above, requires placement of gravel until the gravel deficit in the Englebright Dam reach is eliminated. NMFS also recognizes the transient nature of the GAIP actions:

The gravel augmentation plan that is being implemented as a conservation action under the proposed action is likely to temporarily increase spawning habitat for spring-run Chinook salmon and Central Valley steelhead. The gravel augmentation is likely to support approximately 23 to 37 redds between Englebright and Daguerre Point dams, but the increase will not be permanent, and the benefit to the conservation of spring-run Chinook salmon and Central Valley steelhead will decrease as the augmentation gravels are moved out of the system during high flow events.

Id. at 191-92. Yet despite the insufficient and temporary augmentation program called for by the GAIP, the Corps has no plans to implement any actions beyond the GAIP. As noted in the BiOp, “[t]he proposed action has measures to nominally increase Spring-run Chinook salmon and Central Valley steelhead spawning numbers but does not support conservation of the species.” *Id.* at 192. Additionally, nothing in the GAIP or any other Corps plan calls for the actions required to provide quality spawning habitat downstream of Englebright under the Channel Restoration Program required by RPA 5. Rather, the Corps has stated that “[g]iven that PG&E is ready, willing, and able to undertake these measures and these measures don't relate to any effect of the Corps' action, it is inappropriate to assign this responsibility to the Corps.” See Corps letter at 18. PG&E, however, has not undertaken these actions and these actions remain undone.

For these reasons, the Corps will fail to comply with RPAs 4 and 5 by failing to implement the required gravel additions and channel restoration. This constitutes a violation of ESA Section 9 and ESA Sections 7(a)(1) and 7(a)(2).

D. Violations of ESA through Failure to Implement RPAs and Terms and Conditions Requiring Implementation of a Predator Control Plan and Term and Condition 1 Requiring Implementation of Measures to Implement a New Fish Screen at the Brophy Diversion

RPA 6 requires the Corps to implement an immediate predator control program to reduce entrainment-related mortality caused by predation to spring Chinook and steelhead at Daguerre and the Brophy Diversion, Hallwood-Cordua Diversion, and the Browns Valley Irrigation District Diversion. This requires the Corps to provide a predator reduction and monitoring plan to NMFS for approval by September 1, 2012, to implement the plan by November 1, 2012, and to provide annual updates on August 1 of each year thereafter. This also requires the Corps to prepare a predator removal plan and implement the plan by December 2013.

In addition, Term and Condition 1 requires the Corps to provide a new easement for the Brophy Diversion that calls for completion of a new fish screen at the Brophy Diversion by the end of June 2018. Term and Condition 1 calls for the development of a plan to monitor and reduce predation associated with the diversion, and specifies that reinitiation of consultation is required if juvenile fish mortality is greater than 10 percent in the vicinity of the Brophy Diversion. Term and Condition 1 also requires the Corps to include predator control requirements in a new easement issued for the Brophy Diversion. Finally, Term and Condition 1 requires that the Corps issue a permit for the Hallwood-Cordua Diversion that includes requirements for monitoring flows, fish survival through the diversion fish screens and fish return pipe, and for predation in the diversion and immediately downstream of the return pipe.

In response to concerns over this biological opinion, South Yuba, Brophy, and Wheatland water districts, as well as Dry Creek Mutual Water Company (collectively the “South County Diverters”) wrote a letter to NMFS on February 8, 2012, stating clearly that they cannot afford to replace the rock weir at the Brophy Diversion with a fish screen that meets current CDFG and NMFS screening criteria. The diverters made clear that they consider the rock weir to be located on private property and outside the Corps’ authority. As stated in the BiOp: “Dissent from the South County Diverters may result in the June 2018 construction date on South Yuba/Brophy Diversion fish screen to be delayed.” February 2012 BiOp at 187. The Corps has to date failed to issue a new easement for the Brophy Diversion that requires completion of a new fish screen at the Brophy Diversion by the end of June 2018 or predator control measures. The Corps has further failed to issue a permit for the Hallwood-Cordua Diversion that includes requirements for monitoring flows, fish survival through the diversion fish screens and fish return pipe, and for predation in the diversion and immediately downstream of the return pipe. The Corps did not provide a predator reduction and monitoring plan to NMFS for approval by September 1, 2012, and failed to implement the required plan by November 1, 2012. Therefore, the Corps is not complying with and will not in the future comply with the measures called for in RPA 6 and Term and Condition 1. The Corps is therefore in violation of ESA Section 9 and ESA Sections 7(a)(1) and 7(a)(2).

E. Violations of ESA through Failure to Implement Term and Condition 2 Requiring Channel Dredging and Fish Ladder Maintenance at Daguerre

As noted above, the February 2012 ITS requires the Corps to implement actions to maintain clear fish passage at Daguerre. Term and Condition 2 requires the Corps to inspect the channels upstream of Daguerre each May. If the channels are less than three feet deep but still sufficient for fish passage, the Corps must submit a dredging plan to NMFS and the California Department of Fish and Game (“DFG”) for approval, with dredging occurring between mid-July and mid-August. If the inspections reveal that the channels are sufficiently blocked to impede fish access to the ladder entrances, then by June 1 of the same year the Corps must provide to NMFS and DFG a dredging plan for review and approval, to be implemented prior to mid-June. The Corps is also required to inspect the channels upstream of the fish ladders at Daguerre after all high flow events. If the inspections reveal sediment buildup that could impede fish passage, the Corps is required to dredge the channel in a manner that minimizes adverse impacts to fish as soon as it is possible to operate the dredging equipment safely.

Term and Condition 2 of the February 2012 ITS also includes specific requirements for maintaining the fish ladders at Daguerre. These include the requirement to conduct weekly surface and subsurface inspections of the fish ladders (and daily inspections during high-flow conditions) and remove debris within twelve hours (or within twelve hours of a return to safe flow levels), even if the Corps determines that flow levels are adequate for fish passage. The Corps must also inspect the fish ladder gates at the exits to the fish ladders weekly to ensure no third parties close them.

These requirements were derived from, though are more detailed than, the sediment management and debris clearing plans that the Corps proposed as part of its Project operations at issue in the November 2007 BiOp. Though these provisions were required before, the February 2012 BiOp notes that the Corps has a track record of non-compliance with its sediment management and debris clearing plans, which has become a moderate to high stressor to the reproductive fitness of spring Chinook and steelhead. Specifically, the BiOp notes:

Failure of the Corps to follow through on implementation of their sediment management plan, has contributed to the baseline conditions today. Although there are plans and measures propose[d] to minimize migration impediments at Daguerre Point Dam, the Corps has not shown a pattern of consistent maintenance of the fish ladders. Without better oversight, NMFS has an expectation that the Corps's sediment monitoring and sediment clearing activities could diminish over time.

February 2012 BiOp at 170 (emphasis added).

NMFS has made several other observations indicating that the Corps appears likely to continue not to comply with its sediment management and fish ladder clearing obligations imposed by Term and Condition 2. For example, NMFS noted in the BiOp, “[t]he proposed action does not include a firm commitment to inspect the channel after a ‘high flow event.’” *Id.* at 171. Similarly, the BiOp notes that “[f]unding for maintenance has improved since litigation, but is still dependent upon funding that is not guaranteed.” *Id.* at 172. The BiOp notes that the fish ladders are a low to medium stressor under the best of circumstances, meaning when “maintenance is timely and thorough.” *Id.* “[H]owever, in years where maintenance is delayed or not conducted, fish ladder operations and maintenance (or lack of it) are a high-level stressor on spring-run Chinook salmon.” *Id.* (Emphasis added.) Based on NMFS’s cautionary observations, NMFS’s professed concern that the Corps will repeat its past failures concerning fish ladder and channel clearing, and the fact that the Corps has not demonstrated any increased commitment of resources to fish ladder and channel clearing, SYRCL alleges that the Corps will continue in the future not to be in compliance with Term and Condition 2. The Corps is therefore in violation of ESA Section 9 and its substantive ESA Section 7(a)(1) and 7(a)(2) duties.

F. Violations of ESA through Failure to Implement Term and Condition 3 Requiring Large Woody Material Augmentation and Riparian Re-Vegetation

Term and Condition 3 of the February 2012 ITS requires the Corps to take numerous actions to implement a large wood placement program: (1) to provide NMFS with a plan for a

large wood augmentation program by June 1, 2012; (2) commence placement of large wood in 2012 by placing a minimum quantity of large wood into the river; and (3) repeating that placement in 2013, 2014, and annually until modified by NMFS. The ITS specified large wood length and width diameters, the proportion of logs with attached root wads, types of wood to be used, and requirements for establishing logjams. However, the Corps' *Lower Yuba River Large Woody Material Management Plan Pilot Study, Final Environmental Assessment* ("LWMMP" found at www.spk.usace.army.mil) submitted to NMFS in August 2012 in response to the February 2012 BiOp made clear that the Corps does not intend to comply with the provisions of Term and Condition 3. The LWMMP only commits the Corps to a pilot large wood introduction in the fall of 2012 and 2013. *See* LWMMP at 3. The Corps does not commit to large woody material ("LWM") placement beyond 2013. It only proposes to conduct an annual monitoring program to "assess the effectiveness of LWM placement and guide subsequent placements under the Pilot Study and the development of the long term LWMMP." *Id.* at 4.

Thus, the LWMMP is fundamentally at odds with the program outlined in Term and Condition 3. The LWMMP provides no assurance that any long-term program will ever be implemented at all, since it only calls for a pilot study and leaves open the possibility of no future large wood placements depending on the outcome of the analysis. In contrast, Term and Condition 3 provides a firm commitment to install a specific quantity of large wood on an annual basis until NMFS directs otherwise. Thus, the Corps' own statements in the LWMMP indicate that it will not comply with Term and Condition 3 of the February 2012 ITS. Further, the LWMMP solidifies the position the Corps' took in its' October 2011 Biological Assessment that the agency did not agree with annual wood placement.

Similarly, Term and Condition 3 requires the Corps to implement a riparian re-vegetation program to enhance riparian habitat features necessary for successful spawning and rearing life stages. The ITS requires the Corps to develop a plan that identifies: (1) a minimum of 30 acres to be planted annually downstream of the Highway 20 crossing; (2) a minimum of five miles of shoreline to be planted annually upstream of the Highway 20 crossing; and (3) makes plans for monitoring the planting success.

In the BA the Corps addresses riparian planting in one of its conservation measures. This conservation measure is inadequate to comply with BiOp Term and Condition 3. Specifically, the BiOp notes:

The LWM supplementation that is being implemented as a conservation action under the proposed action is likely to increase rearing habitat for spring-run Chinook salmon and Central Valley steelhead in *approximately 0.5 percent* of the riverine edge between Englebright and Daguerre Point dams. The increase is not permanent, and its benefits will decrease as LWM decomposes and is transported out of the system with high flow events and under operational flow conditions.

February 2012 BiOp at 188 (emphasis added). Thus, the paltry sum of riparian planting and the lack of a plan to monitor and ensure the long-term success of the program demonstrate that the Corps' conservation measures in the proposed action are not presently in compliance and will not in the future be in compliance with Term and Condition 3's riparian re-vegetation requirements.

As noted in the BiOp, “[t]he conservation value of rearing habitat for both spring-run Chinook salmon and Central Valley steelhead is negatively affected as a result of the proposed action.” *Id.* at 193. The Corps is therefore in violation of ESA Section 9 and its substantive ESA Section 7(a)(1) and 7(a)(2) duties.

G. Violations of ESA through Failure to Implement Term and Condition 4 Requiring Maintenance of Fish Barrier at Waterway 13

Term and Condition 4 of the February 2012 ITS requires the Corps to take “immediate corrective action to address potential biological concerns associated with Waterway 13 by August 15, 2012.” *Id.* at 266. As stated above, the Corps has failed to meet this deadline. The BiOp notes that Waterway 13 is an outlet channel from the Yuba Goldfields that serves to drain the area to support mining and aggregate operations on the land. A barrier is supposed to be in place to ensure that migrating salmonids do not migrate up Waterway 13 into a dead end in the Yuba Goldfields where no adequate spawning or rearing habitat exists. However, the BiOp notes that the fish barrier has been washed out and the Corps has failed to implement repairs to the barrier. The BiOp notes that the failure to prevent spring Chinook, steelhead, and green sturgeon from migrating up Waterway 13 is a chronic stressor to the Listed Species. With respect to green sturgeon, the BiOp notes: “If only a single green sturgeon entered Waterway 13 and experienced migration delay, stranding, or thermal stress, that would constitute a significant impact on the Yuba River population.” *Id.* at 174.

The BiOp notes that efforts were undertaken in the past to prevent anadromous salmonids from entering the Goldfields via Waterway 13, but each effort has failed. The various structures put in place to try to prevent passage have all washed out during high flow events. The Corps has jurisdiction over the land where Waterway 13 is located, yet the proposed action “does not include any immediate corrective measures to close off Waterway 13” *Id.* Based on the Corps’ repeated past failures to maintain the fish barrier at Waterway 13, and lack of any commitment to close off Waterway 13, SYRCL alleges that the Corps is not currently in compliance with and will not comply with Term and Condition 4 by August 15, 2012. The Corps is therefore in violation of ESA Section 9 and its substantive ESA Section 7(a)(1) and 7(a)(2) duties.

H. Violations of ESA through Failure to Implement Term and Condition 8 Requiring a Green Sturgeon Conservation and Management Program

Term and Condition 8 of the February 2012 ITS requires the Corps immediately after the issuance of the 2012 BiOp to establish a green sturgeon conservation and management program. Specifically, the Corps must move immediately to create a steering committee comprised of green sturgeon experts and representative from the Corps, NMFS, USFWS, CDFG and academic or other agency science programs or steering committees. The Corps has not yet developed this program and has expressed its unwillingness to do so. *See* Corps letter at 15, 18. Therefore the Corps is presently in violation of Term and Condition 8. Accordingly, the Corps is presently perpetuating take of the Listed Species without incidental take authorization and will continue in the future to do so in violation of ESA Section 9. Furthermore, the Corps is presently violating and will in the future continue to violate its substantive ESA Section 7(a)(1) and 7(a)(2) duties.

I. Violation of ESA through Perpetuation of Unlawful Take

The Corps is perpetuating “take” of the Listed Species in the manner described above. By perpetrating “take” without complying with the RPAs and ITS provisions, the Corps is in violation of ESA Section 9 and ESA Section 7(a)(1) and 7(a)(2).

In addition, the Corps is perpetrating take that exceeds the amount or extent of take authorized in the February 2012 BiOp. For example, the February 2012 ITS sets an amount or extent of allowable take at the Brophy Diversion for juvenile spring Chinook and steelhead as the take occurring “[y]ear-round during water diversion operations through 2018 upon the installation of [a] NMFS and CDFG approved fish screen.” February 2012 BiOp at 254, 257. As noted above, the Brophy Diversion does not currently have a NMFS and CDFG-approved fish screen. The South County Diverters have stated clearly that they cannot afford to install a fully compliant fish screen and that they consider the issue to be beyond the Corps’ jurisdiction. The February 2012 BiOp notes that the current fish screen subjects juvenile salmonids to “high stressors of predation, impingement, and entrainment.” February 2012 BiOp at 143. The BiOp finds that up to 229,800 juvenile spring Chinook and steelhead are killed at the Brophy Diversion and Hallwood-Cordua Diversion every year. February 2012 BiOp at 190-91. The BiOp further finds that up to 321,720 juvenile spring Chinook are killed at the Brophy Diversion every year due to the increased diversion of water during the winter migration period caused by the Wheatland Project. Every day that the Corps permits these water diversions to take place in the absence of a fish screen that fully complies with all NMFS and CDFG fish screening criteria, the Corps is exceeding the amount or extent of allowable take of spring Chinook and steelhead in the ITS. This constitutes a violation of ESA Section 9 and ESA Section 7(a)(1) and 7(a)(2).

IV. NOTICE OF INTENT TO SUE FOR VIOLATIONS OF THE ENDANGERED SPECIES ACT

SYRCL contends that the Corps has failed in the respects set forth above to comply with the requirements imposed by the Endangered Species Act. ESA section 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under ESA section 11(g), a citizen must give notice of his/her intention to sue. As noted above, this letter provides such notice. SYRCL is also sending a copy of this letter to the relevant U.S. Attorney and the U.S. Attorney General.

This notice letter was served by electronic mail on November 13, 2012. This service is effective immediately and to extent that any additional 60 day notice period is required before SYRCL can file new claims, this 60 day notice period will expire 60 days from November 13, 2012. As a courtesy, SYRCL is also serving this notice letter via certified mail, return receipt requested.

SYRCL intends to seek injunctive relief preventing further ESA violations pursuant to ESA sections 11(g)(1), 16 U.S.C. § 1540(g)(1), and such other relief as is permitted by law. In addition to the violations set forth above, this notice covers all ongoing violations of the ESA and violations evidenced by information that becomes available to SYRCL after the date of this Notice of Intent to File Suit.

V. CONCLUSION

SYRCL is interested in discussing effective remedies for the violations noted in this letter and hopes that such discussions can culminate in a settlement agreement that will avoid the need for further litigation. If such a settlement is to be reached, it will be imperative for the parties to commence settlement discussions in the very near future. We request that you contact us at your earliest convenience to discuss the possibility of a mutual agreement on the measures that the Corps will take to implement its ESA duties. I can be reached at (415) 533-3376.

Sincerely,

Handwritten signature of Christopher A. Sproul in cursive script.

Christopher Sproul
Environmental Advocates
Attorney for South Yuba River Citizens League