



**Frequently Asked Questions (FAQ):  
The 2012 Biological Opinion and the Legal Challenges to Protect Yuba Salmon**

Introduction:

This FAQ sheet seeks to explain certain aspects of the Biological Opinion issued by the National Marine Fisheries Service (NMFS) on February 29, 2012 concerning the impacts of the US Army Corps of Engineers' (Army Corps) operations on the Yuba River with respect to three species of fish listed as "threatened" under the Endangered Species Act: Central Valley spring-run Chinook salmon, Central Valley steelhead, and North American green sturgeon. This FAQ also explains why the South Yuba River Citizens League (SYRCL) and Friends of the River (FOR) have filed suit against NMFS and the Army Corps, following the lawsuit by the Yuba County Water Agency (YWCA) against NMFS.

The Biological Opinion:

**Q. What is the Biological Opinion?**

**A.** The Biological Opinion is a document prepared by NMFS to provide a scientific opinion on whether the Army Corps' operations on the Yuba River are driving threatened salmon, steelhead, and green sturgeon towards extinction.

**Q. What did the Biological Opinion conclude?**

**A.** The Biological Opinion concluded that the Army Corps' project on the Yuba River – including Englebright Dam, Daguerre Point Dam, and the licensing of various water diversions – is likely to jeopardize the continued existence of these three species.

**Q. Why did the Biological Opinion reach this conclusion?**

**A.** The Biological Opinion finds that the project is driving the threatened species toward extinction by blocking access to habitat above Englebright Dam, preventing habitat features like spawning gravel and large wood from flowing past Englebright Dam, forcing the fish to compete for scarce spawning space and interbreed with genetically impure hatchery strays, impeding upstream passage through the inadequate fish ladders at Daguerre Point Dam, and causing juvenile fish to be killed by predators below Daguerre Point Dam, among other impacts.

**Q. What recommendations does the Biological Opinion make?**

**A.** The Biological Opinion contains a “Reasonable and Prudent Alternative,” which describes actions the Army Corps should take to stop the project from driving the threatened species toward extinction. These include:

- Implementing a “Yuba River Fish Passage Improvement Strategy and Plan.” This requires the Army Corps to convene working groups to study ways to feasibly implement fish passage past Englebright. The Corps is required to submit a long-term fish passage plan to NMFS by December 31, 2017, and to implement the plan by January 31, 2020.
- Completing the feasibility and Planning, Engineering, and Design (“PED”) phases of a Fish Passage Improvement Project at Daguerre by November 21, 2012. The Corps must implement the fish passage project by November 2017.
- Conducting annual gravel injections of 15,000 tons below Englebright until the deficit of 63,000 to 101,000 tons is eliminated.
- Implementing a channel restoration program to restore properly-functioning channel morphology and depositional surfaces to the channel below Englebright. This area was impacted by dam-related shot-rock, and restoration of habitat capacity requires both channel reconfiguration and a supply of gravel.
- Implementing a large wood placement program by submitting a plan to NMFS and then placing a minimum quantity of large wood into the river annually.
- Implementing a predator control plan at Daguerre by November 1, 2012.

**Q.** **Are these recommendations feasible?**

**A.** In making the recommendations, NMFS explained that the measures can be implemented consistent with the Corps’ existing authority and without altering the basic purpose of the project. NMFS highlighted similar actions being successfully undertaken on other rivers.

**Q.** **What would happen if the Corps fails to comply with the recommendations?**

**A.** The species will continue to decline toward extinction.

**Q.** **Is the Corps complying?**

**A.** After the Biological Opinion was issued, the Corps stated publicly that it would not comply with the recommended actions for securing fish passage past Englebright Dam, based on its position that it lacks authority to implement the program.



The Corps originally committed to pursuing funding for the feasibility study and PED phases of a Daguerre Fish Passage Improvement Plan in 2002. To date, the Corps has not begun preparing the feasibility study or PED phases of the plan.

The Corps was originally required to inject gravel by March 2003 under a Biological Opinion issued in 2002. The Corps did not comply with the deadline. The Corps made a pilot gravel injection of 500 tons in November 2007, and further injections of 5,000 tons of gravel in 2010 and 2012. These actions have been inadequate to meet the Biological Opinion's requirement for annual injections of 15,000 tons.

The Corps has stated that it will not implement a channel restoration project below Englebright because it does not believe this impact is related to the operation of the project.

In August 2012, the Corps submitted a plan to NMFS committing to a pilot project for placing large wood into the lower Yuba River in the fall of 2012 and 2013. To date, the Corps has not placed any large wood into the river.

To date, the Corps has not produced a predator reduction control plan for Daguerre.

**Q. Does the Biological Opinion call for the removal of Englebright Dam and Daguerre Point Dam?**

**A.** The Biological Opinion requires the Corps to study the best way to achieve fish passage at Englebright Dam and Daguerre Point Dam, but does not mandate dam removal. The Corps and other stakeholders have been involved in fish passage planning efforts for over a decade on the Yuba River, and are considering options that would keep the dams in place.

**Q. Would the recommendations of the Biological Opinion increase risk to downstream communities from flooding or contaminated sediment stored behind the dams?**

**A.** Englebright Dam and Daguerre Dam do not provide any flood management role. Nothing in the Biological Opinion requires changes to the infrastructure of flood management or actions that would release sediment from behind the dams. If the Corps selects dam removal as the preferred option, then such action must follow development of a plan to safely manage contaminated sediment behind the dams, including removal and disposal.

## Legal Challenges to Protect Yuba Salmon:

### **Q. Has SYRCL tried to find ways to protect the fish without the need for litigation?**

- A. For years, SYRCL has actively participated in numerous collaborative stakeholder proceedings working to find technically and economically feasible ways to protect Yuba River fish populations. Working together, we can restore California's ecologically and economically valuable salmon fisheries, ensure public safety and respect the interests of agricultural and municipal water users.

SYRCL believes these stakeholder working groups have established a foundation that the Army Corps can use to implement the recommendations of the Biological Opinion. For example, SYRCL participates in a scientific and technical forum convened by the Yuba County Water Agency known as the Yuba Salmon Forum, which has already gathered substantial information about fish passage options. SYRCL encourages the Army Corps to increase its leadership and participation in the Yuba Salmon Forum. Unfortunately, the Corps' absence threatens to render this opportunity lost through inaction.

### **Q. Why did SYRCL and Friends of the River file suit against the Army Corps?**

- A. The Biological Opinion notes that the recommended measures are required to stop the project from driving the threatened species toward extinction. SYRCL and Friends of the River sent the Corps letters in November 2012 advising them that they were violating their duties under the Endangered Species Act by failing to implement the recommendations of the Biological Opinion. SYRCL and Friends of the River offered to continue to work together to find collaborative ways to protect the fish without the need for litigation. However, because the Corps is standing by its position that compliance with a number of the measures is not required, SYRCL and Friends of the River have been forced to file a lawsuit seeking to compel the Corps to comply.

### **Q. Why did SYRCL file suit against NMFS?**

- A. The Biological Opinion contains specific deadlines for the Corps to implement the recommended measures. The Biological Opinion states: "In order to meet the requirements of the [Endangered Species Act], the Corps must implement the actions in the timeframes identified." (See Biological Opinion at page 211.) However, on November 27, 2012, NMFS sent a letter to the Army Corps granting a unilateral extension of up to three years for implementing some of the key measures. NMFS also conditioned the Corps' compliance on its ability to obtain Congressional appropriations for implementation.

In granting the extensions, NMFS did not analyze or explain what the impact of these extensions would be for the threatened species. NMFS mentioned that the extensions were required for practical reasons, including the need to conduct environmental



reviews. But NMFS did not explain which measures would require environmental review, or why the length of the extensions was needed for such reviews. And in conditioning all deadlines on Congressional appropriations, the letter effectively rendered the deadlines illusory.

SYRCL sent NMFS a letter explaining these issues on December 10, 2012, and requesting that NMFS reinstate the deadlines. NMFS has not agreed to do so, forcing SYRCL to file a lawsuit to have the deadlines reinstated.

**Q. Why did the Yuba County Water Agency file suit against NMFS?**

**A.** The Yuba County Water Agency filed suit against NMFS on January 9, 2013. YCWA's lawsuit advances the new legal theory that dams are exempt from the Endangered Species Act's provisions requiring owners of federal projects to consult with wildlife agencies over the impacts on threatened or endangered species. Couched in legal terms, YCWA argues the impacts derived from the existence of the dams – rather than their operation – are not part of the “project” that must undergo consultation leading to the issuance of a Biological Opinion. If those impacts are not part of the project, then NMFS erred in making recommendations for the Corps to study and implement fish passage at Englebright and Daguerre, according to YCWA.

This new legal theory conflicts with the position taken by the Corps in each of its previous consultations with NMFS. Each time, the Corps included the impacts of Englebright and Daguerre as part of the project subject to consultation.

If followed, YCWA's legal theory would mean that numerous dams around the country are improperly licensed and the impacts of those dams in blocking fish passage can be ignored, even if that drives endangered fish to extinction.

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