



November 7, 2012

Frequently Asked Questions
The National Marine Fisheries Service 2012 Biological Opinion
on the U.S. Army Corps of Engineers Daguerre Point Dam and Englebright Dam

Introduction

The U.S. Army Corps of Engineers (Corps) owns two debris dams on California's lower Yuba River – Daguerre Point Dam (Daguerre), constructed in 1906 (and rebuilt in 1965), and Englebright Dam (Englebright), constructed in 1941. Both dams were built to contain Gold Rush era mining debris and sediment that was damaging river navigation and contributing to flooding of downstream communities. The construction of both dams pre-dates the formation of the Yuba County Water Agency (YCWA). Portions of YCWA's operations, as well as substantial investments in hydropower generation and water delivery facilities, depend on the presence of the dams. Accordingly, YCWA has a significant interest in any measures that may affect these dams.

The Corps has consulted with the National Marine Fisheries Service (NMFS) regarding the operations and maintenance of the two dams under the Endangered Species Act (ESA). The latest consultation process resulted in the issuance, on February 29, 2012, of a NMFS Biological Opinion (2012 BiOp). The Corps' 2012 Biological Assessment (produced before the NMFS Biological Opinion) determined that the Corps' proposed operation and maintenance activities would not appreciably reduce the likelihood of the survival or recovery of spring-run salmon or steelhead, would not result in the destruction or adverse modification of spring-run salmon or steelhead critical habitat, and were not likely to adversely affect green sturgeon critical habitat. Under the ESA, the 2012 BiOp should have evaluated impacts from the proposed action described in the biological assessment. The 2012 BiOp, however, instead improperly treats as effects of the Corps' proposed action numerous conditions and actions over which the Corps has no control. In addition, the 2012 BiOp is replete with technical errors, and flawed.

The 2012 BiOp requires a number of measures that could dramatically impact the Corps' facilities, and, therefore, YCWA's operations, with wide-ranging adverse effects to Yuba County and the surrounding region, including Sacramento. As a result, YCWA has submitted a letter to the Department of Commerce (the department that includes the NMFS) and the Corps (which has "conditionally accepted" the 2012 BiOp), notifying these agencies that YCWA may file a lawsuit to challenge the NMFS opinion.

Q What will YCWA accomplish with the 60-day letter of notice?

A YCWA plans to try and engage senior Administration officials in a meaningful, focused dialogue that will lead to the reissuance of a credible biological opinion that relies upon the best available science and information, and that reconciles the differing opinions and responsibilities of the Corps, NMFS and the watershed's stakeholders. YCWA has years of experience on the Yuba River and with its stakeholders, but has been consistently excluded by NMFS from the consultation process. YCWA's participation in the ESA consultation with the federal agencies is not only required by law because of YCWA's applicant status, but is likely to result in a more scientific, practical and cooperative resolution to the current impasse.

It is equally important to note that YCWA's letter of notice is not a lawsuit, and in fact, is meant to facilitate a more collaborative and focused resolution of the problems in the 2012 BiOp. *"The purpose of the 60-day notice provision is to put the agencies on notice of a perceived violation of the statute and an intent to sue. When given notice, the agencies have an opportunity to review their actions and take corrective measures if warranted. The provision therefore provides an opportunity for settlement or other resolution of a dispute without litigation."* Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1210 (D.Id. 1993), aff'd, 42 F.3d 1399 (9th Cir. 1994).

Q What is the purpose of these two debris dams, Daguerre and Englebright?

A These two dams relate back to California's Gold Rush era. They were built by the California Debris Commission, a partnership between the federal and state governments, to prevent (and continue to prevent) a mountain of contaminated gold-mining debris from washing downstream into the Yuba, Feather, and Sacramento Rivers, and ultimately the Bay-Delta, where it was impeding navigation. Today, 30 million cubic yards of contaminated debris and sediments continues to remain sequestered behind both dams. The release of this debris, which contains mercury and other harmful chemicals, could have devastating impacts on fisheries habitat and water quality from the lower Yuba River to California's Bay-Delta, significantly increase the downstream flood risk, and present public health concerns.

Daguerre is 25 feet high, was built in 1906 (and rebuilt in 1965) and includes two fish ladders. It is 11.5 miles upstream from the confluence of the Yuba and Feather Rivers. Congress authorized the dam's construction in the 1902 Rivers and Harbors Act (P.L. 57-154). Englebright is 260 feet high, was built in 1941, and is 24 miles upstream from the Yuba and Feather confluence. Englebright has no fish ladders and was authorized by Congress in the 1935 Rivers and Harbors Act (P.L. 74-409).

Q What is the Corps' operation and maintenance role for Daguerre and Englebright?

A Daguerre

When the California Debris Commission was decommissioned in 1986, the responsibility for Daguerre passed to the Corps. Because Daguerre is a debris retention facility, it does not contain a low-level water outlet. Unregulated flows spill over the dam's crest. The Corps does not "operate" Daguerre, but the Corps does operate and maintain two fish ladders, located on the dam's north and south abutments. The Corps' ongoing maintenance of Daguerre is minimal, and pertains to long-term dam safety and security, fish ladder maintenance, and issuance of permits for other facilities located on its land nearby. The Corps has no discretionary authority or control over the continued existence of Daguerre.

Englebright

Similar to Daguerre, when the Debris Commission was decommissioned, responsibility for Englebright also passed to the Corps. Because Englebright is a sediment retention facility, it does not contain a low-level water outlet. Unregulated flood flows spill over Englebright's crest. Water releases from upstream of Englebright to the Yuba River downstream of the dam are controlled by two hydroelectric facilities, one of which is owned and operated by YCWA and the other of which is owned and operated by Pacific Gas and Electric Company (PG&E). YCWA's facilities were installed about 25 years after the dam's construction. The Corps does not have authority or discretion to control these hydroelectric facilities or their operations or streamflows upstream or downstream from Englebright. Therefore, the Corps does not "operate" Englebright. The ongoing maintenance of Englebright is minimal, and pertains to long-term dam safety and security. While the Corps operates and maintains recreation-related facilities at Englebright Reservoir, it has no discretionary authority or control over the continued existence of Englebright.

Q Why did NMFS prepare a Biological Opinion on the Corps' operation and maintenance of Daguerre and Englebright?

A The 2012 BiOp is a result of the Corps' consultation with NMFS under the ESA for the operation and maintenance of the two dams. This opinion is the fourth one for the Corps' consultation with NMFS, and is a result of a 2006 lawsuit brought against NMFS and the Corps on previous Biological Opinions prepared in 2002 and 2007.

Q Do the Corps and NMFS agree with the conclusions in the 2012 BiOp?

A There is a fundamental factual and legal disagreement between the Corps and NMFS over the 2012 BiOp, which is one of the reasons YCWA has filed a letter with the Department of Commerce and the Corps notifying them of the potential that YCWA may file a lawsuit challenging the legality of the 2012 BiOp. Under the ESA, such a notice must be provided at least 60 days before a lawsuit is filed.

One area of disagreement is over the effects of the Corps' operation and maintenance of the dams on three anadromous fish species listed as "threatened" under the ESA. The Corps' 2012 Biological Assessment (produced before the NMFS Biological Opinion) determined that the Corps' proposed operation and maintenance activities would not appreciably reduce the likelihood of the survival or recovery of spring-run salmon or steelhead, would not result in the destruction or adverse modification of spring-run salmon or steelhead critical habitat, and were not likely to adversely affect green sturgeon critical habitat. The Corps contends the 2012 BiOp incorrectly states that the purpose of the proposed action is "to perpetuate the existence of the dams," incorrectly and inappropriately expands the Corps' action area to include the entire Yuba River watershed, and mischaracterizes the relationship of the Corps' proposed action to other projects in the watershed. According to the Corps, the dams continue to exist because Congress authorized them, and unless Congress deauthorizes the dams, the Corps has no authority to remove them. (For background on these facilities, see <http://www.spk.usace.army.mil/Locations/SacramentoDistrictParks/EnglebrightLake.aspx>)

Q What does the NMFS 2012 BiOp require the Corps to do?

A There are over 30 separate actions included in the "Reasonable and Prudent Alternative" that the Corps is required to undertake, and many have multiple component parts or include ongoing requirements. There are also 6 "Reasonable and Prudent Measures" that the Corps is required to implement to minimize the effect of incidental take on the three listed species addressed in the 2012 BiOp. Major required actions include the following:

- Fish passage design and evaluation studies at Daguerre and Englebright;
- Short-term improved fish passage at Daguerre Point Dam;
- Removal of Daguerre or long-term improvements to fish passage facilities;
- Short-term fish passage program to reintroduce spring run salmon and steelhead above Englebright;

- Removal of Englebright or long-term fish passage facilities;
- Instream flow changes and other mandatory conditions satisfactory to NMFS on hydroelectric projects operated by YCWA, Pacific Gas & Electric Company (PG&E) and Nevada Irrigation District (NID) throughout the Yuba River watershed;
- Annual gravel augmentation program;
- Channel restoration;
- Woody material program;
- New screened diversion for the YCWA's South Canal;
- Predator removal program;
- Training wall modifications;
- Salmonid monitoring and adaptive management; and
- Green sturgeon monitoring and adaptive management

Q What does the NMFS 2012 BiOp require the Corps to do with respect to fish passage at Daguerre and Englebright?

A The 2012 BiOp directs the Corps to implement approximately 17 actions as part of the Reasonable and Prudent Alternative that relate to short-term and long-term fish passage. These actions could take decades to implement at a total cost of hundreds of millions of dollars, and potentially in excess of \$1 billion dollars. Many of the actions are for the development and implementation of a new federal plan to enable salmon and steelhead to swim over Englebright on their own volition (without human intervention). The 2012 BiOp acknowledges, however, that such “volitional passage” would require the construction of an unprecedented fish ladder or some other mechanism because there are no successfully operating ladders at any dam as high as the 260-foot tall Englebright Dam. The 2012 BiOp argues Englebright should be modified or even removed: “... dam removal is the most preferred approach ...” (see 2012 BiOp, p. 222); <http://swr.nmfs.noaa.gov/bo/index.htm>.

Q How would the NMFS 2012 BiOp affect YCWA?

A YCWA owns and operates the Yuba River Development Project, which includes New Bullards Bar Dam and Reservoir and the New Colgate Powerhouse - located upstream from Englebright Dam. YCWA also owns the Narrows 2 Powerhouse, and a water diversion facility at Daguerre - which are located downstream from Englebright Dam.

Many of the 2012 BiOp's recommended steps would compromise the operational capability of these facilities. For example, the 2012 BiOp directs the Corps to implement a long-term fisheries passage plan over Englebright, and even

recommends its removal. Modifying or removing this dam could directly reduce YCWA's future hydropower generation and associated revenues and could adversely affect a key facility that provides stability for the Northern California electric grid (which depends on this power supply). The 2012 BiOp does not address how the Corps should remove and dispose of the 28 million cubic yards of contaminated debris stored behind the dam, which would present immense public health and safety, environmental and financial challenges for the region. A 2002 U.S. Geological Survey report noted that any modifications to the dam could result in significant changes to the stored debris, *"This increased sediment load could exacerbate existing physical and chemical hazards in the lower Yuba River area."* (See www.YCWA.com under "current projects" for this report).

The 2012 BiOp also directs the Corps to compel YCWA to implement various actions, including some that may affect the Lower Yuba River Accord (See www.YCWA.com under "current projects" for information on the Yuba Accord). For example, changes to the Yuba Accord's instream flow requirements could compromise YCWA's ability to provide water supplies to 85,000 acres of productive farmland in Yuba County.

YCWA is concerned the 2012 BiOp's unproven recommendations will cloud realistic and legitimate efforts to implement a viable salmon and steelhead program, could have significant adverse environmental impacts, and will likely detract from or derail other collaborative habitat enhancement and reintroduction activities in the watershed. Unfortunately, the 2012 BiOp's recommended fish passage programs would prevent YCWA and others in the watershed from playing a meaningful role in developing a collaborative science-based approach for planning salmonid recovery actions in the watershed, including possible reintroduction in the Upper Yuba River. For example, the Corps has stated: *"The Corps is willing to convene an interagency workgroup comprised of federal, state and academic participants; however, the Corps cannot fund the activities of the group nor can the Corps fund the participation of any individual member. Additionally, the Corps will not seek advice or recommendations from the workgroup or allow the workgroup to make management or policy decisions."* (Corps' July 3, 2012 letter to NMFS, Attachment 1, p. 15).

Q Does the NMFS 2012 BiOp rely on the best available science to support its conclusions and stated need for actions?

A The 2012 BiOp does not contain the best available scientific information. Leading academic and professional experts have submitted detailed comments that point out that the 2012 BiOp contains numerous and pervasive errors and flaws, did not use the best available science, and lacked scientific rigor in its analysis and conclusions.

These errors, omissions of available information, and unsupported determinations raise serious questions about the opinion's conclusions and required actions. In fact, during a July 19, 2012 meeting with the Corps and others, NMFS representatives acknowledged serious flaws in the 2012 BiOp and stated they plan to reissue it.

University of California, Davis, geomorphologist, Dr. Greg Pasternak, wrote in a May 9, 2012 report to the Corps regarding the NMFS Biological Opinion: "*Numerous other false statements that are obviously contrary to available data and conclusions of peer-reviewed literature exist throughout the reviewed BO...*" (See p. 2 of the report at www.YCWA.com, under "current projects").

Q Is YCWA involved in a fish passage evaluation with NMFS? And if so, why is YCWA opposed to the fish passage actions in the 2012 BiOp?

A YCWA is leading two passage investigations with NMFS and other agencies and conservation groups: the Yuba Salmon Forum (YSF) and the North Yuba Re-Introduction Initiative (NYRI). The difference between those investigations and the 2012 BiOp is that the opinion is a unilateral, flawed regulatory action that was developed without any other party's participation, while the YSF and the NYRI are science-based, collaborative processes.

YCWA is concerned that the 2012 BiOp, if implemented would fail, culminating in a poorly-planned, expensive, and unsustainable program that would attempt to reintroduce fish in the watershed with little regard to the social, economic and even environmental consequences. For example, the Corps has repeatedly informed NMFS that the Corps does not have the legal authority or budget to implement many of the actions required by the 2012 BiOp. Further, the 2012 BiOp imposes unachievable deadlines on the Corps that do not allow for analysis required by the National Environmental Policy Act or extensive permitting. There is also a fundamental lack of scientific consensus regarding the 2012 BiOp recommendations.

For example, with preliminary data available, at this point it appears that only limited areas of the upper watershed have the potential to support a durable reintroduction program due to unsuitable temperatures. In stark terms, many experts believe salmon and steelhead reintroduced into the upper watershed may perish under current conditions resulting in an unsustainable program. "*Contrary to the statements in the BO (2012 BiOp), the LYR (Lower Yuba River) is moving along on a path of natural, self-driven ecological recovery that is directly attributable to the existence of Englebright Dam. Englebright Dam protects the river from the vast wastes of a degraded watershed blocked upstream.*" (See p. 3 of this report at www.ycwa.com, under "current projects").

YCWA believes a collaboratively-developed fish passage program, and one that addresses all stakeholder interests, is the best path that could lead to a sustainable program that accelerates the recovery of these species.

Q How could NMFS correct the technical and legal deficiencies in the 2012 BiOp?

A NMFS should correct all of the technical and legal errors in the 2012 BiOp identified in 300 pages of comments submitted by the Corps, YCWA and PG&E. NMFS should then review and revise the 2012 BiOp's conclusions and recommendations based upon the documents' revised technical and legal foundation. This process could result in a reconsultation between NMFS and the Corps, and the issuance of a new, legally compliant biological opinion.

Incredibly, NMFS has stated in two official communications to the Federal Energy Regulatory Commission, however, that the erroneous conclusions of the 2012 BiOp are not likely to be corrected: *“Although there are specific issues that NMFS will correct or clarify, at this point in its review of comments and discussions with parties, NMFS has not identified any issues that necessarily would undermine the conclusion of the Biological Opinion, or change the conclusion in the Biological Opinion that the RPA is necessary to avoid jeopardy and adverse modification to critical habitat.”* (Encl. A to NMFS's July 31, 2012 Motion to Intervene (pages 15-16) and August 23, 2012 letter (pages 8-9) in the Yuba Bear/Drum Spaulding hydroelectric project relicensing processes.

Q Is YCWA taking any other steps during the 60-day period of time?

A YCWA is continuing to work with local, state and federal officials, and stakeholders from the Yuba River watershed, regarding the NMFS 2012 BiOp to explore the best steps to achieve recovery measures for salmon and steelhead in the watershed. YCWA will continue to support the passage and reintroduction of salmon and steelhead, and other recovery measures, provided there are social, economic and environmental benefits to these actions. Finally, YCWA will continue to implement the successful Yuba Accord, and work with state and federal agencies, and conservation groups, to implement meaningful studies and restoration measures to improve salmon and steelhead habitat on the Yuba River.

For more information on YCWA and the 2012 BiOp, see www.YCWA.com (under “current projects”)