



November 7, 2012

## Timeline of the National Marine Fisheries Service 2012 Biological Opinion

### 1998 - 2000

- 1998 NMFS lists Central Valley Steelhead as a threatened species under Endangered Species Act (ESA).
- 1998 SYRCL files lawsuit against Corps seeking order requiring the Corps to consult with NMFS regarding impacts of Daguerre Point Dam on steelhead (South Yuba River Citizens League v. Walsh, E.D. Cal. Case No. CV S-99-1492-LKK-JFM).
- 1999 NMFS lists spring-run Chinook salmon as a threatened species under ESA.
- 2000 SYRCL files amended complaint seeking order requiring Corps to consult with NMFS regarding impacts of Daguerre on spring-run Chinook salmon and steelhead.
- 2000 Corps initiates consultation with NMFS concerning the Corps' operation of Daguerre and Englebright, and YCWA's operation of the South Yuba-Brophy Diversion.
- 2000 Corps files with NMFS a Biological Assessment concerning the Corps' operation of Daguerre and Englebright, and the Corps' permitting of YCWA's operation of the South Yuba-Brophy Diversion, pursuant to ESA section 7.
- 2000 Stipulated settlement and dismissal of SYCRL v. Walsh case.
- 2000 Corps submits revised biological assessment to NMFS.

### 2002-2008

- 2002 NMFS issues a five-year Biological Opinion (BiOp) that analyzed the effects of the Corps' operation of Daguerre and Englebright dams on spring-run Chinook salmon and steelhead. The 2002 BiOp concluded that the Corps' project was not likely to

jeopardize the continued existence of listed species or adversely modify critical habitat.

- 2005 NMFS designates critical habitat for spring-run Chinook salmon and steelhead.
- 2006 NMFS lists southern distinct population segment (DPS) of North American green sturgeon as a threatened species under ESA.
- 2006 SYRCL and Friends of the River file lawsuit against NMFS challenging the 2002 BiOp and seeking order that Corps consult with NMFS regarding southern DPS of green sturgeon, among other claims (South Yuba River Citizens League v. NMFS, E.D. Cal. Case No. 2:06-cv-02845-LKK-JFM).
- 2007 SYRCL files Second Amended Complaint adding YCWA as Defendant.
- 2007 Corps submits biological assessment to NMFS. (March)
- 2007 NMFS issues an interim BiOp that analyzed the effects of continuation of operation of the Corps' project for 1 year. The April 2007 BiOp concluded that the Corps' actions were not likely to jeopardize the continued existence of ESA-listed species or adversely modify their critical habitat. (April)
- 2007 NMFS issues a long-term BiOp that analyzed the effects of the Corps' operations of Daguerre and Englebright dams. The long-term BiOp was intended to be the final BiOp for these Corps' operations. The November 2007 BiOp concluded that the Corps future operations of Daguerre and Englebright dams would not jeopardize species listed under the ESA or adversely modify critical habitat. (Nov)
- 2008 SYRCL files Sixth Amended Complaint.

**2009-2011**

- 2009 NMFS designates "Critical Habitat" for Southern DPS of North American green sturgeon.
- 2010 U.S. District Court Eastern District of California enters stipulated settlement order dismissing all the claims and relief sought against YCWA.
- 2010 Court issues decision that NMFS acted arbitrarily and capriciously in the November 2007 BiOp's no-jeopardy and no adverse modification conclusions, and in issuing the incidental take statement. (7/8)

- 2010 The Corps and YCWA discuss need to prepare a revised Biological Assessment to addresses the Court's July 8, 2010 order and proposed ESA consultation approach to clarify elements of the proposed action, environmental baseline, and effect of the project, as well as the general content and format of a revised Biological Assessment.
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp and updates on the 2011 Biological Assessment. (2/10)
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp and updates on the 2011 Biological Assessment. (3/24)
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp and updates on the 2011 Biological Assessment. (4/28)
- 2011 Court remands the November 2007 BiOp to NMFS and orders a new BiOp be prepared consistent with the Court's July 8, 2010 order.
- 2011 YCWA submits letter to the Corps requesting applicant status for the Yuba River consultation.
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp and updates on the 2011 Biological Assessment. (6/29)
- 2011 Court grants in part SYRCL's Motion for Final Remedies ordering the Corps to take actions to protect species during the remand of the BiOp.
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp and updates on the 2011 Biological Assessment. (7/28)
- 2011 NMFS and Corps file an application seeking reconsideration of portions of the Court's July 26, 2011 decision ordering the Corps to implement interim measures.
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the terms and conditions of the current BiOp, updates on the 2011

Biological Assessment, and status of the Corps' implementation of the interim measures required by the Court's July 26, 2011 Order. (8/25)

- 2011 Court accepts parties' stipulation that no grates would be installed on the lower 8 bays at the Daguerre fish ladders and that the remaining bays would be completely grated by September 14, 2011.
- 2011 NMFS and Corps advise Court that the Corps expects to complete the segregation weir study on time and requests that the August 23, 2011 application for reconsideration be withdrawn.
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp, updates on the 2011 Biological Assessment, and status of the Corps' implementation of the interim measures required by the District Court's July 26, 2011 Order. (9/22)
- 2011 NMFS sends a letter to the Corps requesting that the Corps expedite preparation of the draft Biological Assessment. (10/5)
- 2011 Corps transmits comprehensive draft biological assessment to NMFS, which totaled 746 pages. (10/17)
- 2011 Coordination meeting between the Corps and NMFS to discuss current activities regarding the status of the terms and conditions of the current BiOp and issues related to completion of the new BiOp. (10/27)
- 2011 NMFS sent a letter to the Corps identifying what NMFS believed to be deficiencies in the Corps draft Biological Assessment. (12/2)
- 2011 Court issues order extending due date for the new BiOp to February 29, 2012.

## **2012**

- January 12, 2012 Coordination meeting between the Corps and NMFS to discuss issues related to completion of the new BiOp. NMFS informed Corps it intends to issue a jeopardy opinion and will propose a "Reasonable and Prudent Alternative" (RPA).
- January 27, 2012 NMFS met with YCWA and the Corps. NMFS refused to discuss or provide any information regarding its reasons for reaching a jeopardy decision or why an RPA is necessary.

January 27, 2012	Corps submits final Biological Assessment to NMFS. This final Biological Assessment contained only minor changes to the draft Biological Assessment that the Corps submitted to NMFS on October 17, 2011.
February 2, 2012	Meeting between Corps and NMFS to discuss issues relating to new BiOp.
February 8, 2012	YCWA sends letter to the Corps requesting that YCWA be allowed to meaningfully participate in consultation regarding the BiOp and to provide input on any proposed RPA.
February 2012	NMFS cancels all scheduled meetings with the Corps and YCWA to discuss RPA.
February 27, 2012	NMFS issues the draft 2012 BiOp.
February 28, 2012	YCWA submits comments based on 24-hour review period provided by NMFS for the 300-page draft BiOp.
February 28, 2012	Corps submits preliminary comments based on 24-hour review provided by NMFS.
February 29, 2012	NMFS issues the final 2012 BiOp.
March 14, 2012	NMFS meets with Corps, YCWA, Pacific Gas & Electric Company (PG&E) and Congressional staff to discuss the 2012 BiOp. NMFS acknowledges errors and omissions in final 2012 BiOp and commits to clarification process.
May 29, 2012	First Clarification Workshop with NMFS, the Corps, YCWA, PG&E and Congressional staff regarding final 2012 BiOp. The Corps, YCWA and PG&E outline factual, scientific, and legal inadequacies in the 2012 BiOp. NMFS commits to a clarification process that includes correcting factual errors and reviewing conclusions in the BiOp, as well as reviewing the resulting findings of jeopardy and RPA measures. The Corps, YCWA, PG&E agree to provide specific written comments.

- June 29, 2012 YCWA submits 300 pages of clarifications and comments addressing significant factual, scientific, and legal errors in 2012 BiOp.
- July 3, 2012 Corps submits clarification letter (and comments) addressing significant factual, scientific, and legal errors in 2012 BiOp.
- July 11, 2012 NID submits clarification letter addressing factual and legal errors in the 2012 BiOp.
- July 12, 2012 PG&E submits clarification letter (and comments) addressing significant factual, scientific, and legal errors in the 2012 BiOp.
- July 19, 2012 Second Clarification Workshop with NMFS, the Corps, YCWA, PG&E and Congressional staff regarding the 2012 BiOp. NMFS notes it has reviewed clarification letters and acknowledges that the 2012 BiOp contains significant deficiencies. NMFS states it first needs to resolve disputed legal issues with the Corps prior to addressing factual and scientific issues. NMFS commits to address disputed legal issues with the Corps, but will not allow YCWA or PG&E to participate in the discussions, until legal issues with Corps are resolved, at some undetermined point in the future.
- July 31, 2012 NMFS files Motion to Intervene in the FERC Yuba-Bear Hydroelectric Project (P-2266) and the Drum-Spaulding Hydroelectric Project (P-2310) based in part on conclusions and RPA in 2012 BiOp. Rodney R. McInnis letter to FERC stating:
- “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 Yuba BiOp, or change the conclusion in the Yuba BiOp that the RPA is necessary to avoid jeopardy and adverse modification to critical habitat. While many of the details of upstream and downstream fish passage remain to be worked out, given the duration of hydropower licenses issued under the Federal Power Act (30 years minimum, 50 years maximum), the fish passage RPA provides the Corps a path to fulfilling its legal obligations by undertaking actions resulting in salmon and/or steelhead being present upstream of Englebright Dam within the term of the licenses for the Yuba-Bear Project and Drum-Spaulding Project. It is likely this will result in federally listed anadromous fish species being

reintroduced and present in the upper Yuba River and/or North Yuba River and/or Middle Yuba River and/or the South Yuba River within the FERC license periods for these projects.”

- August 23, 2012 NMFS sends a second letter to FERC containing similar language as in the July 31<sup>st</sup> letter.
- September 5, 2012 Curt Aikens sends letter to Rodney R. McInnis addressing YCWA’s concerns relating to the clarification process and his letter to FERC regarding the Yuba-Bear and the Drum-Spaulding Hydroelectric Projects.
- September 10, 2012 Curt Aikens’ letter to Major General Michael Walsh addressing YCWA’s concerns relating to the clarification process and Rodney R. McInnis’ letter to FERC regarding the Yuba-Bear and the Drum-Spaulding Hydroelectric Projects.
- September 18, 2012 Rodney R. McInnis’ letter to Curt Aikens, “Until a new biological opinion is issued, the conclusions and the reasonable and prudent alternative in the existing biological opinion stand.”
- September 19, 2012 Clarification process conference call regarding status of process with NMFS, the Corps, YCWA, PG&E and Congressional staff on the 2012 BiOp. NMFS Southwest Region states it has reached an impasse with Corps’ Sacramento District on legal issues and the agencies have elevated the matter internally. NMFS states it will issue new BiOp and no longer plans to issue clarification letter addressing inadequacies in the 2012 BiOp. NMFS also changes position on clarification process of addressing the legal issue first and proposes a series of technical meetings to discuss factual and scientific issues in parallel with a separate process on disputed legal issues with Corps. NMFS reiterates that it does not intend to discuss disputed legal issues with YCWA and PG&E prior to issuing a new draft BiOp.
- October 2, 2012 NMFS submits a third letter to FERC with references to the 2012 Biological Opinion on the Yuba River. This letter states “...the conclusions and RPA’s in the existing BO stand.” (See NMFS letter to FERC regarding Archon Energy Inc., enclosure A, page 4).
- October 25, 2012 NMFS, the Corps and YCWA discuss the fundamental legal problems in the 2012 BiOp.