

1 Christopher A. Sproul (Bar No. 126398)
2 Environmental Advocates
3 5135 Anza Street
4 San Francisco, California 94121
5 Telephone: (415) 533-3376
6 Facsimile: (415) 358-5695
7 Email: csproul@enviroadvocates.com

8 Brian Orion (Bar No. 239460)
9 Law Offices of Brian Orion
10 1156 Florida Street
11 San Francisco, CA 94110
12 Telephone: (858) 354-8222
13 Email: borion@enviroadvocates.com

14 Patricia Weisselberg (Bar No. 253015)
15 Law Office of Patricia Weisselberg
16 115 Oakdale Avenue
17 Mill Valley, CA 94941
18 Telephone: (415) 388-2303
19 Facsimile: (415) 388-2303
20 Email: pweisselberg@wans.net

21 Attorneys for Plaintiffs
22 SOUTH YUBA RIVER CITIZENS LEAGUE and FRIENDS OF THE RIVER

23 UNITED STATES DISTRICT COURT
24 EASTERN DISTRICT OF CALIFORNIA

25 SOUTH YUBA RIVER CITIZENS LEAGUE, a
26 non-profit corporation, and FRIENDS OF THE
27 RIVER, a non-profit corporation,

28 Plaintiff,
v.

29 NATIONAL MARINE FISHERIES SERVICE;
30 REBECCA M. BLANK, as Acting Secretary of
31 Commerce; RODNEY MCINNIS, as Regional
32 Administrator of the NMFS Southwest Region;
33 UNITED STATES ARMY CORPS OF
34 ENGINEERS; JOHN MCHUGH, as Secretary of
35 the Army; COLONEL WILLIAM J. LEADY, P.E.,
36 as District Commander, Sacramento District,

37 Defendants.

Civil Case No.: 2:13-cv-00059-MCE-EFB

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

**(Administrative Procedure Act, 5 U.S.C.
§§ 701 *et seq.*; Endangered Species Act,
16 U.S.C. §§ 1531 *et seq.*)**

1
2 South Yuba River Citizens League (“SYRCL”) and Friends of the River (“FOR”) (collectively
3 “Plaintiffs”) allege as follows:

4 **INTRODUCTION**

5 1. Plaintiffs bring this action under the provisions of the Administrative Procedure Act
6 (“APA”) and Endangered Species Act (“ESA”) that permit aggrieved parties to seek judicial review of
7 federal agency actions and to redress harms caused by violations of the ESA. *See* 5 U.S.C. §§ 702, 706;
8 16 U.S.C. § 1540(g).

9 2. In Claim 1, Plaintiffs seek relief from conduct by the National Marine Fisheries Service,
10 Acting Secretary of Commerce Rebecca M. Blank, and Regional Administrator Rodney McInnis,
11 (collectively “NMFS”) that is arbitrary, capricious and otherwise contrary to the legal requirements of
12 the APA. Specifically, Plaintiffs challenge NMFS’s issuance of extensions to the deadlines for several
13 measures for protecting certain anadromous fish required in the Biological Opinion (“BiOp”) issued by
14 NMFS on February 29, 2012 for the United States Army Corps of Engineers’ Project on the Yuba River
15 (File number 151422SWR2006SA00071). NMFS issued extensions to several of the deadlines for
16 actions in the Reasonable and Prudent Alternative (“RPA”) in the BiOp in a letter to Colonel William J.
17 Leady, Commander, U.S. Army Corps of Engineers, Sacramento District dated November 27, 2012
18 (File Number 2012/9298).

19 3. In Claim 2, Plaintiffs seek relief from conduct by the U.S. Army Corps of Engineers,
20 John McHugh, as Secretary of the Army, and Colonel William Leady, as District Commander,
21 Sacramento District (collectively “the Corps”) (collectively with NMFS, the “Federal Defendants”). The
22 Corps owns and operates two dams on the Yuba River – Daguerre Point Dam (“Daguerre”) and
23 Englebright Dam (“Englebright”) – and licenses the operation of related water diversions, including the
24 South Yuba-Brophy Diversion (“Brophy Diversion”) and the Hallwood-Cordua Diversion (collectively
25 “the Project”). The operations of the Project are perpetuating “take” within the meaning of ESA section
26 9, 16 U.S.C. § 1538, of three species of anadromous fish listed as threatened under the ESA: the
27 Evolutionarily Significant Unit (“ESU”) of Central Valley spring run Chinook salmon (“spring
28

1 Chinook”); the Central Valley steelhead ESU (“steelhead”); and the Southern distinct population
2 segment of North American green sturgeon (“green sturgeon”) (collectively “the Listed Species”). The
3 Corps is perpetuating this take while failing to comply with the BiOp’s RPA measures and the
4 reasonable and prudent measures and terms and conditions of the BiOp’s Incidental Take Statement
5 (“ITS”) in violation of ESA section 9, 16 U.S.C. § 1538.

6 4. In Claim 3, Plaintiffs seek relief from the Corps’ violation of its independent ESA section
7 7(a)(1) duty. Under ESA section 7(a)(1), the Corps is required to use its authorities in furtherance of the
8 purposes of the ESA by carrying out programs for the conservation of endangered species and
9 threatened species. 16 U.S.C. § 1536(a)(1). As noted, the BiOp concludes that the Corps’ proposed
10 project is likely to jeopardize the continued existence of the Listed Species and adversely modify the
11 Listed Species’ critical habitat. The Corps is failing to carry out programs that will promote conservation
12 of the Listed Species. The BiOp’s RPA actions and the terms and conditions of the ITS are examples of
13 the programs that the Corps should implement to promote conservation of the Listed Species. The
14 Corps, however, is failing to implement the RPA actions and the terms and conditions of the ITS.
15 Accordingly, the Corps is in violation of ESA section 7(a)(1).

16 5. In Claim 4, Plaintiffs seek relief from the Corps’ violation of its independent ESA section
17 7(a)(2) duty. Under ESA section 7(a)(2), the Corps has a substantive duty to “insure” that actions
18 authorized, funded, or carried out by the Corps do not cause jeopardy to the Listed Species or cause
19 destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The Corps is failing to
20 ensure that its actions on the Yuba River are not causing jeopardy to the Listed Species. The BiOp’s
21 RPA actions and the terms and conditions of the ITS are examples of the actions that the Corps should
22 implement to promote conservation of the Listed Species. The Corps, however, is failing to implement
23 the RPA actions and the terms and conditions of the ITS. Accordingly, the Corps is in violation of ESA
24 section 7(a)(2).

25 **JURISDICTION**

26 6. This Court has subject matter jurisdiction over the APA and ESA claims set forth in this
27 Complaint pursuant to 28 U.S.C. section 1331 (an action for declaratory, injunctive and other relief
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1 arising under the Constitution and laws of the United States) because this case involves a civil action
2 arising under the laws of the United States, specifically 5 U.S.C. section 702, which authorizes any
3 person aggrieved by an agency action under a relevant statute to seek judicial review; 5 U.S.C. section
4 706, which authorizes a reviewing court to compel an agency to take an action that has been unlawfully
5 withheld or unreasonably delayed, and to set aside agency actions that are found to be arbitrary,
6 capricious, an abuse of discretion, or otherwise not in accordance with the law; and 16 U.S.C. section
7 1540(g)(1), which authorizes citizens to bring suit to enjoin any person or governmental agency or
8 instrumentality that is in violation of the ESA or any regulation issued pursuant to the ESA. Further, 16
9 U.S.C. section 1540(g)(1) also grants jurisdiction to this Court to hear this ESA citizen suit.

10 7. Pursuant to 16 U.S.C. section 1540(g)(2)(A)(i), Plaintiff provided notice of the Corps'
11 violation of the ESA, and of Plaintiff's intention to file suit against the Corps, to the Corps and NMFS
12 on November 20, 2012. The allegations of ESA violation in this First Amended Complaint are timely
13 since they were filed after the expiration of this 60-day notice period.

14 8. Plaintiffs and their members are aggrieved by NMFS's unlawful issuance of extensions to
15 numerous deadlines in the BiOp and the Corps' unlawful taking of the Listed Species. Plaintiffs'
16 members visit the Yuba River for wildlife viewing, scientific observation, educational study, aesthetic
17 enjoyment, spiritual contemplation, cultural fulfillment, and recreation, including rafting, kayaking, and
18 fishing. NMFS's unlawful extension of deadlines in the BiOp and the Corps' unlawful taking of the
19 Listed Species have caused and will in the future continue to cause an impairment of the state of the
20 ecosystem of the Yuba River and the fisheries therein, and as a result, Plaintiffs' members' use of the
21 area is impaired and diminished. NMFS's unlawful extension of these BiOp deadlines, and the Corps'
22 unlawful taking of the Listed Species, will lead to the Corps taking a greater number of species protected
23 by the ESA than it would in the absence of these violations. As a result, Plaintiffs' members' enjoyment
24 of those species has been and is being impaired and diminished.

25 9. This Court has personal jurisdiction over the National Marine Fisheries Service, the
26 NMFS Regional Administrator for the Southwest Region of the NMFS, and the Secretary of Commerce.
27 NMFS is a federal agency established by the government of the United States. The regional office of
28 NMFS overseeing the Yuba River is located in the City and County of Sacramento.

1 10. This Court has personal jurisdiction over the Corps, the Secretary of the Army, and the
2 Corps District Commander for the Sacramento District. The Corps is a federal agency established by the
3 government of the United States. The district office of the Corps overseeing the Yuba River is located in
4 the City and County of Sacramento.

5 **VENUE**

6 11. Venue in the United States District for the Eastern District of California is proper under
7 28 U.S.C. section 1391(e) because the property that is the subject of the action is located within the
8 Eastern District of California. In addition, the NMFS and Corps offices overseeing the Yuba River are
9 located in the City and County of Sacramento.

10 **INTRADISTRICT ASSIGNMENT**

11 12. Intradistrict assignment of this matter to the Sacramento Division of the Court is
12 appropriate pursuant to Civil Local Rule 3-120(d) in that the events or omissions which give rise to
13 Plaintiffs' claims occurred and are occurring in Nevada and Yuba Counties. In addition, the NMFS and
14 Corps offices directly overseeing the action are located in Sacramento County. Plaintiff SYRCL's main
15 office is located in Nevada County. Plaintiff FOR's main office is located in Sacramento County.

16 **THE PARTIES**

17 13. The South Yuba River Citizens League is a community-based educational non-profit
18 corporation, established in 1983, and is located in Nevada City, California. SYRCL is committed to the
19 protection and restoration of the entire Yuba watershed. SYRCL works to fulfill its mission through
20 education, organization, collaboration, litigation and legislation. Since its founding in 1983, SYRCL has
21 become one of California's largest and most effective organizations focused on a single-watershed.
22 SYRCL has more than 3,500 supporters, including hundreds of local businesses, and works with nearly
23 1,000 active volunteers in hosting community events, including river clean-ups, restoration projects,
24 salmon tours, and educational forums. SYRCL has initiated numerous highly successful collaborations
25 with businesses, property owners, and local, state and federal agencies in efforts to restore the Yuba
26 watershed. SYRCL has been involved for many years with efforts to improve ecosystem conditions on
27 the Yuba River. SYRCL's members use the Yuba River for water contact recreation, wildlife
28 observation and study, aesthetic enjoyment, commercial enterprise such as paid rafting trips, and

1 spiritual renewal. SYRCL's members particularly enjoy as a recreational, educational, cultural, and/or
2 spiritual pursuit observing the migration of anadromous fish in the Yuba River, including salmon,
3 steelhead and green sturgeon. Many of SYRCL's members are members of local Native American
4 tribes. SYRCL members, in coordination with local Native American tribes, as well as other
5 environmental and indigenous rights groups, participate in an annual Calling Back the Salmon
6 Ceremony, a traditional salmon ceremony that supports both cultural and salmon restoration on the
7 Yuba River.

8 14. Friends of the River was founded in 1973 and is incorporated under the non-profit laws
9 of the State of California, with its principal place of business in Sacramento, California. FOR has more
10 than 5,000 members dedicated to the protection, preservation, and restoration of California's rivers,
11 streams, watersheds and aquatic ecosystems. FOR has been involved in the protection and management
12 of California's rivers and estuaries for more than 30 years, with an emphasis on protecting free flowing
13 rivers and streams, watersheds, water quality, aquatic habitat, and aquatic species. FOR is involved in
14 water rights issues with the goal of improving flows for spring Chinook, steelhead and green sturgeon
15 and is also involved in the program to resolve fish passage issues associated with Daguerre Point Dam
16 and Englebright Dam on the Yuba River. FOR's members use the Yuba River for water contact
17 recreation, wildlife observation and study, aesthetic enjoyment, and spiritual renewal. FOR's members
18 particularly enjoy as a recreational, educational, and/or spiritual pursuit observing the migration of
19 anadromous fish in the Yuba River, including spring Chinook, steelhead and green sturgeon. Many of
20 Friends of the River's members visit the Yuba River for outdoor recreation and spiritual renewal.

21 15. As a result of the acts and omissions of the Federal Defendants alleged herein, Plaintiffs'
22 members have suffered and will continue to suffer injuries to their aesthetic, environmental, educational,
23 spiritual, and economic interests in enjoying and using the Yuba River and its tributaries.

24 16. Defendant National Marine Fisheries Service, part of the National Oceanic and
25 Atmospheric Administration, a division of the Department of Commerce, is the agency of the United
26 States Government responsible for administering and implementing the ESA for anadromous fisheries
27 and generally is responsible for the stewardship of the nation's living marine resources and their habitat.
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1 17. Defendant Rebecca M. Blank, Acting Secretary of Commerce, is the Secretary within the
2 meaning of 16 U.S.C. sections 1540(g)(1)(C) and 1532(15) and is sued in her official capacity only. If
3 ordered by the Court, Ms. Blank has the authority and ability to remedy the harm inflicted by
4 Defendants' actions.

5 18. Defendant Rodney McInnis, Regional Administrator of NMFS Southwest Region has
6 been delegated certain authority granted to the Secretary under the ESA, with responsibility for
7 consultation for anadromous fish within the Southwest Region under 16 U.S.C. sections 1540(g)(1)(C)
8 and 1532(13), and is sued in his official capacity only. If ordered by the Court, Mr. McInnis has the
9 authority and ability to remedy the harm inflicted by Defendants' actions.

10 19. Defendant United States Army Corps of Engineers, a division of the Department of the
11 Army, is the agency of the United States Government responsible for providing engineering services to
12 the nation.

13 20. Defendant John McHugh, Secretary of the Army, is a person within the meaning of 16
14 U.S.C. sections 1540(g)(1)(C) and 1532(13) and is sued in his official capacity only. If ordered by the
15 Court, Mr. McHugh has the authority and ability to remedy the harm inflicted by Defendants' actions.

16 21. Defendant William J. Leady, District Commander of the Sacramento District is a person
17 within the meaning of 16 U.S.C. sections 1540(g)(1)(C) and 1532(13), and is sued in his official
18 capacity only. If ordered by the Court, Colonel Leady has the authority and ability to remedy the harm
19 inflicted by Defendants' actions.

20 **STATUTORY BACKGROUND**

21 **Endangered Species Act**

22 22. The ESA was enacted to provide a means to conserve threatened and endangered species
23 and to conserve the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). The ESA calls
24 for all Federal agencies to use their authority to seek to conserve threatened and endangered species. 16
25 U.S.C. § 1531(c). In addition, the ESA prohibits take of endangered and certain threatened¹ species

26 ¹ 16 U.S.C. section 1538 explicitly prohibits take of species listed as endangered; however, NMFS may
27 extend this prohibition to species listed as threatened. NMFS is required to issue protective regulations
28

1 listed under the ESA. 16 U.S.C. § 1538(a)(1). Take of a listed species means, *inter alia*, to harass, harm,
2 kill, trap or capture the species. 16 U.S.C. § 1532(19). An actor can take a listed species within the
3 meaning of the ESA by killing or injuring an individual member of the species, or by engaging in an act
4 that causes significant habitat modification or degradation which kills or injures fish or wildlife by
5 significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating,
6 feeding or sheltering. 50 C.F.R. § 222.102.

7 23. To accomplish these goals, the ESA requires that each Federal agency (“action agency”)
8 insures that any action authorized, funded, or carried out by such agency does not jeopardize the
9 continued existence of a threatened or endangered species or result in the destruction or adverse
10 modification of habitat that the Secretary has determined to be critical for such species. 16 U.S.C. §
11 1536(a)(2). In furtherance of that goal, the ESA requires that each Federal agency shall consult with the
12 National Marine Fisheries Service (“consulting agency”) for marine and anadromous species on any
13 action which is likely to result in jeopardy or destruction or adverse modification of critical habitat,
14 using the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b);
15 50 C.F.R. § 223. To this end, the action agency may provide the consulting agency with a Biological
16 Assessment outlining the action and the effects of that action on the species. 16 U.S.C. § 1536(c); 50
17 C.F.R. § 402.12.

18 24. After consultation has ended, the consulting agency shall provide the action agency with
19 a written statement, known as a biological opinion, which must set forth the consulting agency’s
20 opinion, and the information upon which that opinion is based, and detail how the action will affect the
21 species or its critical habitat. 16 U.S.C. § 1536(b)(3)(A). In arriving at its biological opinion, the
22 consulting agency, using the best scientific and commercial data available, must review all relevant
23 information provided by the action agency, evaluate the current status of the species, evaluate the effects
24 of the action and the cumulative effects on the species or critical habitat, and formulate its opinion as to

25
26 for all species listed as threatened, and these regulations may prohibit take of threatened species. 16
27 U.S.C. § 1533(d). NMFS has issued regulations that prohibit take under 16 U.S.C. section 1538(a)(1) of
28 all anadromous fish with an intact adipose fin that are listed as threatened. 50 C.F.R. § 223.203.

1 whether the action, taken together with cumulative effects will jeopardize the continued existence of the
2 species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g)(1-4, 8).

3 25. If the consulting agency finds that the action will likely jeopardize the species or
4 adversely modify critical habitat, the consulting agency shall suggest reasonable and prudent alternatives
5 that it believes would not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A). If there
6 are no reasonable and prudent alternatives that will avoid such jeopardy or adverse modification, the
7 action agency cannot continue with the action unless it obtains an exemption under ESA section 7(h).
8 16 U.S.C. § 1536(a)(2).

9 26. If the action or reasonable and prudent alternative to the action will result in a take of a
10 listed species, but the consulting agency concludes that the incidental taking of threatened or endangered
11 species as a result of the action or alternative will not result in jeopardy of the species or adverse
12 modification of its critical habitat, then the Secretary may issue an Incidental Take Statement (“ITS”),
13 for that take. 16 U.S.C. § 1536(b)(4). The ITS shall set forth the impact of the incidental take on the
14 species, the reasonable and prudent measures the consulting agency considers necessary or appropriate
15 to minimize such impact, and the terms and conditions that the action agency must take to comply with
16 the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4).

17 27. As long as the action agency complies with the terms of the ITS, the prohibition against
18 take in ESA section 9 will not apply. 16 U.S.C. § 1536(o)(2). However, if an agency does not comply
19 with the ITS and its actions result in take of a listed species, or if its actions result in take not provided
20 for in the ITS, the agency is in violation of ESA section 9. 16 U.S.C. §§ 1536(o)(2), 1538(a)(1).
21 Furthermore, if an agency does not abide by the terms of the ITS, both the consulting and action
22 agencies have a responsibility to reinitiate consultation. 50 C.F.R. § 402.16.

23 28. In addition to the procedural duties imposed by ESA section 7(a)(2), ESA sections
24 7(a)(1) and 7(a)(2) also impose substantive duties on each federal agency. Under ESA section 7(a)(1),
25 the Corps is required to use its authorities in furtherance of the purposes of the ESA by carrying out
26 programs for the conservation of endangered species and threatened species. 16 U.S.C. § 1536(a)(1).
27 Under ESA section 7(a)(2), the Corps has a substantive duty to “insure” that actions authorized, funded,
28

1 or carried out by the Corps do not cause jeopardy to the Listed Species or cause destruction or adverse
2 modification of critical habitat. 16 U.S.C. § 1536(a)(2).

3 **FACTUAL BACKGROUND**

4 **The Listed Species**

5 29. The Corps' activities on the Yuba River affect three species listed as threatened under the
6 ESA: spring Chinook, steelhead, and green sturgeon. NMFS listed spring Chinook as threatened
7 effective November 16, 1999. 64 Fed. Reg. 50,394 (Sept. 16, 1999). The threatened status of spring
8 Chinook was reaffirmed on January 5, 2006. NMFS listed steelhead as threatened effective May 18,
9 1998. 63 Fed. Reg. 13,347 (Mar. 19, 1998). The threatened status for spring Chinook and steelhead was
10 reaffirmed in a combined status review on August 8, 2011, though NMFS noted that the status of the
11 species had declined in the past five years and recommended a status reassessment in two to three years.
12 NMFS issued final protective regulations for spring Chinook on June 28, 2005. 70 Fed. Reg. 37160
13 (June 28, 2005). NMFS listed green sturgeon as threatened effective June 6, 2006. 71 Fed. Reg. 17757
14 (April 7, 2006).

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

26 **The Yuba River and the Project**

27 31. The Yuba River flows from the Sierra Nevada through Sierra, Nevada, and Yuba
28 counties until it meets the Feather River at Marysville, California. The Yuba River system once

1 supported healthy runs of spring Chinook and steelhead. Even after the environmental devastation of
2 rivers during the California gold rush, spring Chinook runs in the Central Valley as a whole were as
3 large as 600,000 fish between the late 1880s and the 1940s, and steelhead runs reached 40,000 fish in
4 the early 1960s. Spring Chinook salmon and steelhead inhabited all three forks of the Yuba River before
5 the construction of Englebright, Bullards Bar and later New Bullards Bar Dams, which serve as
6 impassable barriers to all fish. Spring Chinook once migrated at least as far upstream as Washington on
7 the South Yuba, to the lower portions of the Middle Yuba, and as far upstream as Downieville on the
8 North Yuba. Before the construction of Englebright, steelhead also spawned in the uppermost reaches of
9 the Yuba and its tributaries. The lower Yuba River (below Englebright Dam, discussed below) provides
10 suitable, but not optimal, spawning and rearing habitat for juvenile spring Chinook salmon and for adult
11 and juvenile steelhead.

12 32. The Corps operates and maintains two dams on the Yuba River, Daguerre and
13 Englebright. Daguerre is located approximately 11.4 miles upstream of the confluence of the Yuba and
14 Feather Rivers, in Yuba County, California. Englebright is 12 miles upstream of Daguerre, in Yuba and
15 Nevada Counties. Congress authorized both dams as part of the Yuba River Debris Control Project.
16 Daguerre was authorized in the Rivers and Harbor Act of June 13, 1902. In 1986, Congress eliminated
17 the California Debris Commission, and transferred the Debris Commission's powers, duties, lands and
18 other interests, including Daguerre to the Secretary of the Army. Englebright was constructed in 1941.

19 33. Daguerre is an overflow concrete ogee spillway, 575 feet long and 25 feet high.
20 Daguerre's purpose was to catch mining debris, preventing the debris from washing downstream into the
21 Feather and Sacramento Rivers. Daguerre does not provide flood control or hydroelectric power
22 generation. The basin behind Daguerre, which was designed to collect debris, has completely silted in,
23 and water and sediment now flow unimpeded over Daguerre. Crude fish ladders were added to Daguerre
24 in 1911, but washed out in 1927-1928 and were not replaced until 1938. The fish ladders were damaged
25 several times in floods and the present fish ladders were constructed in 1964.

26 34. In addition, the Corps has issued licenses for the operation of water diversions on the
27 Yuba River. One such diversion is the South Yuba-Brophy Diversion ("Brophy Diversion"). The
28 Brophy Diversion is located approximately 1,000 feet upstream of Daguerre on the south side of the

1 Yuba River, and diverts water through an excavated channel. The diversion includes a 450-foot long
2 porous rock weir fitted with a fine-mesh barrier within the weir. The fish screen does not meet current
3 California Department of Fish and Game (“CDFG”) or NMFS fish screening criteria.

4 35. The Corps issued a license for the construction of the Brophy Diversion to the South
5 Yuba Water District (“SYWD”) on March 15, 1985. SYWD and Brophy Water District shared the cost
6 of construction, and the diversion is used to deliver water to both of those entities. The Bureau of Land
7 Management issued a Right-of-Way Grant to the Yuba County Water Agency (“YCWA”) on June 24,
8 2002, granting YCWA the right to operate and maintain the Brophy Diversion until December 31, 2031.
9 On information and belief, Plaintiffs allege that the Corps owns the land that the Brophy Diversion is
10 located upon and that the Corps has issued licenses and easements to YCWA authorizing the operation
11 of the Brophy Diversion. On information and belief, Plaintiffs further allege that YCWA owns and
12 operates the Brophy Diversion itself.

13 36. The Corps issued a license to the Hallwood Irrigation Company to operate the Hallwood-
14 Cordua diversion in 1997. The Hallwood-Cordua diversion is located on the north side of Daguerre with
15 the intake facilities directly connected to the superstructure of the dam. BiOp at 28. There is an interim
16 fish screen on the Hallwood-Cordua Canal approximately 0.25 mile down the canal from the river,
17 which was rebuilt in the spring of 2000 by the Cordua Irrigation District. *Id.* at 132. The interim fish
18 screen does not meet all CDFG and NMFS criteria for fish screens. Juvenile fish that encounter the fish
19 screen in the Hallwood-Cordua diversion are sent back to the Yuba River via a return flow from the
20 diversion.

21 **Impacts of the Project on the Listed Species**

22 37. The fish ladders at Daguerre are inadequate at all flows. At low flows, they provide
23 insufficient attraction flows for salmonids; at high flows, they are ineffective and sometimes closed
24 altogether. Sediment and debris often clog the ladders, rendering them impassable. In addition, the
25 ladders’ design is poor compared to newer ladders being used: the ladders are narrow, water flow in the
26 ladders is unmeasured and uncontrolled leading to less than optimum passage conditions. Delays caused
27 when the ladders are closed or fish cannot find the ladders cause stress, injury, depletion of precious
28 energy reserves and/or pre-spawning mortality. In addition, the pool below Daguerre subjects the fish to

1 the threat of human poachers. Even if the fish manage to make it up the ladders, sediment buildup on the
2 upstream side of the ladders may prevent them from reaching the river channel. All of the obstacles to
3 passage can result in injuries, stress, delays in spawning, and/or affect egg viability. Alternatively, the
4 fish may end up spawning downstream of Daguerre where reduced habitat and warmer temperatures
5 adversely affect the chances of success.

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

10 39. Daguerre also injures and disorients juvenile spring Chinook and steelhead as they plunge
11 over the face of the dam on their way downstream. The large pool at the base of Daguerre provides
12 excellent habitat for predators, and the juveniles are highly vulnerable to predation after their trip over
13 the dam into the turbulent waters below. This unnatural advantage Daguerre gives to the predators
14 increases the level of predation, thus decreasing the numbers of juveniles making it to the ocean.

15 40. Located just upstream of Daguerre, the Brophy Diversion diverts water through a channel
16 into an old dredger pond. The pond is separated into two parts by a porous dike, or gabion weir, which is
17 constructed of a wire-mesh basket filled with rocks, with a fine mesh screen imbedded within the rocks.
18 Water passes from the river side of the weir to a pond on the diversion side of the weir. Water is then
19 pumped from the pond on the diversion side to a diversion canal. An agreement with California
20 Department of Fish and Game ("DFG") requires that ten percent of the flow diverted from the river
21 return to the river through a channel at the south end of the pond on the river side of the weir. The
22 channel rejoins the river just upstream of Daguerre.

23 41. Before the diversion was even constructed, NMFS expressed concerns about the type of
24 screen to be used, sweeping flows, impingement, injury, and predation. The interstitial spaces in the
25 rocks making up the weir are larger than those defined in the NMFS Fish Screening Criteria for
26 Anadromous Salmonids, a category which includes spring Chinook and steelhead. Spring Chinook and
27 steelhead juveniles now become entrained in the weir and a fine mesh fabric inside of the weir only adds
28 to the problem. Sweeping flows to prevent entrainment are often minimal or non-existent. Out-migrating

1 spring Chinook salmon and steelhead seek the cover of interstitial spaces along the rock weir at the
2 Brophy Diversion and are impinged within the weir and killed.

3 42. In addition to impingement, flows into the Brophy Diversion give a false cue to out-
4 migrating juveniles and attract them into the pool next to the diversion. This pool is a predator field that
5 causes the death of juvenile salmonids that cannot pass successfully. No predator control program is in
6 place at the Brophy Diversion and salmonid loss at this facility is likely to have been a severe and
7 chronic stressor on out-migrating salmonids. The 300 to 600 cubic feet per second (“cfs”) flows coming
8 into the diversion pool, with much less flow returning to the river, does not allow for sweeping flows to
9 let the out-migrating juveniles pass. The diversion pool and return flow channel provide foraging cover
10 for predators and provide predators with easy access to exposed juvenile fish because they have clear
11 open water, no riparian cover or aquatic large woody material, and steeply sloped sides. In addition to
12 the issues posed by low flows along the weir, at high flows exceeding 20,000 cfs juvenile fish, including
13 spring Chinook and steelhead, are swept over the weir into the diversion pool on the other side of the
14 weir, where the fish have no means of escape.

15 43. Although the adverse effects of the Brophy Diversion on spring Chinook and steelhead
16 are exacerbated when the diversion pumps are running, because there is no way to prevent water from
17 entering the diversion channel, losses to those fish due to predation and entrainment occur even when
18 water is not being diverted. DFG sampling has found juvenile spring Chinook and steelhead in the river
19 virtually year-round making the Brophy Diversion a constant source of injury to these fish species.

20 44. Water diversions in the upper Yuba River watershed and lower Yuba River reduce the
21 amount of downstream outmigration habitat available for spring Chinook and steelhead. Water
22 diversions of an average of 71,000 acre-feet per year are diverted out of the North Yuba River, and
23 410,000 acre-feet per year are diverted out of the Middle and South Yuba rivers. These annual exports
24 reduce the ability of the Yuba River and its watershed to support native salmonids and sturgeon.
25 Increased water exports lead to a reduction in flows within the mainstem of the river, and reduction in
26 flows exacerbates the impacts of inadequate water depth and lack of access to the floodplain. Flows are
27 generally below optimal conditions for all life-history stages of salmon, and the natural hydrograph is
28 altered by hydropower and water delivery.

1 45. Water diversion at the Brophy Diversion removes water from the Yuba River that would
2 otherwise be utilized by spring Chinook for basic life history behavior. These adverse impacts of the
3 Brophy Diversion are being greatly exacerbated due to the increases in Yuba River flow diversion that
4 are being implemented by YCWA as part of its “Wheatland Project.” The Wheatland Project has been
5 constructed and is beginning to divert water from the lower Yuba River. Under this program, water
6 exported from the Brophy Diversion has increased to 75,647 acre-feet annually, a 114% increase over
7 the delivery amounts in 2005. These increased exports have increased entrainment and impingement on
8 the inadequate screens. The changes in flow levels associated with implementation of the Wheatland
9 Project will be of sufficient magnitude, timing, and duration to adversely affect the survival of juvenile
10 spring Chinook and steelhead and the conservation value of certain primary constituent elements of
11 critical habitat (i.e., freshwater rearing and migration habitat). The Brophy Diversion constitutes a
12 chronic, long-term, high level-stressor for spring Chinook and steelhead populations and measurably
13 contributes to the risk of extinction of these species.

14 46. Like the Brophy Diversion, the Hallwood-Cordua Diversion is also a substantial stressor
15 to spring Chinook and steelhead through entrainment, impingement, and predation. A 1999-2000 study
16 estimated that 36,144 and 91,113 steelhead were entrained at the Hallwood-Cordua Diversion in 1999
17 and 2000 respectively. BiOp at 159. Although the fish screen has been modified at the Hallwood-Cordua
18 Diversion, the screen does not fully meet all DFG and NMFS criteria, and entrainment and impingement
19 continue to adversely affect juvenile spring Chinook and steelhead at the diversion. Moreover, predation
20 at the Hallwood-Cordua diversion is a significant source of losses of spring Chinook and steelhead. The
21 BiOp refers to the Hallwood-Cordua Diversion canal and fish return pipe as “[h]igh-density predator
22 fields,” and notes that “Sacramento pikeminnow are documented to forage heavily on salmonids
23 approaching the Hallwood-Cordua fish screen.” BiOp at 151. For these reasons, NMFS considers the
24 overall estimated mortality to spring Chinook associated with the diversion to be substantially the same
25 as before the diversion was modified.

26 47. Englebright is located twelve miles upstream of Daguerre. Completed in 1941,
27 Englebright, like Daguerre, was constructed to retain hydraulic mining debris from washing
28 downstream. Englebright is 260 feet high and stores 70,000 acre-feet of water. Englebright has no fish

1 ladders and is therefore a complete barrier to fish passage to the upper reaches of the Yuba River. The
2 upper reaches represent the majority of historic habitat in the watershed for spring Chinook and
3 steelhead. NMFS has estimated that more than 100 miles of stream in the upper watershed were
4 available to steelhead before construction of Englebright. Spring Chinook relied on suitable habitat in
5 upper reaches to provide natural segregation from fall-run Chinook that could not ascend the rivers as
6 far upstream during low flows of the summer and fall seasons.

7 48. Englebright completely blocks gravel from the upstream reaches from supplying habitat
8 to the Yuba River's lower reaches where it can be utilized by listed species. In addition, movement of
9 large wood is blocked by Englebright except in extreme high flow conditions when the dam fills and
10 spills. Large woody material - through interaction with hydraulics, sediment dynamics and invertebrate
11 biota - provides an essential functional component to habitat for listed species.

12 49. Englebright offers very little flood control, and is not managed for flood control
13 purposes. Following construction of New Bullards Bar Reservoir ("Bullards Bar"), the burden of flood
14 control in the Yuba watershed shifted to the New Bullards Bar reservoir. Englebright reservoir provides
15 the head needed for the operation of two hydroelectric facilities. The Corps issued easements to Pacific
16 Gas and Electric ("PG&E") and YCWA for the construction and operation of two hydroelectric
17 facilities, the Narrows 1 and Narrows 2 Powerhouses ("the Powerhouses"). The majority of releases
18 from Englebright are through the Powerhouses, although if the Englebright reservoir is full, water spills
19 over the dam. The Corps retains responsibility for maintenance of the Englebright dam structure, while
20 PG&E and YCWA administer water releases from Englebright and operation and maintenance of the
21 Powerhouses.

22 **ESA Section 7 Consultation History**

23 50. On March 8, 2000, the Corps initiated consultation with NMFS under the ESA
24 concerning the Corps' operation of Daguerre and Englebright and approval of operation of the South
25 Yuba-Brophy Diversion. The Corps issued its Biological Assessment ("BA") concerning these activities
26 ("the Project") pursuant to ESA section 7(c) with NMFS on July 29, 2000. The Corps amended its BA
27 about six months later to include measures intended to reduce the take of listed salmonids by alleviating
28 some of the adverse impacts associated with the Project, and asked that the BiOp be based upon that

1 additional information. In particular, the Corps stated that it planned to develop and implement a plan to
2 routinely clear debris from the two Daguerre fish ladders, that it planned to install a pressure/transducer
3 device at Daguerre to monitor debris, that it planned to develop and implement a plan to remove
4 sediment above Daguerre, and that it would work to improve conditions for juvenile salmonids at the
5 South Yuba-Brophy Diversion. Additionally, the Corps asserted that it would attempt to ameliorate the
6 effects of Englebright by working on a gravel injection program. The Corps also specifically stated that
7 one of the most important measures that the Corps would take is to assume a lead role in the ongoing
8 efforts for the restoration of salmonid populations on the Yuba River including the Upper Yuba River
9 Studies Program and the Yuba River Technical Working Group including acting as the lead Federal
10 agency in conducting environmental review pursuant to the National Environmental Policy Act of
11 improving fish passage at Daguerre.

12 51. NMFS issued a biological opinion for the Project, entitled "Operations of Englebright
13 Dam/Englebright Lake and Daguerre Point Dam on the Yuba River, California" to the Corps on March
14 27, 2002 ("2002 BiOp"). In that BiOp, NMFS reached a finding of no jeopardy for the Corps' actions
15 related to the Project. NMFS specifically limited that determination to a five-year time period.

16 52. In the 2002 BiOp, NMFS recognized the impacts outlined above that Daguerre,
17 Englebright, and the South Yuba-Brophy Diversion have on listed spring Chinook and steelhead.

18 53. In the 2002 BiOp, NMFS specified four reasonable and prudent measures that it believed
19 necessary and appropriate to minimize take of spring Chinook and steelhead. NMFS required the Corps:
20 (1) to seek to improve the effectiveness and reliability of the Daguerre fish ladders; (2) to implement
21 interim as well as long term improvements to the South Yuba-Brophy Diversion to reduce impacts of
22 that facility on juvenile salmonids; (3) to develop and implement a gravel injection program in key areas
23 on the Yuba River which have been deprived of adequate spawning gravels by the interruption of
24 recruitment of gravel by the construction and maintenance of Englebright; and (4) to provide an annual
25 report on the progress and effectiveness of the above measures. NMFS also included terms and
26 conditions to implement the reasonable and prudent measures. The terms and conditions required that
27 the Corps: (1) seek to improve the effectiveness and reliability of Daguerre fish ladders, by clearing
28 debris from the fish ladders, installing a remote pressure/transducer device to monitor the accumulation

1 of debris in the fish ladders, and by controlling sediment on the upstream side of Daguerre where the
2 fish ladders exit so that sediment build-up does not impede fish passage; (2) implement interim as well
3 as long term improvements to the South Yuba-Brophy Diversion to reduce impacts of that facility on
4 juvenile salmonids; and (3) develop and implement a gravel injection program in key areas on the Yuba
5 River which have been deprived of adequate spawning gravels by the interruption of recruitment of
6 gravel by the construction and maintenance of Englebright. The BiOp also mandated that the Corps
7 submit annual reports on the Corps' progress in implementing the BiOp's terms and conditions.

8 54. Recognizing that the Project's operations would take species under the ESA, NMFS also
9 issued an incidental take statement with the 2002 BiOp. NMFS did not specify an exact number of
10 allowable take in this 2002 ITS. Instead, NMFS set a level of permissible take based on the Corps'
11 compliance with the Reasonable and Prudent Measures 1-4, their implementing terms and conditions,
12 and the effects analysis set forth within the BiOp and within the project description provided in the
13 Biological Assessment. NMFS cautioned the Corps that any action not in compliance with those
14 requirements could cause an exceedance in anticipated take levels, thereby triggering the need to
15 reinitiate consultation on the Project.

16 55. The Corps did not comply with the 2002 BiOp's reasonable and prudent measures or
17 attendant terms and conditions during the lifetime of the 2002 BiOp.

18 56. First, the Corps did not develop an implementation plan to clear debris from the Daguerre
19 fish ladders. The Corps did not submit any plan to NMFS by September 27, 2002, the Corps did not
20 implement such a plan by March 26, 2003, and the Corps did not add the plan to the requirements of the
21 Corps Operation and Maintenance Manual for Daguerre, as required by the 2002 BiOp. The Corps did
22 not install a remote pressure/transducer device by October 1, 2002 as required by the 2002 BiOp. The
23 Corps did not develop an implementation plan to routinely remove or otherwise manage sediments on
24 the upstream side of Daguerre. The Corps did not submit any sediment implementation plan to NMFS
25 by September 27, 2002, it did not implement such a plan by March 26, 2003, and it did not add the plan
26 to the requirements of the Corps Operation and Maintenance Manual for Daguerre, as required by the
27 2002 BiOp.

1 57. Second, the Corps did not implement interim or long-term improvements to the Brophy
2 Diversion to reduce impacts of that facility on juvenile salmonids.

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

7 59. Fourth, the annual reports on the Corps' compliance efforts submitted by the Corps did
8 not sufficiently detail the progress that was being made towards the implementation of the above listed
9 measures and the effectiveness of those measures, as required by the 2002 BiOp and 50 C.F.R. §
10 402.14(i)(3).

11 60. Spring Chinook and steelhead populations on the Yuba River have continued to decline
12 since NMFS issued the 2002 BiOp.

13 61. After NMFS issued the 2002 BiOp, NMFS listed green sturgeon as an ESA protected
14 threatened species and further recognized that green sturgeon are being adversely affected by Daguerre.

15 62. On April 27, 2007, NMFS issued another biological opinion for the "Operation of
16 Englebright and Daguerre Point Dams on the Yuba River, California, for a 1-year Period" ("April 2007
17 BiOp"). The April 2007 BiOp addressed only the impacts of the Project on spring Chinook and
18 steelhead, and did not address the impacts on green sturgeon. Although NMFS stated that the April 2007
19 BiOp did not include consultation for the green sturgeon, it provided no justification nor explanation for
20 failure to conduct or complete consultation on this species. The April 2007 BiOp concluded that the
21 Project will not jeopardize the continued existence of the spring Chinook and steelhead and that the
22 Project is not likely to destroy or adversely modify the critical habitat of those species for the one-year
23 period of the April 2007 BiOp.

24 63. In the April 2007 BiOp, NMFS generally described the Project as the continued operation
25 of Daguerre and Englebright as well as the issuance of any licenses or easements for water diversion
26 from the reach of the Yuba River between these dams. NMFS's description of the Project further
27 included six "conservation and restoration measures" that NMFS stated the Corps had committed to
28 incorporate as part of its Project operations: (1) to coordinate with other agencies to manage flows from

1 New Bullards Reservoir and Englebright Lake to enhance critical habitat and water temperature in the
2 lower Yuba River; (2) to coordinate with other agencies to develop a gravel implementation program;
3 (3) pending funding and approval, to coordinate with YCWA to construct a temperature control device
4 on the intake for Narrows II Powerhouse on Englebright; (4) to continue to implement its plan of
5 routinely clearing debris from the Daguerre fish ladders; (5) to continue to implement its plan to
6 routinely remove the sediment that occasionally blocks the north Daguerre fish ladder exit; and (6) to
7 coordinate with other agencies to investigate, design, and implement an economical plan to improve
8 conditions for juvenile spring Chinook and steelhead at the Brophy Diversion.

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

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

20 66. The April 2007 BiOp included an Incidental Take Statement (“April 2007 ITS”) for the
21 Corps’ Project. The April 2007 ITS set three ecological surrogates as a measure of allowable take for the
22 one-year period of the April 2007 BiOp, which included flow releases from Englebright, the availability
23 of spawning gravel below Englebright, and the maintenance of clear passage through the ladders on
24 Daguerre. The April 2007 ITS did not set any quantitative measure of these requirements, stating that
25 the analysis of effects anticipates that the operation of a full-flow bypass around the Powerhouses will
26 prevent large flow fluctuations in the lower Yuba River, that a gravel injection program will be
27 implemented in 2007, which will inject at least 500 tons of gravel, and finally that the fish ladders exits
28 will be kept clear of sediment and that a clear channel will be maintained from ladder exits to the main

1 channel of the river. The April 2007 ITS stated that if these ecological surrogates are not met, then the
2 Project will be considered to have exceeded anticipated take levels, triggering the need to reinitiate
3 consultation.

4 67. The April 2007 ITS also included one reasonable and prudent measure to minimize take
5 of spring Chinook and steelhead, which required the Corps to implement the proposed pilot gravel
6 injection program within one year of the issuance of the April 2007 BiOp.

7 68. The Corps did not comply with the April 2007 BiOp's one reasonable and prudent
8 measure during the April 2007 BiOp's term, as the Corps did not add any gravel to the Yuba River
9 below Englebright during the term of the April 2007 BiOp. The Corps also did not implement the
10 conservation and restoration measures specified in the April 2007 BiOp. Finally, the ecological
11 surrogates specified in the April 2007 BiOp were not met.

12 69. On November 21, 2007, NMFS issued another biological opinion for the Project ("the
13 November 2007 BiOp"). Unlike its prior two biological opinions for the Project, NMFS did not set an
14 expiration date for the November 2007 BiOp and the November 2007 BiOp ostensibly permanently
15 addressed the impacts of the Project on spring Chinook, steelhead, and green sturgeon. The November
16 2007 BiOp concluded that the Project will not jeopardize the continued existence of spring Chinook,
17 steelhead and green sturgeon and that the Project is not likely to destroy or adversely modify the critical
18 habitat of the Species.

19 70. In the November 2007 BiOp, NMFS indicated that it was incorporating sections of the
20 2002 BiOp by reference. For example, NMFS indicated it was incorporating by reference the 2002
21 BiOp's description of baseline habitat conditions for spring Chinook and steelhead in the Yuba River.

22 71. In the November 2007 BiOp, NMFS again generally described the Project as the
23 continued operation of Daguerre and Englebright as well as the issuance of any licenses or easements for
24 water diversions for all reaches of the Yuba River affected by Englebright and Daguerre. The November
25 2007 BiOp further indicated that the Corps's description of the Project further included five
26 "conservation and restoration measures" that NMFS stated the Corps had committed to incorporate as
27 part of its Project operations: (1) to coordinate with other agencies to manage flows from New Bullards
28 Reservoir and Englebright Lake to enhance critical habitat and water temperature in the lower Yuba; (2)

1 to coordinate with other agencies to develop and implement a gravel implementation program; (3) to
2 continue to implement its plan of routinely clearing debris from the Daguerre fish ladders; (4) to
3 continue to implement its plan to routinely remove the sediment that occasionally blocks the Daguerre
4 fish ladder exits; and (5) to coordinate with other agencies to investigate, design, and implement an
5 economical plan to improve conditions for juvenile spring Chinook and steelhead at the Brophy
6 Diversion. These five “conservation and restoration measures” were identical to five of the six
7 “conservation and restoration measures” for the Project that NMFS identified in the April 2007 BiOp.
8 NMFS, however, deleted from the November 2007 BiOp’s list of “conservation and restoration
9 measures” one of the “conservation and restoration measures” that NMFS had listed in the April 2007
10 BiOp: that pending funding and approval, the Corps would coordinate with YCWA to construct a
11 temperature control device on the intake for Narrows II Powerhouse on Englebright. NMFS provided no
12 explanation why it and the Corps had deleted this conservation and restoration measure from the list of
13 environmentally beneficial measures that the Corps had committed to implement to reduce the impact of
14 the Project on spring Chinook and steelhead.

15 72. The November 2007 BiOp confirmed that the Project has caused and continues to cause
16 several different adverse impacts on spring Chinook, steelhead and green sturgeon.

17 73. In the November 2007 BiOp, NMFS stated that the overall status of spring Chinook and
18 steelhead essentially remains the same as in the 2002 BiOp. NMFS observed that spring Chinook still
19 face a moderate to high risk of extinction and that steelhead populations have experienced substantial
20 decline. NMFS stated that in the Yuba River, spring Chinook escapement is relatively low and greatly
21 reduced from historic levels. NMFS asserted that it has very little information about recent population
22 trends and overall abundance of steelhead in the Yuba River, other than that steelhead have not
23 substantially recovered and continue to be at risk of extinction.

24 74. The November 2007 BiOp indicated that green sturgeon’s survival is jeopardized by
25 severe losses of its traditional spawning habitat, which is now limited to a portion of the Sacramento
26 River due to various artificial barriers on the rivers they once utilized for spawning, by reductions of
27 flows in the rivers it utilizes or once utilized for spawning due to water diversions, invasion of non-
28 native species into its habitat, and accumulation of toxic pollutants in its habitat. The November 2007

1 BiOp confirmed that green sturgeon have been found in the lower Yuba River below Daguerre, but that
2 Daguerre is a complete barrier to their passage above Daguerre.

3 75. The November 2007 BiOp included an Incidental Take Statement (“November 2007
4 ITS”) for the Corps’ Project. The November 2007 ITS again set three ecological surrogates as a measure
5 of allowable take of spring Chinook, steelhead, and green sturgeon: flow releases from Englebright, the
6 availability of spawning gravel below Englebright, and the maintenance of clear passage through the
7 ladders on Daguerre. The November 2007 ITS did not set any quantitative measure of these
8 requirements, stating that NMFS’s analysis of Project effects anticipates that the operation of a full-flow
9 bypass on the Powerhouses associated with Englebright will prevent large flow fluctuations in the lower
10 Yuba River, that the Corps will implement a gravel injection program in 2007, which will inject at least
11 500 tons of gravel, and finally that the Corps will keep the Daguerre fish ladders exits clear of sediment
12 and that a clear channel will be maintained from ladder exits to the main channel of the Yuba River.
13 The November 2007 ITS stated that if these ecological surrogates are not met, then the Project will be
14 considered to have exceeded anticipated take levels, triggering the need to reinitiate consultation.

15 76. The November 2007 ITS also included five reasonable and prudent measures to minimize
16 take of spring Chinook and steelhead and five terms and conditions implementing these five reasonable
17 and prudent measures. The five terms and conditions were: (1), utilizing the information from its pilot
18 gravel injection project, the Corps must develop and implement a long-term gravel augmentation
19 program within three years for adding gravel to the Yuba River below Englebright, (2), the Corps must
20 complete a study to determine an effective method for replenishing into the Yuba River the supply of
21 large woody material that is trapped by Englebright and upstream reservoirs and then develop and
22 commence implementing a long-term program to replenish woody debris in the River within 4 years,
23 (3), the Corps must complete a study of implementing a feasible Daguerre fish passage improvement
24 project within 5 years and then commence implementation of the Corps’ preferred alternative for
25 securing anadromous fish passage past Daguerre within ten years, (4), the Corps must continue to
26 implement its Daguerre fish ladder clearing and maintenance programs and (5), the Corps must
27 diligently pursue “the ongoing effort” for securing an improved fish screen at the Brophy diversion that
28 meets all DFG and NMFS criteria.

1 77. Plaintiffs challenged the November 2007 BiOp in *South Yuba River Citizens League v.*
2 *NMFS*, E.D. Cal. Case No. 2:06-cv-02845-LKK-JFM. On July 8, 2010, the United States District Court
3 for the Eastern District of California issued an order, which concluded that the November 2007 BiOp
4 was arbitrary and capricious due to failure to properly analyze key information concerning the Listed
5 Species, impacts of the Project on the Listed Species, and environmental baseline context for the impact
6 of the Project on the Listed Species. *South Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d 1247
7 (E. D. Cal. 2010). The Court ordered that the November 2007 BiOp be remanded to NMFS and
8 subsequently ordered that NMFS prepare a new biological opinion for the Project by February 29, 2012,
9 consistent with the Court's July 8, 2010 order.

10 **Biological Opinion Issued in February 2012**

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

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

27 80. The description of the proposed action contains three conservation and restoration
28 measures proposed by the Corps: (1) to complete the monitoring of the November 2010 gravel

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

7 81. The BiOp states that the overall status of spring Chinook and steelhead has worsened
8 since the last status review five years ago, while the status of green sturgeon is compromised by low
9 abundance, limited distribution, and lack of population redundancy. *Id.* at 200, 203, 205. NMFS
10 underscores the severe impacts being caused by the Project. For instance, with respect to spring
11 Chinook, the BiOp notes:

12 The Yuba River population of spring-run Chinook salmon is not likely to survive
13 the conditions perpetuated by the proposed action. . . . Project effects continue the
14 pattern of low abundance, variable/declining growth rate, insufficient spawning
15 substrate, spatial structure overlaps with fall-run Chinook salmon, hatchery
16 introgression, and lack of habitat diversity. The population may not survive
17 climate change or even variable water years, so even minor adverse effects could
18 cause the population to go extinct. (*Id.* at 201.)

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

22 The expected effects of the proposed action in the Yuba River will result in
23 potential death, injury, or harm to the freshwater life stages of springrun Chinook
24 salmon, Central Valley steelhead, and/or the Southern DPS of North American
25 green sturgeon in the Yuba and occasionally the lower Feather River downstream
26 from the confluence with the Yuba River. These effects are the result of continued
27 operation of the proposed action. Anticipated effects of the proposed action are
28 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.)

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

5 84. To avoid this jeopardy and adverse modification of critical habitat, NMFS ordered the
6 implementation of a Reasonable and Prudent Alternative (“RPA”) to the proposed Project. This RPA
7 includes near-term and long-term actions relating to fish passage at Englebright and Daguerre and
8 programs to augment gravel, restore the river channel, control predators, and monitor salmonids and
9 green sturgeon, among other things.

10 85. NMFS selected these RPA measures after consideration of the significant adverse
11 impacts of the Project on the Listed Species in light of their degraded status and the threats posed by
12 existing baseline conditions. In selecting the RPA measures, NMFS stated: “This RPA was developed
13 through a thoughtful and reasoned analysis of the key causes of the jeopardy and adverse modification
14 findings, and a consideration of alternative actions within the legal authority of the Corps to alleviate
15 those stressors.” BiOp at 210. NMFS explained that the RPA actions contained separate components that
16 were required to be implemented in full. NMFS explained: “This RPA is composed of numerous
17 elements for each of the various project associated stressors and must be implemented in its entirety in
18 order to avoid jeopardy and adverse modification.” BiOp at 215. Not only did NMFS specify the types
19 of measures to be implemented, NMFS also established specific deadlines by which those measures
20 were to be completed. In so doing, NMFS found that compliance with this schedule was essential: “In
21 order to meet the requirements of the ESA, the Corps must implement the [RPA] actions in the
22 timeframes identified. It will be up to the Corps to determine under which authority(s) it will use to meet
23 the time requirements. The Corps should not let any opportunities be lost through inaction.” BiOp at
24 211.

25 86. The BiOp also includes an Incidental Take Statement for the Corps’ Project (“ITS”). The
26 ITS states that it establishes an amount of allowable take where possible and otherwise specifies a
27 geographic and/or temporal extent of allowable take. The ITS sets forth six reasonable and prudent
28 measures and associated terms and conditions that NMFS deemed necessary and appropriate to

1 minimize the effect of incidental take on the Listed Species. These are: (1) reducing entrainment and
2 impingement of salmonids at the Brophy and Hallwood-Cordua diversions; (2) enhancing migration
3 success through the Daguerre fish ladders through monitoring, clearing of debris in the fish ladders,
4 inspection of the upstream channels, dredging when needed to maintain clear passage, and flashboard
5 management activities; (3) enhancing juvenile salmonid rearing habitat by implementing programs for
6 large wood augmentation and riparian re-vegetation; (4) minimizing adverse effects from Waterway 13
7 by ensuring that an effective fish barrier remains in place; (5) utilizing Corps authority to improve flow
8 management by, for example, altering the terms of licenses to ensure beneficial flows are provided for
9 the Listed Species: and (6) monitoring and reporting on implementation of the terms and conditions
10 annually.

11 **Extensions for Implementing RPA Measures in BiOp**

12 87. In contradiction to its findings discussed in the preceding paragraph, on November 27,
13 2012, NMFS issued a letter (“November 2012 letter”) extending several of the deadlines for the Corps’
14 implementation of the RPA as set forth in the BiOp. Specifically, NMFS extended the deadlines for
15 implementations of RPA actions 2, 5, 6, 7, and 8.

16 88. RPA action 2 requires the Corps to form a Yuba Interagency Fish Passage Committee by
17 December 2012. The November 2012 letter moves this deadline to October 2013. RPA action 2 further
18 requires the Corps to evaluate salmonid spawning and rearing habitat upstream of Daguerre and
19 Englebright commencing immediately and finishing by January 2013. The letter moves this deadline to
20 commence this evaluation in October 2013 and complete it by April 2014. Finally, RPA action 2
21 requires the Corps to complete an evaluation of fish passage improvement at Daguerre by November 21,
22 2012. The letter moves this deadline three years to November 21, 2015.

23 89. RPA action 5 requires the Corps to develop a plan for a channel restoration program in
24 the Yuba River by December 2012. The November 2012 letter moves this deadline by over three years
25 to December 31, 2015.

26 90. RPA action 6 requires the Corps by September 1, 2012 to develop a predator reduction
27 and monitoring plan to address predators that prey upon the Listed Species. The November 2012 letter
28 extends this deadline to June 1, 2013. RPA action 6 also requires the Corps to implement the predator

1 reduction and monitoring plan by November 1, 2012. The November 2012 letter moves this deadline to
2 January 2015.

3 91. RPA action 7 requires the Corps to implement a salmonid monitoring and adaptive
4 management program starting immediately. The November 2012 letter moves this deadline over three
5 years to December 31, 2015.

6 92. RPA action 8 requires the Corps to immediately commence implementing a green
7 sturgeon conservation and management program. The November 2012 letter moves this deadline to June
8 2014. RPA action 8 further requires the Corps to create a green sturgeon technical subcommittee by
9 August 29, 2012. The letter moves this deadline to June 2014. Finally, RPA action 8 requires the Corps
10 to develop annual conservation monitoring and management plans for green sturgeon by February 28,
11 2013. The November 2012 letter moves this deadline to December 31, 2015.

12 93. In issuing extensions of the BiOp's RPA deadlines, NMFS stated in its November 2012
13 letter that it was granting these extensions solely because it found that the existing RPA contains
14 deadlines that "cannot be met for practical reasons, such as a lack of appropriations, or the length of time
15 required to comply with the National Environmental Policy Act, among other implementation
16 challenges." The letter contained no explanation or analysis of how moving the RPA deadlines would
17 impact the Listed Species and on information and belief, Plaintiffs allege that NMFS has undertaken no
18 such analysis and reached no conclusions concerning the impacts of the extensions on the Listed
19 Species. In its letter, NMFS indicated that it had decided that none of the new deadlines would be
20 enforceable unless the Corps secured Congressional appropriations for Corps implementation of the
21 RPA actions--thus indicating that the Corps would not have to implement any of the measures if it did
22 not secure such appropriations. NMFS provided no analysis in the letter of what the effect would be on
23 the Listed Species if the Corps never implemented the RPA actions in issue because it did not secure
24 Congressional appropriations. The NMFS letter further provided no analysis of why each extension of a
25 particular RPA action is necessary in light of practical considerations identified in the letter. For
26 example, the letter failed to identify which of the RPA actions would require National Environmental
27 Policy Act ("NEPA") review, whether a full environmental impact statement would be needed versus a
28 finding of no significant impact, and how long NEPA review would take to complete. Additionally, the

1 letter provided no analysis of how much the measures would cost and whether Congressional
 2 appropriations would be needed as the only way for the Corps to fund the RPA measures. Finally, the
 3 letter provided no explanation what it meant by “other implementation challenges” to the RPA actions.
 4 On information and belief, Plaintiffs allege that NMFS has undertaken no analysis and reached no
 5 reasoned conclusions supported by a record concerning whether NEPA review is required to implement
 6 the RPA and how long such review would take, how much it would cost to implement the RPA actions
 7 in issue, and what other implementation challenges may in fact exist to the RPA.

8 **The Corps’ Violations of RPA Measures and Terms and Conditions of the ITS**

9 **A. Violations of ESA Through Failure to Implement RPA Actions Requiring Fish 10 Passage at Englebright**

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

- 15 • NTFP 1: Formation of Yuba Interagency Fish Passage Committees: This requires the Corps
 16 by December 2012, to establish, chair, and staff the Yuba Interagency Fish Passage Steering
 Committee.
- 17 • NTFP 2: Evaluation of Salmonid Spawning and Rearing Habitat Upstream of Dams: This
 18 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
 19 the upstream forks of the Yuba river and their tributaries (to be completed by January 2013).
- 20 • 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
 21 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.
- 22 • 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
 23 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.
- 24 • 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
 25 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.
- 26 • 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
 27 downstream juvenile release sites by March 1, 2014.

- 1 • 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
2 measure requires the Corps to implement upstream fish passage for adults via trap and
3 transport facilities while the Corps analyzes volitional fish passage opportunities.
- 4 • NTFP 4.4: Interim Downstream Fish Passage through Reservoirs and Dams: Beginning in
5 2015, the Corps must carry out interim measures to pass downstream migrants around
6 reservoirs and dams.
- 7 • NTFP 4.5: Juvenile Fish Collection Prototype: By the end of 2013, the Corps must identify a
8 preferred location and design for construction for a prototype head-of-reservoir juvenile
9 collection facility upstream of either New Bullards Bar Dam and/or Englebright. The Corps
10 must plan, design, build, and evaluate a prototype with construction to be complete by
11 September 2014. The Corps must issue a draft report, with a final report due by December
12 31, 2016.
- 13 • NTFP 4.6: Pilot Program Effectiveness Monitoring and Evaluation: From 2014-2017, the
14 Corps must study and provide annual reports on the effectiveness of elements of the pilot
15 program and determine the feasibility of long-term passage alternatives, with a final
16 summary report due by February 15, 2017.

17 BiOp at 220-29. In addition, the LTFP actions are:

- 18 • LTFP 1: Long-term Funding and Support to the Interagency Fish Passage Steering
19 Committee and Technical Committee: This requires the Corps to continue to convene, fund,
20 and staff the Fish Passage Steering Committee and Fish Passage Technical Committee if the
21 Comprehensive Fish Passage Report indicates that long-term fish passage is feasible and
22 desirable.
- 23 • LTFP 2: Long-term Fish Passage Plan and Program: This requires the Corps to develop and
24 submit to NMFS a Long-term Fish Passage Plan by December 31, 2017, and to implement a
25 Long-term Fish Passage Program by January 31, 2020.
- 26 • LTFP 2.1: Long-term Adult and Juvenile Fish Passage Facilities: This requires the Corps to
27 construct long-term fish passage facilities necessary for upstream and downstream migration
28 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.

95. In issuing these RPA actions, 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

1 dams. *Id.* NMFS concluded: “Based on the existing economic analyses, the Corps should be able to
2 develop an economical and feasible solution to address fish passage at Englebright Dam and Daguerre
3 Point Dam.” *Id.* at 249. Yet fish passage has not occurred on the Yuba River, as on the other rivers, for
4 one primary reason: “Based on actions since the 2007 biological opinion, the Corps appears to be
5 reluctant to pursue funding to address environmental issues on the Yuba River.” *Id.* at 248.

6 96. Despite the necessity and feasibility of implementing these fish passage RPA measures,
7 the Corps is once again failing to take the actions needed to comply. In fact, this time, the Corps is not
8 only dragging its feet, but it is actively making public statements in which it expressly refuses to
9 comply. In statements made to the press after the release of the BiOp, Randy Olsen, Chief of Operations
10 and Readiness in the Corps’ Sacramento District office, said: “Fish passage is not in our authorization at
11 Englebright. It’s not part of the project purposes. It’s not something we’re going to be able to just do.”
12 *See* Army Corps ordered to move fish above Yuba River dams, *The Sacramento Bee* (Mar. 1, 2012),
13 *available at* <http://www.sacbee.com/2012/03/01/4304043/army-corps-ordered-to-move-fish.html>. The
14 Corps repeated these statements on the Corps’ website announcing the BiOp. The Corps’ website notes
15 that the BiOp “requires actions that are outside of the Corps’ authority.” *See*
16 <http://sacramentodistrict.armylive.dodlive.mil/tag/yuba-river/> (last visited Nov. 12, 2012). The website
17 also provides a Fact Sheet that makes similar statements: “Under federal law, measures required by
18 jeopardy opinions must be ‘reasonable and prudent,’ meaning they ‘can be implemented consistent with
19 the scope of the action agency’s legal authority and jurisdiction (50 CFR §402.02).’ Neither dam
20 removal nor fish passage at Englebright is currently authorized by Congress.”

21 97. In addition, a July 3, 2012 letter from the Corps to NMFS (“Corps letter,” *available at*
22 www.spk.usace.army.mil) states that the Corps does not have authority to evaluate fish passage
23 upstream of New Bullards Bar, Log Cabin and Our House Dams as required by RPA 1, the Yuba River
24 Fish Passage Improvement Strategy and Plan. *See* Corps letter at 15. Further, the Corps states that it will
25 not meet the deadline to develop and implement the Plan. *Id.* at 16.

26 98. Because the Corps is once again failing to take the actions necessary to comply with the
27 fish passage RPA measures at Englebright, and in fact is unequivocally stating its refusal to comply with
28

1 these measures, the Corps is in violation of ESA section 9 and the substantive duties of ESA section
2 7(a)(1) and 7(a)(2).

3 **B. Violations of ESA through Failure to Implement RPA Actions Requiring Fish**
4 **Passage at Daguerre**

5 99. In order to avoid jeopardizing the survival and recovery of the Listed Species, and to
6 avoid destruction or adverse modification of their critical habitat, the BiOp requires the Corps to
7 implement a RPA action in the form of a Daguerre Point Dam Fish Passage improvement project.
8 Specifically, the BiOp requires the following RPA action related to fish passage at Daguerre:

- 9
- 10 • NTFP 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.
 - 11 • NTFP 6: Daguerre Point Dam Fish Passage Improvement: This measure requires the
12 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
13 preliminary step, the Corps must commence implementation of the preferred fish passage
alternative developed through the feasibility and PED process by November 2017, and
14 implement an operation and maintenance plan for the new fish passage system by July
2018.

15 BiOp at 229-30.

16 100. The BiOp also requires various measures related to fish passage at Daguerre as part of
17 Term and Condition 2 of the ITS. *Id.* at 262-63.

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

24 102. However, the Corps did not comply with the November 21, 2012 deadline. Despite
25 having this requirement for the last five years, the Corps today has not even begun to implement the
26 feasibility and PED phases of the fish passage improvement project at Daguerre. *See* Corps letter at 16.
27 The Corps has not even complied with the commitment it made in the BA to complete the Daguerre
28

1 Point Dam Fish Passage Reconnaissance Study (the first step of the feasibility study) by November 21,
2 2012.

3 103. Moreover, the Corps has repeatedly stated its position that it cannot begin to implement
4 this action without a specific appropriation from Congress. *See, e.g.*, BA at 3-43 and Corps letter at 16.
5 Yet the Corps has repeatedly failed to obtain any such appropriation. In filings made during the *SYRCL*
6 *v. NMFS* litigation, Randy Olsen, Chief of Operations and Readiness in the Corps' Sacramento District
7 office, testified under oath in the form of a declaration that the earliest the Corps could have obtained
8 such an appropriation was October 2012. *See* Declaration of Randy Olsen ¶ 3 (Case No. 2:06-cv-2845-
9 LKK-JFM, ECF No. 321-3) (Aug. 6, 2010). The Corps' BA confirms that no funding was received for
10 implementation in the 2012 budget. BA at 3-43. Since it will take several years to complete the
11 feasibility and PED phases of a Daguerre fish passage improvement study, the Corps's failure to secure
12 funding, and the Corps' stated unwillingness to proceed without funding, shows that the Corps will not
13 comply with the November 2017 deadline for implementing the preferred fish passage alternative or the
14 July 2018 deadline to implement an operations and maintenance plan for the fish passage system.

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

18 **C. Violations of ESA through Failure to Implement RPA Actions Requiring Gravel
19 Augmentation and River Channeling Measures Below Englebright**

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

1 106. In June 2012, in response to RPA action 4, the Corps resubmitted the GAIP (which was
2 first provided to NMFS in 2010). See *Lower Yuba River Gravel Augmentation Project, Supplemental*
3 *Environmental Assessment, June 2012*, available at www.spk.usace.army.mil. Despite the requirements
4 in RPA action 4, the Corps reiterated that it would only perform the actions in the GAIP. However,
5 implementation of the GAIP alone will not comply with the RPA because the GAIP does not call for
6 annual gravel augmentations of 15,000 tons. As noted in the BiOp: “This area has a deficit of 63,000 to
7 101,000 tons of spawning gravel (Pasternack 2010a). Gravel augmentation under the proposed action
8 has provided a small incremental improvement above the baseline conditions that Englebright Dam is
9 designed to maintain.” BiOp at 177. This statement recognizes that the GAIP alone will provide only a
10 small incremental addition of gravel, which is insufficient to comply with RPA action 4, which, as noted
11 above, requires placement of gravel until the gravel deficit in the Englebright Dam reach is eliminated.
12 NMFS also recognizes the transient nature of the GAIP actions:

13 The gravel augmentation plan that is being implemented as a conservation action
14 under the proposed action is likely to temporarily increase spawning habitat for
15 spring-run Chinook salmon and Central Valley steelhead. The gravel
16 augmentation is likely to support approximately 23 to 37 redds between
17 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.

18 *Id.* at 191-92.

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

1 108. For these reasons, the Corps has failed, and will continue to fail, to comply with RPA
2 actions 4 and 5 by failing to implement the required gravel additions and channel restoration. This
3 constitutes a violation of ESA section 9 and ESA sections 7(a)(1) and 7(a)(2).

4 **D. Violations of ESA through Failure to Implement RPA Actions and Terms and**
5 **Conditions Requiring Implementation of a Predator Control Plan and Term and**
6 **Condition 1 Requiring Implementation of Measures to Secure a New Fish Screen at**
7 **the Brophy Diversion**

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

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

25 111. In response to concerns over this biological opinion, South Yuba, Brophy, and Wheatland
26 water districts, as well as Dry Creek Mutual Water Company (collectively the “South County
27 Diverters”) wrote a letter to NMFS on February 8, 2012, stating clearly that they cannot afford to
28 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

1 property and outside the Corps' authority. As stated in the BiOp: "Dissent from the South County
2 Diverters may result in the June 2018 construction date on South Yuba/Brophy Diversion fish screen to
3 be delayed." BiOp at 187. The Corps has to-date failed to issue a new easement for the Brophy Diverson
4 that requires completion of a new fish screen at the Brophy Diversion by the end of June 2018 or
5 predator control measures. The Corps has further failed to issue a permit for the Hallwood-Cordua
6 Diversion that includes requirements for monitoring flows, fish survival through the diversion fish
7 screens and fish return pipe, and for predation in the diversion and immediately downstream of the
8 return pipe. The Corps did not provide a predator reduction and monitoring plan to NMFS for approval
9 by September 1, 2012, and failed to implement the required plan by November 1, 2012. Therefore, the
10 Corps is not complying with and will not in the future comply with the measures called for in RPA
11 action 6 and Term and Condition 1. The Corps is therefore in violation of ESA section 9 and ESA
12 sections 7(a)(1) and 7(a)(2).

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

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

26 113. Term and Condition 2 of the ITS also includes specific requirements for maintaining the
27 fish ladders at Daguerre. These include the requirement to conduct weekly surface and subsurface
28 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

1 that flow levels are adequate for fish passage. The Corps must also inspect the fish ladder gates at the
2 exits to the fish ladders weekly to ensure no third parties close them.

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

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

16 BiOp at 170 (emphasis added).

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

116. Term and Condition 3 of the 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," available at www.spk.usace.army.mil) submitted to NMFS in August 2012 in response to the 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.

117. Thus, the LWMMP does not satisfy the requirements of 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 requires 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 ITS. Further, the LWMMP solidifies the position the Corps' took in its October 2011 Biological Assessment that the agency did not agree that it should face an annual wood placement requirement.

118. 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

1 planted annually upstream of the Highway 20 crossing; and (3) makes plans for monitoring the planting
2 success.

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

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

12 BiOp at 188 (emphasis added).

13 120. Thus, the paltry sum of riparian planting and the lack of a plan to monitor and ensure the
14 long-term success of the program demonstrate that the Corps' conservation measures in the proposed
15 action are not presently in compliance and will not in the future be in compliance with Term and
16 Condition 3's riparian re-vegetation requirements. As noted in the BiOp, "[t]he conservation value of
17 rearing habitat for both spring-run Chinook salmon and Central Valley steelhead is negatively affected
18 as a result of the proposed action." *Id.* at 193. The Corps is therefore in violation of ESA section 9 and
19 its substantive ESA section 7(a)(1) and 7(a)(2) duties.

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

22 121. Term and Condition 4 of the ITS requires the Corps to take "immediate corrective action
23 to address potential biological concerns associated with Waterway 13 by August 15, 2012." *Id.* at 266.
24 The Corps failed to meet this deadline. The BiOp notes that Waterway 13 is an outlet channel from the
25 Yuba Goldfields that serves to drain the area to support mining and aggregate operations on the land. A
26 barrier is supposed to be in place to ensure that migrating salmonids do not migrate up Waterway 13 into
27 a dead end in the Yuba Goldfields where no adequate spawning or rearing habitat exists. However, the
28 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

1 BiOp notes: “If only a single green sturgeon entered Waterway 13 and experienced migration delay,
2 stranding, or thermal stress, that would constitute a significant impact on the Yuba River population.”
3 *Id.* at 174.

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

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

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

25 **The Corps is Perpetrating Unlawful “Take”**

26 124. The Corps is perpetrating “take” of the Listed Species in the manner described above
27 with respect to impacts of the Project. By perpetrating “take” without complying with the RPA and ITS
28 provisions, the Corps is in violation of ESA section 9 and ESA section 7(a)(1) and 7(a)(2).

1 In the BiOp, NMFS explained why the dire condition of the Listed Species and the jeopardy to the
2 species' existence and the adverse modification to the species' critical habitat being caused by the
3 Project required the RPA actions and the deadlines for implementation of the RPA actions. By contrast,
4 the November 2012 letter provides no conclusion that the new deadlines for the RPA actions set by the
5 letter are consistent with avoiding jeopardy to the Listed Species or adverse modification to their critical
6 habitat, much less any explanation as to why this would be so. The modification to the BiOp effectuated
7 by the letter is thus arbitrary and capricious and contrary to law in setting RPA actions that NMFS itself
8 has not found are consistent with avoiding jeopardy to the Listed Species or adverse modification to the
9 species' critical habitat--much less provided any reasoned explanation or record support for such a
10 conclusion.

11 129. In issuing extensions of the BiOp's RPA deadlines, NMFS indicated in its November
12 2012 letter that its sole rationale was that the existing RPA deadlines "cannot be met for practical
13 reasons." The letter contained no explanation or analysis of how moving the RPA deadlines would
14 impact the Listed Species and on information and belief, Plaintiffs allege that NMFS has undertaken no
15 such analysis and reached no conclusions concerning the impacts of the extensions on the Listed
16 Species. It is contrary to the dictates of ESA section 7 and thus contrary to law for NMFS to set RPA
17 requirements solely for practical reasons without any consideration of the impact of the RPA
18 requirements on the Listed Species that are the subject of a biological opinion. In its letter, NMFS
19 indicated that it had decided that none of the new deadlines would be enforceable unless the Corps
20 secured Congressional appropriations for Corps implementation of the RPA actions--thus indicating that
21 the Corps would not have to implement any of the measures if it did not secure such appropriation.
22 NMFS has done no analysis of what the effect on the Listed Species is of this open-ended modification--
23 thus making adoption of this modification arbitrary and capricious. It is further contrary to the dictates
24 of ESA section 7 and thus contrary to law for NMFS to provide that measures needed to avoid jeopardy
25 to species need never be implemented if the funding to implement the measures is not readily available--
26 this is the equivalent of saying that a federal agency may allow its conduct to cause the extinction of a
27 species if it does not secure the Congressional appropriation needed to alter its conduct in a way to avoid
28 this outcome. Finally, as alleged above, the NMFS letter further provided no analysis of why each

1 extension of a particular RPA action is necessary in light of the practical considerations identified in the
2 letter and on information and belief, Plaintiffs allege that NMFS has undertaken no such analysis -- a
3 further reason why the decision reflected in the letter is arbitrary and capricious.

4 130. For all of the above reasons, NMFS has violated the ESA and has acted in a manner that
5 is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5
6 U.S.C. § 706(2), in issuing the November 2012 letter extending various deadlines for the RPA actions in
7 the BiOp.

8 **SECOND CLAIM FOR RELIEF**

9 Violation of the ESA
10 16 U.S.C. § 1538(a)(1)(B)

11 **Request for Declaratory Relief and Injunction to Enjoin the Corps**
12 **from Taking ESA Listed Species**

13 131. Plaintiffs reassert and reallege paragraphs 1 through 130 above.

14 132. ESA section 9(a)(1)(B) and 50 C.F.R. section 223.203(a) prohibit any person from taking
15 anadromous fish listed as threatened under the ESA, including spring Chinook, steelhead, and green
16 sturgeon.

17 133. The Corps, in operating and maintaining the Project, has failed to comply with the
18 BiOp's RPA measures designed to ensure the Project is not causing jeopardy to the Listed Species and
19 adversely modifying their critical habitat. In addition, the Corps has failed to comply with ITS Terms
20 and Conditions necessary to ensure that no more than incidental levels of take are occurring. Therefore,
21 the Corps has lost immunity from ESA section 9(a)(1)(B) for the "take" of the Listed Species.

22 134. As discussed above, the Corps' Project is taking species listed as threatened under the
23 ESA; the Corps is harassing, wounding, killing, trapping, capturing, and most certainly harming the
24 species, both by actually killing and/or injuring individual species and by causing significant habitat
25 modification or degradation that impairs behavioral patterns, including spawning, rearing, migrating,
26 feeding, and sheltering. Because the Corps has lost immunity for ESA liability for this "take," the Corps
27 is liable for this taking under ESA section 9(a)(1)(B).
28

1 **THIRD CLAIM FOR RELIEF**

2 Violation of the ESA
3 16 U.S.C. § 1536(a)(1)

4 **Request for Declaratory Relief and Injunction to Enjoin the Corps**
5 **from Violating the ESA**

6 135. Plaintiffs reassert and reallege paragraphs 1 through 134 above.

7 136. Under ESA section 7(a)(1), the Corps is required to use its authorities in furtherance of
8 the purposes of the ESA by carrying out programs for the conservation of endangered species and
9 threatened species. 16 U.S.C. § 1536(a)(1).

10 137. The Corps, in operating and maintaining the Project, has failed to use its authorities to
11 carry out programs for the conservation of the Listed Species. The BiOp's RPA measures and the Terms
12 and Conditions of the ITS are examples of the types of programmatic actions that the Corps should be
13 taking to comply with ESA section 7(a)(1). The Corps, however, is not implementing the RPA measures
14 nor the Terms and Conditions of the ITS nor otherwise implementing measures that are effectively
15 conserving the Listed Species. Therefore, the Corps has violated its substantive ESA section 7(a)(1) duty
16 to use its authorities in furtherance of the conservation purposes of the ESA.

17 **FOURTH CLAIM FOR RELIEF**

18 Violation of the ESA
19 16 U.S.C. § 1536(a)(2)

20 **Request for Declaratory Relief and Injunction to Enjoin the Corps**
21 **from Violating the ESA**

22 138. Plaintiffs reassert and reallege paragraphs 1 through 137 above.

23 139. Under ESA section 7(a)(2), the Corps has a substantive duty to "insure" that actions
24 authorized, funded, or carried out by the Corps do not cause jeopardy to the Listed Species or cause
25 destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).

26 140. The Corps, in operating and maintaining the Project, has failed to ensure that actions
27 authorized, funded, are carried out by the Corps do not cause jeopardy to the Listed Species or
28 destruction or adverse modification of their critical habitat. The BiOp's RPA measures and the ITS
Terms and Conditions are examples of actions that the Corps needs to implement to avoid causing
jeopardy to the Listed Species or destroying or adversely modifying their critical habitat. The Corps,

1 however, has not implemented the RPA measures nor the ITS Terms and Conditions nor otherwise
2 implemented actions that are avoiding causing jeopardy to the Listed Species and avoiding destroying or
3 adversely modifying their critical habitat. Therefore, the Corps has violated its substantive ESA section
4 7(a)(2) duty to insure that its actions do not result in jeopardy to a threatened species or adverse
5 modification of critical habitat.

6 **REMEDY**

7 141. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course of law,
8 other than the relief sought in this Complaint, because there is no other mechanism for compelling
9 NMFS and the Corps to take the action necessary under the APA and the ESA.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs seek the following relief:

12 1. An injunction pursuant to 5 U.S.C. sections 706(1) and (2) ordering NMFS to withdraw
13 and rescind its November 27, 2012 letter and thus to reinstate the former deadlines for the RPA actions
14 in issue in the BiOp.

15 2. A declaratory judgment establishing that NMFS acted arbitrarily capriciously and
16 otherwise contrary to law in issuing its November 27, 2012 letter extending various deadlines for the
17 RPA actions in the BiOp.

18 3. A declaratory judgment establishing that the Corps is in violation of ESA section 9 by
19 perpetrating “take” without complying with the RPA measures and Terms and Conditions of the ITS.

20 4. A declaratory judgment establishing that the Corps is in violation of ESA section 7(a)(1)
21 by failing to implement measures that are effective for securing the conservation of the Listed Species.

22 5. A declaratory judgment establishing that the Corps is in violation of ESA section 7(a)(2)
23 by failing to implement measures that are effective for avoiding jeopardy to the Listed Species and for
24 avoiding destroying or adversely modifying the Listed Species’ critical habitat.

25 6. An award of attorneys’ fees and costs to Plaintiffs.

26 7. Such other and further relief as this Court deems just and proper.

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Respectfully Submitted,

Dated: January 28, 2013

By: *Christopher a. sproul*

Christopher Sproul
Environmental Advocates
Attorney for Plaintiffs