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14 SOUTH YUBA RIVER CITIZENS LEAGUE

15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA

17 SOUTH YUBA RIVER CITIZENS LEAGUE, a
non-profit corporation,

18 Plaintiff,

19 v.
20

21 NATIONAL MARINE FISHERIES SERVICE,
U.S. DEPARTMENT OF COMMERCE,
22 REBECCA M. BLANK, as Acting Secretary of
Commerce, RODNEY MCINNIS, as Regional
23 Administrator of the National Marine Fisheries
Service Southwest Region,
24

25 Defendants.
26

Civil Case No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

**(Administrative Procedure Act, 5 U.S.C.
§§ 701 *et seq.*)**

27 South Yuba River Citizens League (“SYRCL”) alleges as follows:
28

1
2 **INTRODUCTION**

3 1. SYRCL bring this action under the Administrative Procedure Act (“APA”) provisions
4 that permit aggrieved parties to seek judicial review of federal agency actions, 5 U.S.C. sections 702 and
5 706. SYRCL seeks relief from conduct by Defendants United States Department of Commerce, National
6 Marine Fisheries Service, Acting Secretary of Commerce Rebecca M. Blank, and Regional
7 Administrator Rodney McInnis, (collectively “NMFS”) that is arbitrary, capricious and otherwise
8 contrary to the legal requirements of the APA. Specifically, SYRCL challenges NMFS’s issuance of
9 extensions to the deadlines for several measures for protecting certain anadromous fish required in the
10 Biological Opinion (“BiOp”) issued by NMFS on February 29, 2012 for the Army Corps of Engineers'
11 ("Corps') Project on the Yuba River (File number 151422SWR2006SA00071). NMFS issued extensions
12 to several of the deadlines for measures known as Reasonable and Prudent Alternatives ("RPAs") in the
13 BiOp in a letter to Colonel William J Leady, Commander, U.S. Army Corps Of Engineers , Sacramento
14 District dated November 27, 2012 (File Number 2012/9298). The anadromous fish in issue are listed as
15 threatened under the Endangered Species Act ("ESA").

16 **JURISDICTION**

17 2. This Court has subject matter jurisdiction over the APA claims set forth in this Complaint
18 pursuant to 28 U.S.C. section 1331 (an action for declaratory, injunctive and other relief arising under
19 the Constitution and laws of the United States) because this case involves a civil action arising under the
20 laws of the United States, specifically 5 U.S.C. section 702, which authorizes any person aggrieved by
21 an agency action under a relevant statute to seek judicial review, and 5 U.S.C. section 706, which
22 authorizes a reviewing court to compel an agency to take an action that has been unlawfully withheld or
23 unreasonably delayed, and to set aside agency actions that are found to be arbitrary, capricious, an abuse
24 of discretion, or otherwise not in accordance with the law

25 3. SYRCL and its members are aggrieved by NMFS’s unlawful issuance of extensions to
26 numerous deadlines in the BiOp. SYRCL and its members visit the Yuba River for wildlife viewing,
27 scientific observation, educational study, aesthetic enjoyment, spiritual contemplation, and recreation,
28 including rafting, kayaking, and fishing. NMFS’s unlawful extension of deadlines in the BiOp has

1 caused and will in the future continue to cause an impairment of the state of the ecosystem of the Yuba
2 River and the fisheries therein, and as a result, SYRCL’s use of the area is impaired and diminished.
3 Extension of these BiOp deadlines will lead to the Corps taking a greater number of species protected by
4 the ESA: Central Valley spring-run chinook salmon (“spring Chinook”), Central Valley steelhead
5 (“steelhead”), and the southern distinct population segment of green sturgeon (“green sturgeon”)
6 (collectively “the Listed Species”). As a result, SYRCL’s members' enjoyment of those species has been
7 and is being impaired and diminished.

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

12 **VENUE**

13 5. Venue in the United States District for the Eastern District of California is proper under
14 28 U.S.C. section 1391(e) because the property that is the subject of the action is located within the
15 Eastern District of California. In addition, the NMFS office overseeing the Yuba River is located in the
16 City and County of Sacramento.

17 **INTRADISTRICT ASSIGNMENT**

18 6. Intradistrict assignment of this matter to the Sacramento Division of the Court is
19 appropriate pursuant to Civil Local Rule 3-120(d) in that the events or omissions which give rise to
20 SYRCL’s claims occurred and are occurring in Nevada and Yuba Counties. In addition, the NMFS
21 office directly overseeing the action is located in Sacramento County. Plaintiff SYRCL’s main office is
22 located in Nevada County.

23 **THE PARTIES**

24 7. The South Yuba River Citizens League is a community-based educational non-profit
25 corporation, established in 1983, and is located in Nevada City, California. SYRCL is committed to the
26 protection and restoration of the entire Yuba watershed. SYRCL works to fulfill its mission through
27 education, organization, collaboration, litigation and legislation. Since its founding in 1983, SYRCL has
28 become one of California's largest and most effective organizations focused on a single-watershed.

1 SYRCL has more than 3,500 supporters, including hundreds of local businesses, and works with nearly
2 1000 active volunteers in hosting community events, including river clean-ups, restoration projects,
3 salmon tours, and educational forums. SYRCL has initiated numerous highly successful collaborations
4 with businesses, property owners, and local, state and federal agencies in efforts to restore the Yuba
5 watershed. SYRCL has been involved for many years with efforts to improve ecosystem conditions on
6 the Yuba River. SYRCL's members use the Yuba River for water contact recreation, wildlife
7 observation and study, aesthetic enjoyment, commercial enterprise such as paid rafting trips, and
8 spiritual renewal. SYRCL's members particularly enjoy as a recreational, educational, and/or spiritual
9 pursuit observing the migration of anadromous fish in the Yuba River, including salmon, steelhead and
10 green sturgeon.

11 8. As a result of the acts and omissions of Defendants alleged herein, SYRCL's members
12 have suffered and will continue to suffer injuries to their aesthetic, environmental, educational, spiritual,
13 and economic interests in enjoying and using the Yuba River and its tributaries.

14 9. Defendant National Marine Fisheries Service, part of the National Oceanic and
15 Atmospheric Administration, a division of the Department of Commerce, is the agency of the United
16 States Government responsible for administering and implementing the ESA for anadromous fisheries
17 and generally is responsible for the stewardship of the nation's living marine resources and their habitat.

18 10. Defendant Rebecca M. Blank, Acting Secretary of Commerce, is the Secretary within the
19 meaning of 16 U.S.C. sections 1540(g)(1)(C) and 1532(15) and is sued in her official capacity only. If
20 ordered by the court, Ms. Blank has the authority and ability to remedy the harm inflicted by
21 Defendants' actions.

22 11. Defendant Rodney McInnis, Regional Administrator of NMFS Southwest Region has
23 been delegated certain authority granted to the Secretary under the ESA, with responsibility for
24 consultation for anadromous fish within the Southwest Region under 16 U.S.C. sections 1540(g)(1)(C)
25 and 1532(13), and is sued in his official capacity only. If ordered by the court, Mr. McInnis has the
26 authority and ability to remedy the harm inflicted by Defendants' actions.
27
28

1 **STATUTORY BACKGROUND**

2 **Endangered Species Act**

3 12. The ESA was enacted to provide a means to conserve threatened and endangered species
4 and to conserve the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). The ESA calls
5 for all Federal agencies to use their authority to seek to conserve threatened and endangered species. 16
6 U.S.C. § 1531(c). In addition, the ESA prohibits take of endangered and certain threatened¹ species
7 listed under the ESA. 16 U.S.C. § 1538(a)(1). Take of a listed species means, *inter alia*, to harass, harm,
8 kill, trap or capture the species. 16 U.S.C. § 1532(19). An actor can take a listed species within the
9 meaning of the ESA by killing or injuring an individual member of the species, or by engaging in an act
10 that causes significant habitat modification or degradation which kills or injures fish or wildlife by
11 significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating,
12 feeding or sheltering. 50 C.F.R. § 222.102.

13 13. To accomplish these goals, the ESA requires that each Federal agency (“action agency”)
14 insure that any action authorized, funded, or carried out by such agency does not jeopardize the
15 continued existence of a threatened or endangered species or result in the destruction or adverse
16 modification of habitat that the Secretary has determined to be critical for such species. 16 U.S.C. §
17 1536(a)(2). In furtherance of that goal, the ESA requires that each Federal agency shall consult with the
18 National Marine Fisheries Service (“consulting agency”) for marine and anadromous species on any
19 action which is likely to result in jeopardy or destruction or adverse modification of critical habitat,
20 using the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b);
21 50 C.F.R. § 223. To this end, the action agency may provide the consulting agency with a Biological
22 Assessment outlining the action and the effects of that action on the species. 16 U.S.C. § 1536(c); 50
23 C.F.R. § 402.12.

24 _____
25 ¹ 16 U.S.C. section 1538 explicitly prohibits take of species listed as endangered; however, NMFS may
26 extend this prohibition to species listed as threatened. NMFS is required to issue protective regulations
27 for all species listed as threatened, and these regulations may prohibit take of threatened species. 16
28 U.S.C. § 1533(d). NMFS has issued regulations that prohibit take under 16 U.S.C. section 1538(a)(1) of
all anadromous fish with an intact adipose fin that are listed as threatened. 50 C.F.R. § 223.203.

1 14. After consultation has ended, the consulting agency shall provide the action agency with
2 a written statement, known as a biological opinion, which must set forth the consulting agency's
3 opinion, and the information upon which that opinion is based, and detail how the action will affect the
4 species or its critical habitat. 16 U.S.C. § 1536(b)(3)(A). In arriving at its biological opinion, the
5 consulting agency, using the best scientific and commercial data available, must review all relevant
6 information provided by the action agency, evaluate the current status of the species, evaluate the effects
7 of the action and the cumulative effects on the species or critical habitat, and formulate its opinion as to
8 whether the action, taken together with cumulative effects will jeopardize the continued existence of the
9 species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g)(1-4, 8).

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

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

24 17. As long as the action agency complies with the terms of the ITS, the prohibition against
25 take in ESA section 9 will not apply. 16 U.S.C. § 1536(o)(2). However, if an agency does not comply
26 with the ITS and its actions result in take of a listed species, or if its actions result in take not provided
27 for in the ITS, the agency is in violation of ESA section 9. 16 U.S.C. §§ 1536(o)(2), 1538(a)(1).

1 Furthermore, if an agency does not abide by the terms of the ITS, both the consulting and action
2 agencies have a responsibility to reinitiate consultation. 50 C.F.R. § 402.16.

3 **FACTUAL BACKGROUND**

4 18. California’s anadromous fisheries are in grim condition. Despite the enactment of the
5 ESA over thirty years ago, Pacific salmon and steelhead, once present in seemingly endless numbers, are
6 now counted in the hundreds. Habitat loss is largely responsible for the decline; of the original 6,000
7 miles of salmon habitat in the Central Valley, at least eighty percent has been lost. Impassable dams at
8 low elevations have restricted access to most historical spawning and rearing habitat, and the remaining
9 accessible habitat is degraded and inferior in quality to that lost.

10 19. The Corps’ activities on the Yuba River affect three species listed as threatened under the
11 ESA: spring Chinook, steelhead, and green sturgeon. Designated critical habitat for spring Chinook,
12 steelhead, and green sturgeon includes the lower Yuba River. Critical habitat for spring Chinook and
13 steelhead may eventually include stretches upstream above Englebright Dam.

14 20. The Yuba River flows from the Sierra Nevada through Sierra, Nevada, and Yuba
15 counties until it meets the Feather River at Marysville, California. The Yuba River system once
16 supported healthy runs of spring Chinook and steelhead. Even after the environmental devastation of
17 rivers during the California gold rush, spring Chinook runs in the Central Valley as a whole were as
18 large as 600,000 fish between the late 1880s and the 1940s, and steelhead runs reached 40,000 fish in
19 the early 1960s. Spring Chinook salmon and steelhead inhabited all three forks of the Yuba River before
20 the construction of Englebright, Bullards Bar and later New Bullards Bar Dams, which serve as
21 impassable barriers to all fish. Spring Chinook once migrated at least as far upstream as Washington on
22 the South Yuba, to the lower portions of the Middle Yuba, and as far upstream as Downieville on the
23 North Yuba. Before the construction of Englebright, steelhead also spawned in the uppermost reaches of
24 the Yuba and its tributaries. The lower Yuba River (below Englebright Dam, discussed below) provides
25 suitable, but not optimal, spawning and rearing habitat for juvenile spring Chinook salmon and for adult
26 and juvenile Central Valley steelhead.

27 21. The Corps operates and maintains two dams on the Yuba River, Daguerre Point and
28 Englebright Dams. Daguerre Point Dam (“Daguerre”) is located approximately 11.4 miles upstream of

1 the confluence of the Yuba and Feather Rivers, in Yuba County, California. Englebright Dam
2 (“Englebright”) is twelve miles upstream of Daguerre, in Yuba and Nevada Counties. Congress
3 authorized both dams as part of the Yuba River Debris Control Project. Daguerre was authorized in the
4 Rivers and Harbor Act of June 13, 1902. In 1986, Congress eliminated the California Debris
5 Commission, and transferred the Debris Commission’s powers, duties, lands and other interests,
6 including Daguerre to the Secretary of the Army. Englebright was constructed in 1941.

7 22. Daguerre is an overflow concrete ogee spillway, 575 feet long and 25 feet high.
8 Daguerre’s purpose was to catch mining debris, preventing the debris from washing downstream into the
9 Feather and Sacramento Rivers. Daguerre does not provide flood control or hydroelectric power
10 generation. Daguerre, along with the mining debris stored behind it, was completely washed out during
11 floods in 1963 and 1964, but Daguerre was replaced in 1965. The basin behind Daguerre, which was
12 designed to collect debris, has completely silted in, and water and sediment now flow unimpeded over
13 Daguerre.

14 23. Crude fish ladders were added to Daguerre in 1911, but washed out in 1927-1928 and
15 were not replaced until 1938. The fish ladders were damaged several times in floods and the present fish
16 ladders were constructed in 1964. The fish ladders are inadequate at all flows. At low flows, they
17 provide insufficient attraction flows for salmonids; at high flows, they are ineffective and sometimes
18 closed altogether. Sediment and debris often clog the ladders, rendering them impassable. In addition,
19 the ladders’ design is poor compared to newer ladders being used: the ladders are narrow, water flow in
20 the ladders is unmeasured and uncontrolled leading to less than optimum passage conditions. Delays
21 caused when the ladders are closed or fish cannot find the ladders can result in stress, injury, depletion
22 of precious energy reserves and/or pre-spawning mortality. In addition, the pool below Daguerre
23 subjects the fish to the threat of human poachers. Even if the fish manage to make it up the ladders,
24 sediment buildup on the upstream side of the ladders may prevent them from reaching the river channel.
25 All of the obstacles to passage can result in injuries, stress, delays in spawning, and/or affect egg
26 viability. Alternatively, the fish may end up spawning downstream of Daguerre where reduced habitat
27 and warmer temperatures adversely affect the chances of success.

1 24. In addition to the problems Daguerre poses to adult salmon and steelhead migrating
2 upstream to spawn, Daguerre and its related water diversions affect juvenile salmon and steelhead
3 migrating downstream. One such diversion is the South Yuba-Brophy Diversion (“Brophy Diversion”),
4 which is owned and operated by Yuba County Water Agency ("YCWA"). The South Yuba Water
5 District (“SYWD”) built the Brophy Diversion in or around 1985. SYWD and Brophy Water District
6 (“BWD”) shared the cost of construction, and the diversion is used to deliver water to both of those
7 entities. On information and belief, SYRCL alleges that the Corps owns the land that the Brophy
8 Diversion is located upon and that the Corps has issued licenses and easements to YCWA authorizing
9 the operation of the Brophy Diversion. On information and belief, SYRCL further alleges that YCWA
10 owns and operates the Brophy Diversion itself.

11 25. The Brophy Diversion diverts water through a channel into an old dredger pond. The
12 pond is separated into two parts by a porous dike, or gabion weir, which is constructed of a wire-mesh
13 basket filled with rocks, with a fine mesh screen imbedded within the rocks. Water passes from the river
14 side of the weir to a pond on the diversion side of the weir. Water is then pumped from the pond on the
15 diversion side to a diversion canal. An agreement with California Department of Fish and Game
16 (“DFG”) requires that ten percent of the flow diverted from the river return to the river through a
17 channel at the south end of the pond on the river side of the weir. The channel rejoins the river just
18 upstream of Daguerre. Before the diversion was even constructed, NMFS expressed concerns about the
19 type of screen to be used, sweeping flows, impingement, injury, and predation. The interstitial spaces in
20 the rocks making up the weir are larger than those defined in the NMFS Fish Screening Criteria for
21 Anadromous Salmonids, a category which includes spring Chinook and steelhead. Spring Chinook and
22 steelhead juveniles now become entrained in the weir and a fine mesh fabric inside of the weir only adds
23 to the problem. Sweeping flows to prevent entrainment are often minimal or non-existent. In addition to
24 the issues posed by low flows along the weir, at high flows exceeding 20,000 cubic feet per second (cfs),
25 juvenile fish, including spring Chinook and steelhead, are swept over the weir into the diversion pool on
26 the other side of the weir, where the fish have no means of escape. Although the adverse effects of the
27 Brophy Diversion on spring Chinook and steelhead are exacerbated when the diversion pumps are
28 running, because there is no way to prevent water from entering the diversion channel, losses to those

1 fish due to predation and entrainment occur even when water is not being diverted for beneficial use.
2 DFG sampling has found juvenile spring Chinook and steelhead in the river virtually year-round making
3 the Brophy Diversion a constant source of injury to these fish species.

4 26. Daguerre itself can also injure and disorient juveniles as they plunge over the face of the
5 dam on their way downstream. The large pool at the base of Daguerre provides excellent habitat for
6 predators, and the juveniles are highly vulnerable to predation after their trip over the dam into the
7 turbulent waters below. This unnatural advantage Daguerre gives to the predators increases the level of
8 predation, thus decreasing the numbers of juveniles making it to the ocean.

9 27. Englebright is located twelve miles upstream of Daguerre. Completed in 1941,
10 Englebright, like Daguerre, was constructed to retain hydraulic mining debris from washing
11 downstream. Englebright is 260 feet high and stores 70,000 acre-feet of water. Englebright has no fish
12 ladders and is therefore a complete barrier to fish passage to the upper reaches of the Yuba River. The
13 upper reaches provide the highest quantity and quality of critical habitat to maintain self-sustaining
14 populations for adult spawning and rearing juvenile spring Chinook and steelhead. Spawning substrates
15 and flows in those reaches are more suitable than the main stem, and there is a greater amount of holding
16 water for spring Chinook than in the lower Yuba below Englebright. In addition to blocking upstream
17 passage of fish, Englebright also serves as a complete barrier to gravel or woody debris recruitment,
18 from the upstream reaches to the Yuba River's lower reaches that are accessible to the species, except in
19 extreme high flow conditions when the dam fills and spills.

20 28. Englebright offers very little flood control, and is not managed for flood control
21 purposes. Following construction of New Bullards Bar Reservoir ("Bullards Bar"), the burden of flood
22 control in the Yuba watershed shifted to the New Bullards Bar reservoir. Englebright reservoir provides
23 the head needed for the operation of two hydroelectric facilities. The Corps issued easements to Pacific
24 Gas and Electric (PG&E) and Yuba County Water Agency (YCWA) for the construction and operation
25 of two hydroelectric facilities, the Narrows 1 and Narrows 2 Powerhouses ("the Powerhouses"). The
26 majority of releases from Englebright are through the Powerhouses, although if the Englebright reservoir
27 is full, water spills over the dam. The Corps retains responsibility for maintenance of the Englebright
28

1 dam structure, while PG&E and YCWA administer water releases from Englebright and operation and
2 maintenance of the Powerhouses.

3 29. On March 8, 2000, the Corps initiated consultation with NMFS under the ESA
4 concerning the Corps' operation of Daguerre and Englebright and approval of operation of the South
5 Yuba-Brophy Diversion. The Corps issued its Biological Assessment ("BA") concerning these activities
6 ("the Project") pursuant to ESA section 7(c) with NMFS on July 29, 2000. The Corps amended its BA
7 about six months later to include measures intended to reduce the take of listed salmonids by alleviating
8 some of the adverse impacts associated with the Project, and asked that the BiOp be based upon that
9 additional information. In particular, the Corps stated that it planned to develop and implement a plan to
10 routinely clear debris from the two Daguerre fish ladders, that it planned to install a pressure/transducer
11 device at Daguerre to monitor debris, that it planned to develop and implement a plan to remove
12 sediment above Daguerre, and that it would work to improve conditions for juvenile salmonids at the
13 South Yuba-Brophy Diversion. Additionally, the Corps asserted that it would attempt to ameliorate the
14 effects of Englebright by working on a gravel injection program. The Corps also specifically stated that
15 one of the most important measures that the Corps would take is to assume a lead role in the ongoing
16 efforts for the restoration of salmonid populations on the Yuba River including the Upper Yuba River
17 Studies Program and the Yuba River Technical Working Group including acting as the lead Federal
18 agency in conducting environmental review pursuant to the National Environmental Policy Act of
19 improving fish passage at Daguerre.

20 30. NMFS issued a biological opinion for the Project, entitled "Operations of Englebright
21 Dam/Englebright Lake and Daguerre Point Dam on the Yuba River, California" to the Corps on March
22 27, 2002 ("2002 BiOp"). In that BiOp, NMFS reached a finding of no jeopardy for the Corps' actions
23 related to the Project. NMFS specifically limited that determination to a five-year time period.

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

26 32. In the 2002 BiOp, NMFS specified four reasonable and prudent measures that it believed
27 necessary and appropriate to minimize take of spring Chinook and steelhead. NMFS required the Corps:
28 (1) to seek to improve the effectiveness and reliability of the Daguerre fish ladders; (2) to implement

1 interim as well as long term improvements to the South Yuba-Brophy Diversion to reduce impacts of
2 that facility on juvenile salmonids; (3) to develop and implement a gravel injection program in key areas
3 on the Yuba River which have been deprived of adequate spawning gravels by the interruption of
4 recruitment of gravel by the construction and maintenance of Englebright; and (4) to provide an annual
5 report on the progress and effectiveness of the above measures. NMFS also included terms and
6 conditions to implement the reasonable and prudent measures. The terms and conditions required that
7 the Corps: (1) seek to improve the effectiveness and reliability of Daguerre fish ladders, by clearing
8 debris from the fish ladders, installing a remote pressure/transducer device to monitor the accumulation
9 of debris in the fish ladders, and by controlling sediment on the upstream side of Daguerre where the
10 fish ladders exit so that sediment build-up does not impede fish passage; (2) implement interim as well
11 as long term improvements to the South Yuba-Brophy Diversion to reduce impacts of that facility on
12 juvenile salmonids; and (3) develop and implement a gravel injection program in key areas on the Yuba
13 River which have been deprived of adequate spawning gravels by the interruption of recruitment of
14 gravel by the construction and maintenance of Englebright. The BiOp also mandated that the Corps
15 submit annual reports on the Corps' progress in implementing the BiOp's terms and conditions.

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

24 34. The Corps did not comply with the 2002 BiOp's reasonable and prudent measures or
25 attendant terms and conditions during the lifetime of the 2002 BiOp.

26 35. First, the Corps did not develop an implementation plan to clear debris from the Daguerre
27 fish ladders. The Corps did not submit any plan to NMFS by September 27, 2002, the Corps did not
28 implement such a plan by March 26, 2003, and the Corps did not added the plan to the requirements of

1 the Corps Operation and Maintenance Manual for Daguerre, as required by the 2002 BiOp. The Corps
2 did not install a remote pressure/transducer device by October 1, 2002 as required by the 2002 BiOp.
3 The Corps did not develop an implementation plan to routinely remove or otherwise manage sediments
4 on the upstream side of Daguerre. The Corps did not submit any sediment implementation plan to
5 NMFS by September 27, 2002, it did not implement such a plan by March 26, 2003, and it did not add
6 the plan to the requirements of the Corps Operation and Maintenance Manual for Daguerre, as required
7 by the 2002 BiOp.

8 36. Second, the Corps did not implement interim or long-term improvements to the South
9 Yuba-Brophy diversion to reduce impacts of that facility on juvenile salmonids.

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

14 38. Fourth, the annual reports on the Corps' compliance efforts submitted by the Corps did
15 not sufficiently detail the progress that was being made towards the implementation of the above listed
16 measures and the effectiveness of those measures, as required by the 2002 BiOp and 50 C.F.R. §
17 402.14(i)(3).

18 39. Spring Chinook and steelhead populations on the Yuba River have continued to decline
19 since NMFS issued the 2002 BiOp.

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

22 41. On April 27, 2007, NMFS issued another biological opinion for the "Operation of
23 Englebright and Daguerre Point Dams on the Yuba River, California, for a 1-year Period" ("April 2007
24 BiOp"). The April 2007 BiOp addressed only the impacts of the Project on spring Chinook and
25 steelhead, and did not address the impacts on green sturgeon. Although NMFS stated that the April 2007
26 BiOp did not include consultation for the green sturgeon, it provided no justification nor explanation for
27 failure to conduct or complete consultation on this species. The April 2007 BiOp concluded that the
28 Project will not jeopardize the continued existence of the spring Chinook and steelhead and that the

1 Project is not likely to destroy or adversely modify the critical habitat of those species for the one-year
2 period of the April 2007 BiOp.

3 42. In the April 2007 BiOp, NMFS generally described the Project as the continued operation
4 of Daguerre and Englebright as well as the issuance of any licenses or easements for water diversion
5 from the reach of the Yuba River between these dams. NMFS's description of the Project further
6 included six "conservation and restoration measures" that NMFS stated the Corps had committed to
7 incorporate as part of its Project operations: (1) to coordinate with other agencies to manage flows from
8 New Bullards Reservoir and Englebright Lake to enhance critical habitat and water temperature in the
9 lower Yuba River; (2) to coordinate with other agencies to develop a gravel implementation program;
10 (3) pending funding and approval, to coordinate with YCWA to construct a temperature control device
11 on the intake for Narrows II Powerhouse on Englebright; (4) to continue to implement its plan of
12 routinely clearing debris from the Daguerre fish ladders; (5) to continue to implement its plan to
13 routinely remove the sediment that occasionally blocks the north Daguerre fish ladder exit; and (6) to
14 coordinate with other agencies to investigate, design, and implement an economical plan to improve
15 conditions for juvenile spring Chinook and steelhead at the Brophy Diversion.

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

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

27 45. The April 2007 BiOp included an Incidental Take Statement ("April 2007 ITS") for the
28 Corps' Project. The April 2007 ITS set three ecological surrogates as a measure of allowable take for the

1 one-year period of the April 2007 BiOp, which included flow releases from Englebright, the availability
2 of spawning gravel below Englebright, and the maintenance of clear passage through the ladders on
3 Daguerre. The April 2007 ITS did not set any quantitative measure of these requirements, stating that
4 the analysis of effects anticipates that the operation of a full-flow bypass around the Powerhouses will
5 prevent large flow fluctuations in the lower Yuba River, that a gravel injection program will be
6 implemented in 2007, which will inject at least 500 tons of gravel, and finally that the fish ladders exits
7 will be kept clear of sediment and that a clear channel will be maintained from ladder exits to the main
8 channel of the river. The April 2007 ITS stated that if these ecological surrogates are not met, then the
9 Project will be considered to have exceeded anticipated take levels, triggering the need to reinitiate
10 consultation.

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

14 47. The Corps did not comply with the April 2007 BiOp's one reasonable and prudent
15 measure during the April 2007 BiOp's term, as the Corps did not add any gravel to the Yuba River
16 below Englebright during the term of the April 2007 BiOp. The Corps also did not implement the
17 conservation and restoration measures specified in the April 2007 BiOp. Finally, the ecological
18 surrogates specified in the April 2007 BiOp were not met.

19 48. On November 21, 2007, NMFS issued another biological opinion for the Project ("the
20 November 2007 BiOp"). Unlike its prior two biological opinions for the Project, NMFS did not set an
21 expiration date for the November 2007 BiOp and the November 2007 BiOp ostensibly permanently
22 addressed the impacts of the Project on spring Chinook, steelhead, and green sturgeon. The November
23 2007 BiOp concluded that the Project will not jeopardize the continued existence of spring Chinook,
24 steelhead and green sturgeon and that the Project is not likely to destroy or adversely modify the critical
25 habitat of the Species.

26 49. In the November 2007 BiOp, NMFS indicated that it was incorporating sections of the
27 2002 BiOp by reference. For example, NMFS indicated it was incorporating by reference the 2002
28 BiOp's description of baseline habitat conditions for spring Chinook and steelhead in the Yuba River.

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

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

24 52. In the November 2007 BiOp, NMFS stated that the overall status of spring Chinook and
25 steelhead essentially remains the same as in the 2002 BiOp. NMFS observed that the spring Chinook
26 still faces a moderate to high risk of extinction and that steelhead populations have experienced
27 substantial decline. NMFS stated that in the Yuba River, spring Chinook escapement is relatively low
28 and greatly reduced from historic levels. NMFS asserted that it has very little information about recent

1 population trends and overall abundance of steelhead in the Yuba River, other than that steelhead have
2 not substantially recovered and continue to be at risk of extinction.

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

10 54. The November 2007 BiOp included an Incidental Take Statement ("November 2007
11 ITS") for the Corps' Project. The November 2007 ITS again set three ecological surrogates as a measure
12 of allowable take of spring Chinook, steelhead, and green sturgeon: flow releases from Englebright, the
13 availability of spawning gravel below Englebright, and the maintenance of clear passage through the
14 ladders on Daguerre. The November 2007 ITS did not set any quantitative measure of these
15 requirements, stating that NMFS's analysis of Project effects anticipates that the operation of a full-flow
16 bypass on the Powerhouses associated with Englebright will prevent large flow fluctuations in the lower
17 Yuba River, that the Corps will implement a gravel injection program in 2007, which will inject at least
18 500 tons of gravel, and finally that the Corps will keep the Daguerre fish ladders exits clear of sediment
19 and that a clear channel will be maintained from ladder exits to the main channel of the Yuba River. The
20 November 2007 ITS stated that if these ecological surrogates are not met, then the Project will be
21 considered to have exceeded anticipated take levels, triggering the need to reinitiate consultation.

22 55. The November 2007 ITS also included five reasonable and prudent measures to minimize
23 take of spring Chinook and steelhead and five terms and conditions implementing these five reasonable
24 and prudent measures. The five terms and conditions were: (1), utilizing the information from its pilot
25 gravel injection project, the Corps must develop and implement a long-term gravel augmentation
26 program within three years for adding gravel to the Yuba River below Englebright, (2), the Corps must
27 complete a study to determine an effective method for replenishing into the Yuba River the supply of
28 large woody material that is trapped by Englebright and upstream reservoirs and then develop and

1 commence implementing a long-term program to replenish woody debris in the River within 4 years,
2 (3), the Corps must complete a study of implementing a feasible Daguerre fish passage improvement
3 project within 5 years and then commence implementation of the Corps' preferred alternative for
4 securing anadromous fish passage past Daguerre within ten years, (4), the Corps must continue to
5 implement its Daguerre fish ladder clearing and maintenance programs and (5), the Corps must
6 diligently pursue "the ongoing effort" for securing an improved fish screen at the Brophy diversion that
7 meets all DFG and NMFS criteria.

8 56. SYRCL and Friends of the River challenged the November 2007 BiOp in *South Yuba*
9 *River Citizens League v. NMFS*, E.D. Cal. Case No. 2:06-cv-02845-LKK-JFM. On July 8, 2010, the
10 United States District Court Eastern District of California issued an order, which concluded that the
11 November 2007 BiOp was arbitrary and capricious due to failure to properly analyze key information
12 concerning the Listed Species, impacts of the Project on the Listed Species, and environmental baseline
13 context for the impact of the Project on the Listed Species. *South Yuba River Citizens League v. NMFS*,
14 723 F. Supp. 2d 1247 (E. D. Cal. 2010). The Court ordered that the November 2007 BiOp be remanded
15 to NMFS and subsequently ordered that NMFS prepare a new biological opinion for the Project by
16 February 29, 2012, consistent with the Court's July 8, 2010 order.

17 57. On February 29, 2012, NMFS issued a new biological opinion for the Project. In the
18 BiOp, NMFS found that the Project was jeopardizing the continued existence of the Listed Species.
19 Accordingly, NMFS included Reasonable and Prudent Alternatives in the BiOp which set forth a
20 number of requirements that NMFS found necessary to avoid jeopardy and adverse modification of
21 critical habitat for the Listed Species. NMFS selected these measures after consideration of the
22 significant adverse impacts of the Project on the Listed Species in light of their degraded status and the
23 threats posed by existing baseline conditions. In selecting the RPA measures, NMFS stated: "This RPA
24 was developed through a thoughtful and reasoned analysis of the key causes of the jeopardy and adverse
25 modification findings, and a consideration of alternative actions within the legal authority of the Corps
26 to alleviate those stressors." BiOp at 210. NMFS explained that the RPAs contained separate
27 components that were required to be implemented in full. NMFS explained: "This RPA is composed of
28 numerous elements for each of the various project associated stressors and must be implemented in its

1 entirety in order to avoid jeopardy and adverse modification." BiOp at 215. Not only did NMFS specify
2 the types of measures to be implemented, NMFS also established specific deadlines by which those
3 measures were to be completed. In so doing, NMFS found that compliance with this schedule was
4 essential: "In order to meet the requirements of the ESA, the Corps must implement the [RPA] actions in
5 the timeframes identified. It will be up to the Corps to determine under which authority(s) it will use to
6 meet the time requirements. The Corps should not let any opportunities be lost through inaction." BiOp
7 at 211.

8 58. In contradiction to its findings discussed in the preceding paragraph, on November 27,
9 2012, NMFS issued a letter ("November 2012 letter") extending several of the deadlines for the Corps's
10 implementation of the RPAs set forth in the BiOp. Specifically, NMFS extended the deadlines for
11 implementations of RPA Actions 2, 5, 6, 7, and 8.

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

19 60. RPA Action 5 requires the Corps to develop a plan for a channel restoration program in
20 the Yuba River by December 2012. The November 2012 letter moves this deadline by over three years
21 to December 31, 2015.

22 61. RPA Action 6 requires the Corps by September 1, 2012 to develop a predator reduction
23 and monitoring plan to address predators that prey upon the Listed Species. The November 2012 letter
24 extends this deadline to June 1, 2013. RPA Action 6 also requires the Corps to implement the predator
25 reduction and monitoring plan by November 1, 2012. The November 2012 letter moves this deadline to
26 January 2015.

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

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

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

1 explanation what it meant by "other implementation challenges" to the RPAs. On information and belief,
2 SYRCL alleges that NMFS has undertaken no analysis and reached no reasoned conclusions supported
3 by a record concerning whether NEPA review is required to implement the RPA and how long such
4 review would take, how much it would cost to implement the RPAs in issue, and what other
5 implementation challenges may in fact exist to the RPAs.

6 **FIRST CLAIM FOR RELIEF**

7 Violation of the APA
8 5 U.S.C. §§ 706(1) and (2)

9 Request for Declaratory Relief and Injunction to Compel NMFS to Set Aside

10 Its Extensions to the Deadlines in the BiOp

11 65. SYRCL reasserts and realleges paragraphs 1 through 64 above.

12 66. On November 27, 2012, NMFS improperly issued extensions to multiple deadlines for
13 implementation of RPAs in the BiOp. As further described in the ensuing paragraphs below, NMFS's
14 action in extending the deadlines for these RPAs was arbitrary and capricious, an abuse of discretion,
15 and otherwise contrary to law in violation of the APA, 5 U.S.C. § 706(2).

16 67. NMFS's November 2012 letter constitutes its sole decision document for the extension of
17 the RPA deadlines in the BiOp that are at issue. NMFS's granting of these extensions is contradictory to
18 the detailed, expressed findings adopted by NMFS in issuing the BiOp and the initial RPA deadlines. In
19 the BiOp, NMFS explained why the dire condition of the Listed Species and the jeopardy to the species'
20 existence and the adverse modification to the species' critical habitat being caused by the Project
21 required the RPAs and the deadlines for implementation of the RPAs. By contrast, the November 2012
22 letter provides no conclusion that the new deadlines for the RPA set by the letter are consistent with
23 avoiding jeopardy to the Listed Species or adverse modification to their critical habitat, much less any
24 explanation as to why this would be so. The modification to the BiOp effectuated by the letter is thus
25 arbitrary and capricious and contrary to law in setting RPAs that NMFS itself has not found are
26 consistent with avoiding jeopardy to the Listed Species or adverse modification to the species' critical
27 habitat--much less provided any reasoned explanation or record support for such a conclusion.

28 68. In issuing extensions of the BiOp's RPA deadlines, NMFS indicated in its November
2012 letter that its sole rationale was that the existing RPA deadlines "cannot be met for practical

1 reasons." The letter contained no explanation or analysis of how moving the RPA deadlines would
2 impact the Listed Species and on information and belief, SYRCL alleges that NMFS has undertaken no
3 such analysis and reached no conclusions concerning the impacts of the extensions on the Listed
4 Species. It is contrary to the dictates of ESA section 7 and thus contrary to law for NMFS to set RPA
5 requirements solely for practical reasons without any consideration of the impact of the RPA
6 requirements on the Listed Species that are the subject of a biological opinion. In its letter, NMFS
7 indicated that it had decided that none of the new deadlines would be enforceable unless the Corps
8 secured Congressional appropriations for Corps implementation of the RPAs--thus indicating that the
9 Corps would not have to implement any of the measures if it did not secure such appropriation. NMFS
10 has done no analysis of what the effect on the Listed Species is of this open-ended modification--thus
11 making adoption of this modification arbitrary and capricious. It is further contrary to the dictates of
12 ESA section 7 and thus contrary to law for NMFS to provide that measures needed to avoid jeopardy to
13 species need never be implemented if the funding to implement the measures is not readily available--
14 this is the equivalent of saying that a federal agency may allow its conduct to cause the extinction of a
15 species if it does not secure the Congressional appropriation needed to alter its conduct in a way to avoid
16 this outcome. Finally, as alleged above, the NMFS letter further provided no analysis of why each
17 extension of a particular RPA is necessary in light of the practical considerations identified in the letter
18 and on information and belief, SYRCL alleges that NMFS has undertaken no such analysis -- a further
19 reason why the decision reflected in the letter is arbitrary and capricious.

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

REMEDY

24 70. SYRCL has no plain, speedy, and adequate remedy, in the ordinary course of law, other
25 than the relief sought in this Complaint, because there is no other mechanism for compelling NMFS to
26 take the action necessary under the APA and the ESA.

27 71.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, SYRCL seeks the following relief:

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

6 2. A declaratory judgment establishing that NMFS acted arbitrarily capriciously and
7 otherwise contrary to law in issuing its November 27, 2012 letter extending various deadlines for the
8 RPAs in the BiOp.

9 3. An award of attorneys' fees and costs to SYRCL.

10 4. Such other and further relief as this Court deems just and proper.

11 Respectfully Submitted,

12 Dated: January 11, 2013

13
14 By:

Christopher a. sproul

15 _____
16 Christopher Sproul
17 Environmental Advocates
18 Attorney for SYRCL
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