



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
650 Capitol Mall, Suite 5-100
Sacramento, California 95814-4700

MAY 12 2014

In response refer to:
WCR-2013-3

Michael J. Farrell
Colonel, U.S. Army
Commander
U.S. Army Engineer District, Sacramento
1325 J Street
Sacramento, California 95814-2922

Re: Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River.

Dear Colonel Farrell:

On October 22, 2013, NOAA's National Marine Fisheries Service (NMFS) received your request for a written concurrence that the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River may affect, but is not likely to adversely affect, federally listed threatened Central Valley (CV) spring-run Chinook salmon (*Oncorhynchus tshawytscha*), threatened California Central Valley (CCV) steelhead (*Oncorhynchus mykiss*), threatened Southern distinct population segment (DPS) of North American green sturgeon (*Acipenser medirostris*) (green sturgeon), and the designated critical habitat for those listed species. The Corps has requested concurrence with its determinations. This response to your request was prepared by NMFS, pursuant to section 7(a)(2) of the Endangered Species Act (ESA), implementing regulations at 50 CFR 402, and agency guidance for preparation of letters of concurrence.

This letter underwent pre-dissemination review using standards for utility, integrity, and objectivity in compliance with applicable guidelines issued under the Data Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554). The concurrence letter will be available through NMFS' Public Consultation Tracking System, <https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts>. A complete record of this consultation is on file at the NMFS California Central Valley Area Office.

Previous ESA consultations have been conducted addressing various Corps projects and their activities on the Yuba River (see Consultation History below). Those consultations encompassed activities at both Englebright Dam and Daguerre Point Dam (projects). However, the October 22, 2013, submittal was limited to the Corps' discretionary activities associated with Englebright Dam and reservoir, and a separate biological assessment (BA) was submitted at the same time for the Corps' discretionary activities associated with Daguerre Point Dam. The



Corps evaluated these projects separately in two BAs because “each dam has a separate authorization and appropriation, and because the actions at Englebright and Daguerre are wholly separate and are not dependent upon each other to operate.” The Corps determined in their Englebright Dam and Reservoir BA that some actions were no effect and some actions may affect, but are not likely to adversely affect federally listed anadromous salmonids or their critical habitat.

The Corps requested ESA consultation through two separate BAs submitted to NMFS on October 22, 2013:

- (1) U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River; and
- (2) U.S. Army Corps of Engineers Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Lower Yuba River.

This letter is in response to the Corps’ consultation request and concurrence request regarding its determinations concerning ongoing operation and maintenance of recreational facilities on and around Englebright reservoir. Consultation on the Corps’ operation and maintenance of existing fish passage facilities at Daguerre Point Dam are deferred to a separate consultation.

The Corps deconstructed their Yuba River activities into five categories. The categories the Corps used were:

- (1) Future Corps Actions Requiring Separate ESA Consultation;
- (2) Non-Discretionary Actions;
- (3) Discretionary Actions with No Effects to Listed Species or Critical Habitat;
- (4) Englebright Dam and Reservoir (Discretionary actions that are not likely to adversely affect listed species or critical habitat); and
- (5) O&M of Existing Fish Passage Facilities at Daguerre Point Dam.

Future Corps Actions Requiring Separate ESA Consultation: The Corps has identified that ESA issues related to the outgrants associated with the two hydropower facilities adjacent to Englebright Dam will be addressed through the Federal Energy Regulatory Commission. This will occur through the ESA consultations for the hydropower relicensing processes. The anticipated dates for new outgrants are 2016 and 2023. At this time the specifics associated with the Federal Power Act licenses for the hydropower facilities and for the specifics to be included in the new outgrants have not been determined.

Non-Discretionary Actions: Associated with Englebright Dam the Corps has identified a number of actions that are non-discretionary. These include visual security and safety inspections. The Corps has provided information about their authority, and which actions over which they have discretion. The ESA regulations state “Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.” (50 CFR 402.03).

Discretionary Actions with No Effects to Listed Species or Critical Habitat: The Corps has identified a number of actions associated with Englebright Dam and Englebright Reservoir as having no effects on listed species or designated critical habitat. These actions include:

- Ongoing Maintenance of Recreational Facilities
 - Maintenance Facilities Upkeep
 - Roads and Parking Area Maintenance
 - Sign and Waterway Marker Maintenance
 - Maintenance of Recreation Area Buildings
 - Wastewater Monitoring Plan Implementation
 - Campground Repairs and Renovations
 - Campground Fire Break Clearing
 - Park Office Facility Upkeep
 - Grounds Maintenance
 - Narrows Day Use Facility Improvements
- Continued Administration of Maintenance Service Contracts
 - Janitorial Service and Garbage Pickup
 - Water Quality Testing
- Continued Administration of Outgrants
 - Easement for Use of Power Generation Facilities to Yuba County Water Agency (YCWA) and Pacific Gas & Electric (PG&E)
 - Power Transmission Line Easement to PG&E for Narrows I
 - Road Right of Way Easement to YCWA for Narrows II
- For the first two categories of actions (Ongoing Maintenance of Recreation Facilities, and Continued Administration of Maintenance Service Contracts), all of the activities are upstream of Englebright Dam. Currently, no ESA listed anadromous fish species are present upstream of Englebright Dam, nor is there any designated critical habitat upstream of Englebright Dam. The upstream extent of critical habitat on the Yuba River for salmonids is Englebright Dam, and for the Southern DPS of green sturgeon it is Daguerre Point Dam. For the first two subcategories, no effects from these Corps actions are expected to persist downstream of Englebright Dam.
- For the action subcategory of “Continued Administration of Outgrants” the Corps has identified that the actions are “The administration of ongoing outgrants consists of monitoring for compliance of the terms and conditions of the outgrant.” These outgrants include: (1) road right of way permits and easements; (2) a telephone line license; (3) power transmission line easements; and (4) the concessionaire lease at the Englebright Lake marina. The Corps has identified that the only actions associated with these outgrants are the annual compliance inspection. The Corps has identified that “These inspections constitute administrative actions and not activities that have the potential to affect listed species or their critical habitats in the lower Yuba River.” While future Corps actions to enforce compliance with outgrant conditions do have the potential to affect ESA listed anadromous fish species and/or designated critical habitat downstream of Englebright Dam, the specifics of those future actions cannot be determined at this time, and the timing and extent of those actions is undetermined at this time. Therefore it is not possible to include the potential effects of undetermined actions on ESA listed anadromous fish species in this consultation or to

concur with an effects determination; however, the effects of such actions may be the subject of a future consultation.

Discretionary actions that are not likely to adversely affect listed species or critical habitat:

The remaining proposed activities were identified by the Corps as “may affect, but are not likely to adversely affect” listed species or critical habitat. These activities are described in detail in the Corps’ BA (Corps 2013a), and make up the Corps’ proposed action, and are the subject of this consultation:

Ongoing maintenance of recreational facilities on and around Englebright reservoir. This includes:

- Vehicle, Equipment, and Vessel Maintenance
- Boat Ramps and Courtesy Docks Maintenance

Continued administration of maintenance service contracts at Englebright Dam and reservoir.

This includes:

- Portable restroom pumping
- Herbicide and Pesticide Application

Proposed Action

The proposed action for which the Corps is requesting consultation was provided by the Corps in the U.S. Army Corps of Engineers’ Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River (Corps 2013a) biological assessment. The description of the proposed action provided here is a summary of the information provided by the Corps.

In defining the scope of its discretion, the Corps identified the following relevant statutes:

- (1) The California Debris Act (Ch. 183, §1, 27 Stat. 507;
- (2) The Rivers and Harbors Act of 1935;
- (3) National Dam Inspection Act of 1972;
- (4) National Dam Safety Program Act of 1996 (Public Law 92-367); and
- (5) Dam Safety Act of 2006 (Public Law 109-460).

The remaining proposed actions which the Corps identified as “may affect, but are not likely to adversely affect” listed species or critical habitat are described in detail in the Corps’ BA (Corps 2013a), which are the subject of this consultation are summarized as follows:

Ongoing Maintenance of Recreational Facilities, on and Around Englebright Reservoir

Vehicle, equipment and vessel maintenance: Corps personnel are required to perform a walk-around inspection of their vehicle at least once a day and also to check oil, water, battery and tires when fueling the vehicle or at the start of their shift each day. When not in use, vehicles are parked inside the Corps’ secure Maintenance Shop Facility compound. Maintenance of all vehicles operated by the Corps is accomplished off-site at an authorized dealer. The maintenance of gasoline and diesel powered equipment is conducted by Corps’ contractor personnel, maintenance staff, and equipment operators. All equipment is scheduled for routine

maintenance by Corps maintenance personnel at prescribed intervals. Equipment operators are required to conduct equipment inspections prior to operating equipment at each use. Corps maintenance personnel also conduct periodic equipment inspections for quality of operation and safety purposes. The Corps also maintains three 20-21 foot aluminum jet boats and one 40-foot aluminum utility barge. Vehicle and equipment maintenance activities generally occur in the Corps' Maintenance Shop Facility compound, which is not proximal to Englebright Reservoir.

Corps employees working at Englebright Reservoir are routinely trained in the storage and handling of hazardous materials. The Corps also implements the Harry L. Englebright Lake Operational Management Plan (Corps 2007) for Englebright Reservoir, which includes a Hazardous Materials Plan and a Contingency Plan and Emergency Response Procedures (Corps) to address potential hazards associated with the accidental release of hydrocarbons into aquatic habitat in Englebright Reservoir.

Boat ramps at Englebright Reservoir: These are located at the Narrows and Joe Miller Recreation Areas. Each boat ramp has a courtesy dock adjacent to it for visitor convenience. These ramps are inspected daily by the Corps, and kept clean of debris, driftwood and sediment. All parts are inspected and replaced or repaired as needed including decking, framing, flotation, fasteners, cables, and anchors. Docking is maintained with a slip-free surface. After flood waters recede, all launch ramps are inspected for damage or undercut concrete and repaired as needed. Signs are maintained at each boat ramp to prohibit parking on the ramps and swimming in their vicinity. The courtesy docks are repaired by the Corps, as necessary.

Continued Administration of Maintenance Service Contracts at Englebright Dam and Reservoir

Portable restroom pumping: This action is conducted at Englebright Reservoir under contract with a local vendor. Sewage from portable restroom pumping around the lake is recognized in the Englebright Operations Management Plan as a common hazardous material found on Corps' project lands (Corps 2007), which could pose a threat to public and environmental health. For these reasons, portable restroom pumping is managed as part of the Corps' Wastewater Monitoring Plan, which addresses the management of wastewater from Corps' maintained facilities and monitoring of wastewater generated by houseboats on Englebright Reservoir. The Corps has established a Contingency Plan and Emergency Response Procedures (CERP) (Corps) that provides response guidance and containment procedures to be implemented in the event of an emergency at or around Englebright Reservoir, including the accidental release of hazardous substances.

Herbicide and pesticide application: Poison oak is a problem in day use areas, campgrounds, trails, roadsides, and operations areas. Because the presence of poison oak in high-use recreation and operations areas is an unacceptable nuisance and health hazard, exposure must be controlled or eliminated to reduce risk to visitors and Corps employees. Annual and perennial grasses, as well as assorted noxious herbaceous weeds, also are common to the area. This vegetation has the potential to grow very tall, blocking facilities, harboring insects in recreation sites and creating an extreme fire hazard when dry. Consequently, herbicide application is conducted, on an as-needed basis, around Englebright Reservoir, primarily at campsites, firebreaks and nature trails.

The areas of herbicide and pesticide application are generally located in more upland areas not proximal to Englebright Reservoir. Herbicides are applied in relative dilute quantities. Annual herbicide application around Englebright Reservoir is relatively minor. For example, a usage report dated January 29, 2008, indicates that 2 gallons of herbicide were used on 8 acres of land, and 3 gallons were used on 10 acres of recreation and operation areas to control weeds, grasses and poison oak. Application of herbicides and pesticides is only done through licensed contractors.

Action Area

The proposed project is located on the Yuba River, at Englebright Dam, and Englebright Reservoir. The action area is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action” (50 CFR §402.02). For the purpose of this consultation the action area is from Rice’s Crossing at the upstream end of Englebright Reservoir, downstream to the confluence of the Yuba River and the Feather River. This action area covers the area that could potentially be affected by the activities in the Corps’ proposed action. For example, if a hazardous substance that is lighter than water is accidentally released, winds could move it to the furthest upstream extent of Englebright reservoir. If a hazardous substance is accidentally released in Englebright reservoir it could pass downstream by flowing over the dam or through one of the powerhouses and could persist some distance downstream. The mouth of the Yuba River was selected as the limit of the downstream effect due to dilution effects with the additional amount of water present in the Feather River.

Action Agency’s Effects Determination

The activities for which the Corps has requested consultation are all upstream of Englebright Dam. The ESA listed species and critical habitat are all downstream of Englebright Dam. The Corps has identified that the potential effects of the actions, for which they requested consultation on ESA listed anadromous fish species and critical habitat, are expected to have insignificant and discountable effects, due to the physical separation between where the actions are occurring and the location of ESA listed fish species and designated critical habitat. The Corps has also identified measures they have in place to minimize potential effects, and the dilution of spilled substances in Englebright Reservoir prior to reaching the Yuba River downstream of Englebright Dam as making it unlikely that ESA listed fish species and designated critical habitat are likely to be impacted.

Background and Consultation History

2002 Consultation with the Corps on Operations of Englebright Dam and Reservoir, and Daguerre Point Dam on the Yuba River, California

On March 27, 2002, NMFS issued a biological opinion which analyzed the effects of the Corps’ operations of Englebright and Daguerre Point Dams on the Yuba River in Yuba and Nevada Counties, California, on threatened CV spring-run Chinook salmon and threatened CCV steelhead. The biological opinion covered a five-year period, and the conclusion found that the proposed action was not likely to jeopardize the continued existence of the CV spring-run

Chinook salmon ESU or CCV steelhead DPS, and was not likely to destroy or adversely modify designated critical habitat for these species over that time period. The 2002 biological opinion expired on March 27, 2007.

In December 2006, the South Yuba River Citizens League (SYRCL) and Friends of the River, filed suit in U.S. District Court against both the Corps and NMFS under the Administrative Procedures Act. The suit was amended on March 12, 2007, after a required 60-day notice period, to include complaints under the ESA. The plaintiffs alleged that NMFS unlawfully issued an inadequate biological opinion and failed to reinstate consultation with the Corps. The suit further alleged that the Corps had failed to comply with the requirements of the biological opinion, including improving the effectiveness and reliability of the existing fish ladders at Daguerre Point Dam, developing a plan to remove sediment from the ladders and egress at Daguerre Point Dam, and augmenting spawning gravels in reaches downstream of Englebright Dam.

2007 Consultation with the Corps on Operations of Englebright Dam and Reservoir, and Daguerre Point Dam on the Yuba River, California

On March 23, 2007, the Corps delivered to NMFS' Sacramento Area Office, an initiation package including a cover letter requesting the initiation of formal consultation under section 7 of the ESA for the proposed action along with a BA for the proposed action. Included in the Corps' March 23, 2007, cover letter was a request for the extension of the timeframe covered by the 2002 biological opinion in order to maintain coverage for the proposed action until a new consultation could be completed and a new long-term biological opinion issued.

On April 27, 2007, NMFS issued a preliminary biological opinion, which analyzed the effects of continuation of operation of the proposed action for a period of one year. On November 21, 2007, NMFS adopted the preliminary biological opinion as the final biological opinion for the proposed action, which analyzed the effects of long-term continuation of operation of the proposed action into the foreseeable future. Both of these biological opinions concluded that the proposed action would not jeopardize CV spring-run Chinook salmon, CCV steelhead, or the Southern DPS of green sturgeon, or destroy or adversely modify designated CV spring-run Chinook salmon and CCV steelhead critical habitat.

On July 8, 2010, a Federal court determined that the existing NMFS biological opinion on the operation of Englebright and Daguerre Point dams was inadequate. NMFS was directed to provide a more explicit analysis of effects to the species and to include analysis of the effects of hatcheries, the San Francisco Bay Delta, overall salmonid viability, poaching, and global warming on the species. NMFS was also asked to explain how the species will be able to tolerate cumulative effects such as the Wheatland project (a new water-delivery project).

On October 17, 2011, the Corps provided NMFS with a draft biological assessment on the proposed action. On December 2, 2011, NMFS notified the Corps that the draft biological assessment was insufficient. On January 27, 2012, the Corps initiated formal consultation on the proposed action and submitted the final biological assessment (Corps 2012) and references to NMFS. On February 29, 2012, NMFS issued a biological opinion (NMFS 2012).

On November 6, 2012, the YCWA submitted a 60 day notice of intent to sue the Corps and NMFS, pursuant to section 11(g) of the Endangered Species Act. The intent to sue was based on alleged violations of the Endangered Species Act and its implementing regulations. In a letter dated November 13, 2012, the South Yuba River Citizens League submitted a 60 day notice of intent to sue the Corps for allegedly not implementing reasonable and prudent alternative actions and allegedly unauthorized take of species listed under the Federal Endangered Species Act.

2012 Consultation with the Corps on Operations of Englebright Dam and Reservoir, and
Daguerre Point Dam on the Yuba River, California

In response to the July 2010 judicial remand of the 2007 biological opinion, the Corps provided NMFS with a draft biological assessment on the proposed action on October 17, 2011. On December 2, 2011, NMFS notified the Corps that the draft biological assessment was insufficient. On January 27, 2012, the Corps initiated formal consultation on the proposed action and submitted the final biological assessment (Corps 2012) and references to NMFS. NMFS provided a draft of the biological opinion to the Corps and its applicants on February 27, 2012. Comments were provided to NMFS on February 28, 2012. NMFS provided the final biological opinion to the Corps on February 29, 2012, in accordance with the deadline set by the U.S. District Court.

The February 29, 2012, biological opinion (NMFS 2012) concluded that the operation and maintenance of these two dams as proposed by the Corps would likely jeopardize the continued existence of CV spring-run Chinook salmon, CCV steelhead, and the Southern DPS of green sturgeon, and result in the adverse modification of their critical habitat. The 2012 biological opinion included a reasonable and prudent alternative (RPA) proposed by NMFS that modified the proposed action to avoid jeopardizing the species and adversely modifying their critical habitat.

NMFS received many comments on the 2012 biological opinion. The comments were of both a technical and legal nature. NMFS met with the Corps and stakeholders to discuss issues associated with the biological opinion. Over 900 written comments were submitted to NMFS. Written comments were received from:

- Corps (letter dated July 3, 2012);
- YCWA (letter dated June 29, 2012);
- PG&E (letter dated July 12, 2012);
- Nevada Irrigation District (letter dated July 11, 2012); and
- Brophy Water District - Dry Creek Mutual Water Company – Hallwood Irrigation Company – South Yuba Water District – Wheatland Water District (letter dated September 24, 2012).

In response to the comments NMFS held a number of meetings (2012-2013) with the Corps to address project authorization and funding issues. Additionally, NMFS held a series of meetings with the Corps and key stakeholders to address the technical issues in the biological opinion. Upon receipt of requests under the Freedom of Information Act and two 60 day notices of intent to sue, NMFS postponed and subsequently canceled scheduled technical meetings. Subsequent

to the comments and meetings, the Corps deconstructed its proposed action to more clearly identify which activities were subject to “discretionary Federal involvement or control” and therefore subject to the requirements of ESA Section 7 as described in 50 CFR 402.03 and which were non-discretionary and would therefore not be included in the Corps’ request for consultation.

At the request of the Corps, on November 27, 2012, NMFS modified the schedule for implementation of the reasonable and prudent alternative in the February 29, 2012, biological opinion. The schedule modifications were based on new information about the Corps’ authorities and the ability to meet the schedules in the biological opinion.

On January 11, 2013, the South Yuba River Citizens League filed for relief under the Administrative Procedure Act regarding the extensions of time given to the Corps by NMFS. The South Yuba River Citizens League requested an injunction and order for NMFS to rescind its November 27, 2012, letter. On January 28, 2013, the South Yuba River Citizens League and Friends of the River filed an amended complaint for declaratory and injunctive relief against NMFS and the Corps. The amended complaint requested the same relief as the January 11, 2013, filing and requested the Court to find the Corps in violation of the Endangered Species Act.

Current Consultation

On February 26, 2013, the Corps sent a letter to NMFS requesting reinitiation of formal consultation “for ongoing activities at Englebright and Daguerre Point Dams, and for operation of the fish ladders at Daguerre Point Dam.” On April 11, 2013, NMFS provided a written response to the Corps identifying the necessary information for reinitiation of formal consultation under section 7 of the Endangered Species Act. As set forth in 50 CFR §402.16, reinitiation of formal consultation is appropriate where discretionary Federal agency involvement or control over an action has been retained (or is authorized by law) and if:

- (1) The amount or extent of taking specified in any incidental take statement is exceeded;
- (2) New information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) The agency action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the biological opinion; or
- (4) A new species is listed or critical habitat is designated that may be affected by the action.

In this case, the Corps had determined that reinitiation of consultation was necessary in order for the Corps to provide NMFS with additional information and clarification on subjects that included the following:

- (1) To more accurately and specifically define the scope of the Corps’ authorities and discretion, for purposes both of appropriately defining the proposed action and ensuring that any RPA measures are within the scope of the Corps’ legal authority and jurisdiction. *See* 50 C.F.R. § 402.02.

- (2) To more clearly define the scope of the proposed action area, and the determination of which other activities are interrelated and interdependent with the proposed action.
- (3) To provide additional information regarding the nature of the Corps' proposed activities at Englebright and Daguerre Point Dams.
- (4) To provide the most recent scientific and technical information regarding the listed species and the effects of the proposed action on them.

In order to meet the requirements of 50 CFR 402.14(c), to initiate formal consultation; and 50 CFR 402.14(d), to provide the best scientific and commercial data available; NMFS recommended that the Corps develop an updated biological assessment to evaluate the potential effects of the action on listed species and designated critical habitat, pursuant to 50 CFR 402.12. NMFS identified that consultation would begin once NMFS received a final biological assessment that included a proposed project description and addressed all of the information necessary to evaluate the effects of the action on listed species and critical habitat.

As described above, the Corps provided two biological assessments on October 22, 2013:

- (1) U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River; and
- (2) U.S. Army Corps of Engineers Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Lower Yuba River.

Previous ESA consultations have been conducted addressing various Corps projects and their activities on the Yuba River. Those consultations encompassed activities at both Englebright Dam and Daguerre Point Dam (projects). For this consultation, the Corps submitted a BA for the Corps' discretionary activities associated with Englebright Dam and Reservoir. A separate BA was submitted at the same time for the Corps' discretionary activities associated with Daguerre Point Dam. The Corps evaluated activities at these projects separately, because each dam has a separate authorization and appropriation, and because the actions at Englebright and Daguerre are wholly separate and are not dependent upon each other to operate. The proposed action that is the subject of this consultation is described in the Corps' BA (2013a) and summarized under the Proposed Action section of this letter.

Environmental Baseline

The environmental baseline is an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species in the action area. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process (50 CFR§402.02).

Distinguishing differences between the proposed action and the environmental baseline requires careful consideration of an agency's discretion and lack of discretion. To help inform the distinctions, we applied the following key analytic considerations:

- (1) In general, effects attributable to the existence of the dams or to non-discretionary operations should be included in the environmental baseline rather than attributable to the proposed action. The environmental baseline includes, not only the past and present impacts of existing structures over which the Corps lacks discretion, but also continuing effects into the future, if the Corps lacks discretionary authority to remove or reconfigure the dam.
- (2) Areas of discretion and non-discretion must be clearly described by the Corps in the BAs.
- (3) Where the scope of the Corps' discretion is not clear, NMFS will assume that the Corps has discretion and will attribute effects to the proposed action.

Englebright Dam and Reservoir Non-discretionary Activities

Englebright Dam and Reservoir are located downstream of New Bullards Bar Dam, on the Yuba River, and are part of the Sacramento River and Tributaries project, which was authorized by the Rivers and Harbors Act of August 30, 1935 (P. L. 409, 74th Congress, 1st Session, 49 Stat. p. 1028-1049). The Sacramento River and Tributaries project was constructed by the California Debris Commission in 1941. The Rivers and Harbors Act of 1935 also authorized, according to the Corps, the development of power at Englebright Dam. The Corps has stated that the Rivers and Harbors Act of 1935 stated that hydropower is not a necessary feature of the project. Englebright Dam is 260 feet high, and the storage capacity of Englebright Reservoir was 69,700 acre feet at the time of construction. Upon decommissioning of the California Debris Commission by Section 1106 of the 1986 Water Resources Development Act (P. L. 99-662, 99th Congress, 2nd Session, November 7, 1986), administration of Englebright Dam and Reservoir was transferred to the Corps.

Because Englebright Dam was constructed as a sediment retention facility it does not contain a low-level outlet. Unregulated flood flows spill over Englebright Dam. Following construction of Englebright Dam in 1941 and extending until approximately 1970, controlled flow releases from Englebright Dam were made through the PG&E Narrows I hydropower facilities. Since about 1970 to the present, controlled flow releases from Englebright Reservoir into the lower Yuba River have been made from the PG&E Narrows I and the YCWA Narrows II power plants, both FERC licensed facilities. The water stored in Englebright Reservoir provides recreation and hydroelectric power, and YCWA and PG&E administer water releases for hydroelectric power, irrigation, and other beneficial uses (e.g., instream flow requirements).

Congress authorized Englebright Dam on the Yuba River to prevent hydraulic mining debris from washing downstream and blocking the navigation channel of the Sacramento River. The Corps' BA states that the responsibility to maintain Civil Works structures so that they continue to serve their congressionally authorized purposes is inherent in the authority to construct them and is therefore non-discretionary. The BA further states that only Congressional actions to de-authorize the structures can alter or terminate this responsibility and thereby allow the maintenance of structures to cease. Additionally, the BAs state that the Corps does not have authority or discretion to control Narrows I, Narrows II. The BA also states that Englebright Dam does not contain a low-level outlet and as a result, unregulated flood flows spill over Englebright Dam.

The Corps has determined that existing facilities for which the Corps does not have the authority or discretion to change are considered to be in the environmental baseline. Therefore, the Corps has determined that effects associated with the existence of Englebright Dam are part of the environmental baseline, and therefore not considered to be part of or an effect of the Corps' proposed action. Moreover, the Corps states in the BA that their responsibilities related to safety and security inspections are non-discretionary and the Corps is therefore not initiating consultation on those activities. In addition, the Corps states in the BA that these security and safety inspections are visual inspections that have no effect on listed species.

Englebright Dam impacts ESA listed CCV spring-run Chinook salmon and CVV steelhead, as a barrier to upstream and downstream fish passage, and through the alteration of fish habitat through the inundation caused by Englebright reservoir. Englebright Dam prohibits CV spring-run Chinook salmon and CCV steelhead from accessing historical habitat. This results in the loss of CV spring-run Chinook salmon and CCV steelhead habitat and reduces overall productivity.

Additionally, because spring-run Chinook salmon cannot access their historic habitat upstream of Englebright Dam, and fall-run Chinook salmon inhabit the lower Yuba River, there is overlap in the areas and time that spring-run Chinook and fall-run Chinook salmon spawn. There are two potential effects from this overlap, genetic introgression of the two populations, and spawning superimposition by fall-run Chinook salmon on spring-run Chinook salmon redds.

Genetic introgression of these two populations could result from fall-run Chinook salmon spawning with spring-run Chinook salmon. Because the fall-run Chinook salmon outnumber the spring-run Chinook salmon there is the potential to diminish the distinct characteristics of spring-run Chinook salmon. Available information indicates that the population of spring-run Chinook salmon in the Yuba River likely went extinct due to impacts associated with gold mining and the construction of dams. As habitat conditions improved spring-run Chinook salmon reappeared in the lower Yuba River. This is likely due to Chinook salmon with spring-run timing from the Feather River colonizing the Yuba River. Hatchery releases may have also contributed to the new population of spring-run Chinook salmon in the Yuba River. Data that has been collected at Daguerre Point Dam fish ladders has indicated a variable percentage of adipose fin clipped Chinook salmon during spring-run Chinook salmon timing. Adipose fin clipped fish are typically hatchery fish. In this case, the nearest hatchery is the Feather River Hatchery. In recent years they adipose fin clipped all of the spring-run Chinook salmon they release. The Corps (Corps 2013b) reported that the percentage of adipose fin clipped Chinook salmon passing through the Daguerre Point Dam fish ladders ranged from 3 percent to 61 percent, for the years 2004 through 2011. The average for these years is 20.8 percent. It is likely that there are also naturally spawned Feather River spring-run Chinook salmon that stray into the Yuba River. The Yuba River Management Team (RMT 2013) found that 72.3% of the data variability in the proportion of the clipped adipose fin spring-run Chinook salmon was explained by the flow and temperature ratios between the Yuba and Feather rivers. Through tagging studies (2003-2006) of naturally produced Chinook salmon in the Yuba River, the Yuba River Management Team identified a very low survival rate for Chinook salmon (0.0004% recovery of adult spawners in the Yuba River). If the recovery rate of tagged Chinook salmon is indicative of the survival of Yuba River spring-run Chinook salmon, then the Yuba River population of spring-run Chinook

salmon could be dependent on spring-run Chinook salmon straying in from the Feather River. However, the majority of the spawning that produced the fish that were tagged, were fall-run Chinook salmon. Additionally, there could have been some differential egg to juvenile survival rates and/or juvenile capture rates between fall-run and spring-run Chinook salmon that would make the results of the tagging study not directly applicable to Yuba River spring-run Chinook salmon survival. NMFS completed a status review of spring-run Chinook salmon populations in the Central Valley in 2011. In that status review, NMFS identified the Yuba River spring-run Chinook salmon as a population. The question of whether the spring-run Chinook salmon in the Yuba River are a separate population from the Feather River spring-run Chinook salmon population, or should be considered part of the Feather River spring-run Chinook salmon population deserves future consideration.

With fall-run Chinook salmon using the same spawning habitat as spring-run Chinook salmon and most fall-run Chinook salmon spawning after spring-run Chinook salmon, it is NMFS' interpretation that there is a high potential for spring-run Chinook salmon eggs to be killed through superimposition of fall-run Chinook salmon spawning on top of spring-run Chinook eggs. Additionally, the numbers of fall-run Chinook salmon in the Yuba River are typically two to three times greater than the Spring-run Chinook salmon that are not adipose fin clipped (Table 1).

Table 1. Estimated numbers of Chinook salmon passing through fish ladders at Daguerre Point Dam (based on Corps 2013b).

Year	Spring-run Chinook Salmon	Spring-run Not Ad-Clipped	Fall-run Chinook Salmon
2004	738	666	5,189
2005	3,592	2,916	7,782
2006	1,326	1,245	3,877
2007	372	334	1,022
2008	521	506	2,012
2009	723	510	4,655
2010	2,886	1,112	3,583
2011	1,159	836	6,626

The Yuba River Management Team (RMT 2013) concluded that it appears that effects of Chinook salmon redd superimposition in the lower Yuba River has a small effect at the annual population level. However, it is difficult to parse out the effects on spring-run Chinook salmon from the effects on all Chinook salmon in the lower Yuba River. This is because there is significant overlap in the spawning timing of spring-run and fall-run Chinook salmon. Because of this overlap the total number of Chinook salmon redds was used in the Yuba River Management Team's calculations of the effects of superimposition. The total number of Chinook salmon redds that were affected by superimposition may not be representative of the effect to spring-run Chinook salmon redds. Spring-run Chinook salmon redds may be disproportionately affected by somewhat earlier spawning timing, and by the greater numbers of fall-run Chinook salmon spawners.

Yuba River spring-run Chinook salmon spawning downstream of Englebright Dam are potentially at risk of genetic dilution associated with Feather River Hatchery spring-run Chinook salmon spawning in the lower Yuba River. The percentage of Feather River Hatchery spring-run Chinook salmon passing upstream of the Corps' Daguerre Point Dam can range from 3 to 61 percent of the spring-run Chinook salmon upstream of Daguerre Point Dam. Hatchery influence through interbreeding with wild population has been a factor that has been identified as negatively affecting wild populations.

Due to the long history of human activity and alterations of the landscape in the Action Area, there are a number of additional effects associated with the Environmental Baseline. These include:

- (1) Mining (including hydraulic),
- (2) Physical habitat alterations,
- (3) Changes in Fluvial Geomorphology,
- (4) Loss of Natural River Morphology and Function,
- (5) Loss of Floodplain Habitat,
- (6) Impacts to riparian vegetation,
- (7) Diminished amounts of large woody material,
- (8) Loss of riparian habitat and instream cover
- (9) Alteration of flows (*e.g.* hydropower, Yuba Accord),
- (10) Juvenile standing and redd dewatering,
- (11) Global climate change
- (12) Operation of the Central Valley Project and the State Water Project
- (13) Daguerre Point Dam
- (14) Water diversions in the lower Yuba River,
- (15) Englebright Dam, and
- (16) Deer Creek activities.

Additional information regarding these Environmental Baseline effects are included in the biological opinion for the Operation and Maintenance of Daguerre Point Dam and Fish Ladders (NMFS 2014a).

Effects of the Action

Under the ESA, "effects of the action" means the direct and indirect effects of an action on the listed species or critical habitat, together with the effects of the other activities that are interrelated or interdependent with that action (50 CFR 402.02). The applicable standard to find that a proposed action is not likely to adversely affect listed species or critical habitat is that all of the effects of the action are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species or critical habitat. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. The proposed action is related to non-discretionary facilities and the effects analysis of this consultation considers those effects of the existence of the non-discretionary facilities as an environmental baseline condition onto which the effects of the proposed action are added.

Effects of the Proposed Action

The Corps has determined that only the following actions “may affect” listed species and are therefore requesting consultation only on these actions:

- Ongoing Maintenance of Recreation Facilities
 - Vehicle, Equipment and Vessel Maintenance
 - Boat Ramps and Courtesy Docks Maintenance
- Continued Administration of Maintenance Service contracts
 - Portable Restroom Pumping
 - Herbicide and Pesticide Application

All of these activities take place upstream of Englebright Dam. At the locations of these actions there will be no effect on ESA listed species or designated critical habitat, because there are no ESA listed fish species or designated critical habitat at these locations. However, it is possible for actions upstream of Englebright Dam to cause effects downstream of Englebright Dam. The Corps has the following measures in place to address potential effects downstream of Englebright Dam:

- (1) Spill prevention;
- (2) Spill response;
- (3) Best management practices for vehicle and equipment maintenance; and
- (4) Spill dilution.

To address the effects of a potential release of materials that could be harmful to ESA listed anadromous fish species, downstream of Englebright Dam, the Corps does vehicle and equipment maintenance work away from areas where spilled substances could reach Englebright Reservoir. For work that occurs on or near the reservoir, the Corps has trained staff in spill response and have materials and equipment available to contain and collect spilled substances. The history of spills provided in the biological assessment indicates that it is unlikely that spilled materials would occur or pass downstream of Englebright Dam in concentrations that would affect ESA listed anadromous fish species or designated critical habitat.

If accidental releases of materials were not contained they would be diluted by the large volume of water in Englebright Reservoir. During the period when human activity is at its greatest on and around Englebright Reservoir (summer), flows are usually concentrated through the hydropower facilities in proximity of Englebright Dam. The intakes for the hydropower projects are from deep within Englebright Reservoir. Therefore, accidentally released fuel products, which are lighter than water, would likely not move downstream of Englebright Dam, and would evaporate. During other times of the year accidentally released fuel products could pass over Englebright Dam, if water were flowing over the dam from the reservoir. Water flowing over the dam occurs when the reservoir is full and the inflow exceeds the capacity of the hydropower projects. The maximum capacity of the hydropower projects is 4,130 cubic feet per second (cfs) (730 cfs + 3,400 cfs = 30,895 gallons/second). Additionally, there is a 3,000 cfs flow continuation valve at the Narrows II powerhouse. When flow over the dam is occurring,

the inflow to Englebright Reservoir is at a higher volume and would dilute accidentally released substances to concentrations for which adverse effects to ESA listed anadromous fish species would be insignificant downstream of Englebright Dam. These types of accidental releases are not expected to destroy or adversely affect designated critical habitats for federally listed ESA anadromous fish species.

Any accidentally released substance that is not lighter than water (*e.g.* portable restroom mixture) would be diluted by the volume of Englebright Reservoir and the inflow to the reservoir, prior to moving downstream of Englebright Reservoir. Englebright Reservoir has an estimated water volume of 50,000 acre feet (USGS 2003) (50,000 acre feet equals 16,292,571,663 U.S. gallons). Any accidentally released substance that is not lighter than water is likely to be diluted prior to moving downstream of Englebright Dam and would be at concentrations for which adverse effects to ESA listed anadromous fish species would be insignificant. These types of accidental releases are not expected to destroy or adversely affect designated critical habitats for federally listed ESA anadromous fish species.

Portable restroom pumping has the potential to impact listed anadromous fish species, through accidental releases of pumped substances. However, with the measures the Corps has in place to address spills of hazardous materials, and the dilution of hazardous substances from an accidental release associated with restroom pumping, adverse effects to ESA listed anadromous fish species associated with restroom pumping would be insignificant. These types of accidental releases are not expected to destroy or adversely affect designated critical habitats for federally listed ESA anadromous fish species.

The application of herbicides and pesticides will occur upland from Englebright Reservoir. Due to the locations of application, the amount being applied, the best management practices proposed for implementation, and dilution effects associated with Englebright Reservoir, it is unlikely that any detectable amount would persist at measurable levels downstream of Englebright Dam. Therefore, the effects from the application of herbicides and pesticides to ESA listed anadromous fish species by the Corps are discountable. These types of releases to Englebright reservoir are not expected to destroy or adversely affect designated critical habitats for federally listed ESA anadromous fish species.

The Corps has identified that maintenance work is sometimes done on their public boat facilities. Most of the identified work involves removing small debris from the ramp, replacing or repairing decking, floatation, fasteners, cables and anchors. The effects from these activities to ESA listed anadromous fish species are insignificant and discountable. These types activities are not expected to destroy or adversely affect designated critical habitats for federally listed ESA anadromous fish species.

The Corps has also identified that maintenance work associated with the boat ramp may involve concrete work. Concrete work would be done in dewatered areas when the reservoir is lowered and the effects from boat ramp concrete repairs to ESA listed anadromous fish species would be insignificant and discountable. If concrete work were to be done within the wetted area of the reservoir, it is unlikely that measurable amounts of hazardous substances would be measurable downstream of Englebright Dam, due to dilution of the substances in Englebright Reservoir. The

effects to ESA listed anadromous fish species downstream from Englebright Dam from concrete work done in the water would be insignificant, due to dilution associated with the volume of water in Englebright Reservoir. This type of activity is not expected to destroy or adversely affect designated critical habitats for federally listed ESA anadromous fish species.

Conclusion

In NMFS' analysis of the effects of the proposed action we considered the effects of the environmental baseline and the effects of the proposed project. Due to measures the Corps has in place to: (a) prevent accidental release of hazardous materials; (b) address the potential of accidental release of substances; (c) minimize effects from vehicle and equipment maintenance; (d) minimize herbicides and pesticides reaching water, and dilution effects; and (e) minimize effects from boat facility maintenance practices; and due to the dilution of any potential accidental releases before passing downstream of Englebright Dam, and the historic small magnitude and infrequency of hazardous substance accidental releases, NMFS concurs with the Corps' determination that the proposed project is not likely to adversely affect CV spring-run Chinook salmon, CCV steelhead, or the Southern DPS of green sturgeon in the Yuba River, or their designated critical habitats in the Yuba River.

This concurrence does not provide incidental take authorization pursuant to section 7(b)(4) and section 7(o)(2) of the ESA. It is illegal to "take" a species listed under the Federal ESA. The term "take" is defined by the ESA (section 3(19)) to mean *"to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."*

Reinitiation of Consultation

Reinitiation of consultation is required and shall be requested by the Corps or by NMFS, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (2) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this concurrence letter; or if (3) a new species is listed or critical habitat designated that may be affected by the identified action (50 CFR 402.16). This concludes the ESA portion of this consultation.

Conservation Recommendations

Section 7(a)(1) of the ESA directs Federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of the threatened and endangered species. The Corps also has the same responsibilities, and informal consultation offers action agencies an opportunity to address their conservation responsibilities under section 7(a)(1).

Due to the adverse environmental baseline effects associated with fish passage structures at Daguerre Point Dam, and the structure of Englebright Dam and reservoir, NMFS requests that

the Corps continue the gravel augmentation and large woody material augmentation in the lower Yuba River identified in the biological assessment for Daguerre Point Dam (Corps 2013b).

NMFS further requests that the Corps continue their efforts to complete the Yuba River reconnaissance in fiscal year 2015. Improvement of fish passage at Daguerre Point Dam, and development of a fish passage project to restore spring-run Chinook salmon and steelhead to historic habitats in the Yuba River watershed upstream of Englebright Dam would be a significant step toward the recovery of spring-run Chinook salmon and steelhead listed under the ESA (NMFS 2014). NMFS encourages the Corps coordinate with NMFS and other Yuba watershed stakeholders regarding the ongoing reconnaissance study, and future feasibility study (if authorized by Congress). Yuba watershed stakeholders such as YCWA, U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, California Department of Water Resources, South Yuba River Citizens League, American Rivers, Friends of the River, PG&E, and participants in the Yuba River Management Team and Yuba Salmon Forum, have developed a significant amount of information that should be useful to the Corps in moving forward with the Corps' ongoing reconnaissance study and potential future feasibility study.

Please direct questions regarding this letter to Gary Sprague, located in the California Central Valley Office, 650 Capitol Mall, Suite 5-100, Sacramento, California, 95814, or via phone at (916) 930-3615, or via email at: Gary.Sprague@noaa.gov.

Sincerely,


William W. Stelle, Jr.
Regional Administrator

cc: Randy P. Olsen
Chief, Operations and Readiness Branch
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814

Lisa H. Clay
Senior Assistant District Counsel
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814

Doug Grothe
Harry L. Englebright Lake
U.S. Army Corps of Engineers
P.O. Box 6
Smartsville, CA 95977-0006

Copy to file: ARN 151422SWR2013SA00279

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