



SOUTH YUBA RIVER CITIZENS LEAGUE

December 10, 2012

*Via Email and US Mail*

Rodney R. McInnis  
Regional Administrator, Southwest Region  
National Marine Fisheries Service  
501 West Ocean Blvd., Suite 4200  
Long Beach, CA 90802-4213

Re: NMFS Decision to Delay RPA Measures in Yuba River Biological Opinion

Dear Mr. McInnis:

On November 27, 2012, the National Marine Fisheries Service (NMFS) issued a letter to the U.S. Army Corps of Engineers (Corps) extending the deadlines for the Corps to implement the Reasonable and Prudent Alternative (RPA) measures contained in the February 29, 2012 biological opinion for the Corps' operations on the Yuba River (BiOp). I am writing on behalf of the South Yuba River Citizens League (SYRCL) to express our disagreement with the decision to extend the RPA deadlines and to request that you rescind the letter and agree to convene a meeting with SYRCL and the other interested parties to discuss prompt implementation of the RPA measures under the deadlines contained in the BiOp.

As you know, the RPA measures consisted of a number of actions that NMFS found necessary to avoid jeopardy and adverse modification of critical habitat for the three listed species of anadromous fish inhabiting the Yuba River – Central Valley spring run Chinook salmon, Central Valley steelhead, and the southern DPS of north American green sturgeon (the Listed Species). The measures were selected after full consideration of the impacts of the Project on the Listed Species in light of their degraded status and the threats posed by existing baseline conditions. Because the RPA measures are tailored to alleviate a number of the stressors caused by the Project in accordance with enforceable deadlines, we believe they represent an important step toward addressing the jeopardy and adverse modification being caused by the Project.

Accordingly, we were disappointed to learn that NMFS has decided to extend the deadlines for compliance with many of the RPA measures. Your letter provides lengthy extensions of the RPA deadlines, and importantly, conditions compliance on the ability to obtain "Congressional appropriations for Corps implementation." We believe that conditioning implementation of the RPA measures on Congressional appropriations will effectively eliminate the deadlines entirely.

The history of the Corps' inability to obtain appropriations for a fish passage improvement study at Daguerre Point Dam stands as a cautionary tale in this regard. The biological opinion issued in

2002 noted that the Corps was then pursuing fish passage improvement options at Daguerre. The November 2007 biological opinion recounts budget requests submitted by the Corps in Fiscal Years 2007 and 2008 for an initial appropriation of \$100,000 to begin implementation, but these requests were not approved. The November 2007 biological opinion included a Term and Condition in the Incidental Take Statement requiring the Corps to complete the fish passage improvement planning process and implement an action to improve fish passage at Daguerre within specific deadlines. However, despite the Corps' claims to have repeatedly attempted to obtain funding, no funding was ever approved. Thus, a decade after the Corps began evaluating a fish passage improvement project at Daguerre, it has not obtained the Congressional appropriation to implement it.

What is more, your letter provides no analysis of what these extensions will mean for the Listed Species. Your letter refers to these deadline extensions as "minor" alterations to the RPA measures. However, in selecting the RPA measures, NMFS stated that they were developed through a "thoughtful and reasoned analysis of the key causes of the jeopardy and adverse modification findings . . . ." (BiOp at 210) NMFS explained that the RPA "must be implemented in its entirety in order to avoid jeopardy and adverse modification." (*Id.* at 215) On this basis, NMFS stated that compliance with the schedule set forth in the RPA was essential to avoiding jeopardy and adverse modification:

In order to meet the requirements of the ESA, the Corps must implement the [RPA] actions in the timeframes identified. It will be up to the Corps to determine under which authority(s) it will use to meet the time requirements. The Corps should not let any opportunities be lost through inaction. (*Id.* at 211)

NMFS found these deadlines to be necessary to meet ESA obligations to ensure the action avoids jeopardy and adverse modification of critical habitat. Your letter points to nothing that would suggest the threats posed by the Project are somehow less urgent today than they were when the BiOp came out in February. The lack of reasoned explanation (supported by an administrative record) for how jeopardy and adverse modification can be avoided under the new schedule leads us to wonder whether it is legally defensible.

Your letter states that the deadlines in the RPA measures "cannot be met for practical reasons, such as a lack of appropriations, or the length of time required to comply with the National Environmental Policy Act, among other implementation challenges." However, your letter provides no analysis of why each extension is necessary in light of these practical considerations. For example, your letter fails to identify which of the RPAs would require NEPA review, whether a full environmental impact statement would be needed versus a finding of no significant impact, and how long NEPA review would take to complete. Thus, SYRCL believes that the deadline extensions in your letter represent a significant and unjustified change in agency position.

Since the BiOp was issued, SYRCL has been aware of discussions underway between NMFS and various parties in the Yuba River watershed to address perceived inadequacies of the existing BiOp. SYRCL has been willing to remain on the sidelines based on our understanding that the discussions were not going to be fundamentally altering the BiOp's basic conclusions. However, your letter makes clear that these discussions were leading to much more fundamental changes

than we previously understood, even perhaps the reinitiation of consultation for the issuance of an entirely new biological opinion. We are dismayed that such sweeping decisions would be made without any input from SYRCL or other members of the environmental community. The new BiOp came about because a federal judge in a lawsuit brought by SYRCL and Friends of the River found that the previous biological opinion was arbitrary and capricious for failing to articulate a rational connection between the facts found and the conclusions reached. We are dismayed that discussions to which SYRCL was not a party appear to have caused your agency to return to the kind of analysis that resulted in a remand of the biological opinion in the first place.

For these reasons, we request that you rescind the November 27, 2012 letter and agree to convene a meeting with SYRCL and the other interested parties to discuss prompt implementation of the RPA measures under the deadlines contained in the BiOp. We would greatly prefer to reach a resolution of these issues without the need for further litigation. However, if our request is not honored, we will be forced to commence legal action to seek to have the modifications to the RPA measures overturned and the previous schedule reinstated.

Please contact me at your earliest convenience to discuss the concerns raised in this letter (caleb@syrlc.org or 530-265-5961 x207).

Sincerely,



Caleb Dardick  
Executive Director

cc: Colonel William J. Leady, U.S. Army Corps of Engineers  
Curt Aikens, Yuba County Water Agency