

Water Review

A Perspective on Western Water Issues Prepared by the Family Farm Alliance and Its Members

CALIFORNIA

Northern California Water Agency Faces Controversial Federal Opinion

Overview

The Yuba County Water Agency (YCWA) – a Northern California entity with a distinguished track record for developing proactive and collaborative solutions to the many water challenges it faces – has found itself on the defensive, reacting to a fast-tracked National Marine Fisheries Service (NMFS) biological opinion that could have profound implications for YCWA, local farmers, and rural communities. YCWA believes that NMFS failed to properly consult in the development of the biological opinion (BO) and employed a conclusion-driven approach that does not rely on the best available science. Importantly, the federal agency’s arguments that the mere existence of two U.S. Army Corps of Engineers dams causes jeopardy to threatened and endangered fish species sets a dangerous precedent for all Western water and power users.

This important topic is the focus of interest for this edition of the Family Farm *Water Review*.

The Yuba River

The Yuba River rises at the crest of the Sierra Nevada mountain range some 9,000 feet above the Pacific Ocean and tumbles through a hundred miles of canyons in just 48 hours to join the Feather River – the Sacramento River’s largest tributary - at a confluence only 67 feet above sea level. It drains 1,357 square miles of a watershed never more than 35 miles wide.

Since 1848, the Yuba River has produced the greatest lode of gold of any stream in the United States. But by the end of the 19th century, panning was no longer profitable, placer mining had displaced the prospector and silt was clogging the channel throughout its length.

Daguerre Point Dam and Englebright Dam were built by the California Debris Commission to contain mining debris washed out of the upper Yuba River watershed by Gold Rush miners. Both

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Lower Yuba River, California.

The Yuba River (Continued from Page 1)

facilities are now owned and operated by the U.S. Army Corps of Engineers. Daguerre, originally built in 1906, is 25 feet tall, and has functioning fish ladders at its north and south ends. Englebright, constructed in 1941, is 260 feet tall and has no fish ladders. YCWA built New Bullards Bar Dam in 1970 with dedicated flood storage.

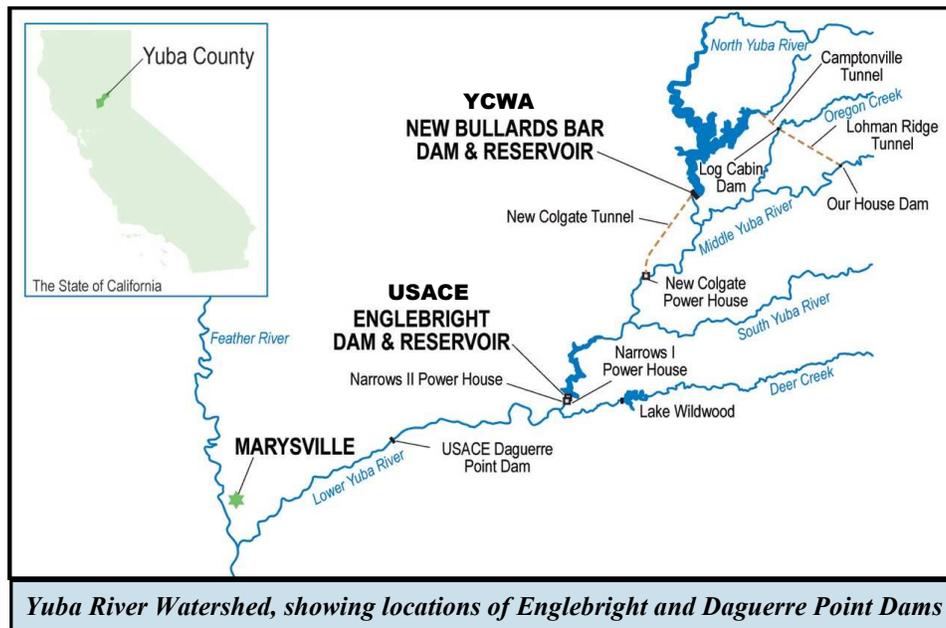
Still, mining debris continues to affect fisheries and flood protection on the Yuba River. For example, the U.S. Geological Survey has estimated that there is approximately 28 million cubic yards of mining sediment contained in Englebright reservoir. The release of this material into the Yuba, Feather and Sacramento rivers could have devastating effects on public safety, and the environment.

There were ten major floods on the Yuba during the previous century. In 1955, as every watershed in California was hit by tropical storms, the Yuba became a ravaging torrent that choked its mountain channel, poured over the dams at Bullards Bar and Englebright Reservoir and ripped into the valley. The 1955 Yuba River flood came within inches of flooding Marysville, wreaked havoc in Yuba City, killed 40 people, forced almost 30,000 people to flee the county, and reinforced the contention that there was an urgent need for a major water program. YCWA's water and power project was

developed in response to the 1955 flood.

Today, the Yuba River, with no fish hatcheries, is one of California's most important rivers because it likely provides habitat for some of the Central Valley's last wild, native Chinook salmon and steelhead runs. Conflicting roles related to fisheries resources, water supply reliability, flood concerns, and surface and groundwater management associated with the Yuba River have resulted in ongoing water litigation between environmental and water supply interests.

Yuba County Water Agency



Yuba River Watershed, showing locations of Englebright and Daguerre Point Dams

Established in 1959 by an act of the State Legislature and headquartered in historic Marysville, California, YCWA is a public agency governed by a 7-member Board of Directors comprised of the five members of the Yuba

County Board of Supervisors and two members elected at large. When bid in 1966, the \$185 million Yuba River Development Project was the largest single non federal, non state construction contract of its kind. Today, YCWA owns and operates 4 dams with a storage capacity of roughly 1 million acre-feet of water and associated powerhouses capable of generating approximately 400 Mw of energy. Additionally, Bullards Bar Reservoir provides a multitude of

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Yuba County Water Agency (Continued from Page 2)

recreational activities, including boating, fishing and camping. YCWA delivers about 310,000 acre-feet of water to local irrigation districts annually.

A leader in water transfers and fisheries restoration, YCWA is involved in many constructive efforts with local, state and federal agencies, and conservation groups.

The primary functions of YCWA are the generation of hydroelectric power, flood control, fisheries enhancement, recreation, conservation and storage of water, and wholesale of water to eight local water companies and irrigation districts.

Yuba River Water Use

During an average year, the annual snow and water runoff that passes down the Yuba River is about 2.4 million acre feet. The maximum annual runoff experienced on the river in 1982 was nearly 5 million acre feet. Approximately 16% of water is diverted by YCWA for irrigation supplies to 8 water districts and companies, other districts and individuals with their own water rights on the Yuba River. About 20% is diverted to other watersheds for water supply and production of electricity. The remainder - 64% - stays in the stream for fish and wildlife and either flows to the ocean or is diverted from the Sacramento-San Joaquin River San Francisco Bay Delta (Delta) by the state and federal water projects and Delta water users.

During low runoff years, YCWA has sold excess water to help alleviate drought conditions being experienced elsewhere in California. It has sold water to various northern California cities, the California Department of Water Resources, other water or irrigation districts and the State Water Bank.

Importance of Surface Water Supplies

Historically, the farmers in a significant portion of the southern YCWA service area relied solely upon groundwater for irrigation. As a result, the groundwater table in southern Yuba County became overdrafted. This overdraft condition reduced water supplies, increased water quality problems and resulted in crop losses.

One of the primary reasons leading to the formation of YCWA and the Yuba River Development Project was to remedy these problems by providing a reliable surface water supply. These actions helped develop agriculture – the production of fruit, rice, nuts and pasture for cattle - into the primary economic engine of Yuba County with total agricultural production valued



Early season rice harvest in Yuba County.
(Source: article.wn.com)

at nearly \$200 million in 2009. The application of surface water to farmland in the south Yuba County groundwater basin has provided in-lieu groundwater recharge that has raised groundwater levels by up to 100 feet.

“Now, our south Yuba County basin groundwater has generally recovered to the historic levels that existed before agricultural pumping started,” said Curt Aikens, general manager for YCWA.

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Proactive, Solution-Driven Efforts (Cont'd from Pg 3)

Proactive, Solution-Driven Efforts

YCWA is a widely recognized leader in collaborative efforts to improve Yuba River fisheries habitat, enhance flood protection and responsibly manage water supplies. Recently, YCWA completed the award-winning Lower Yuba River Accord, which resolved decades of litigation. The Accord concludes a 20-year controversy, and enables YCWA to successfully

operate the Yuba River Development Project for hydropower, irrigation, flood control, recreation and fisheries benefits – all in an innovative manner that surpasses the project's original requirements. As a settlement agreement, the Yuba Accord is the final product of nearly three years of intense negotiations among 17 stakeholders, including local irrigation districts, state and federal resource agencies, and conservation groups.

“The Yuba Accord enables YCWA to provide higher instream flows for salmon and steelhead and still meet all of our responsibilities to the people of Yuba County,” said Aikens.

YCWA is also now leading the North Yuba Reintroduction Initiative, a collaborative effort to evaluate the potential for reintroducing salmon and possibly steelhead to the North Yuba River watershed, and, if such a program is feasible, to carry it out.

“The North Yuba Reintroduction Initiative is the best, or the most practical approach to return-

ing salmon and steelhead into the upper Yuba watershed,” said Aikens.

Recent Litigation on the Yuba

Today, the U.S. Army Corps of Engineers

(Corps) operates and maintains Englebright and Daguerre Point dams and recreational facilities on and around Englebright Reservoir on the Yuba River. Because anadromous fish protected by the



Former California Governor Arnold Schwarzenegger presents Gary Bobker (The Bay Institute) and YCWA leaders with the Governor's Economic and Environmental Leadership Award for their development of the Yuba River Accord.

Endangered Species Act (ESA) are known to have historically accessed habitat in reaches of the Yuba River, NMFS issues biological opinions (BOs) that review the effects of Corps actions on these fish species.

On July 8, 2010, in a suit brought by South Yuba River Citizens League (SYRCL) and Friends of the River, Judge Lawrence K. Karlton of the U.S. District Court for Eastern California found that NMFS acted “arbitrarily and capriciously” in issuing a 2007 BO concluding that operations at the Corps' Daguerre Point and Englebright Dams posed no jeopardy to three ESA-listed fish populations. The court remanded the document to NMFS. On December 20, 2011, Judge Karlton ordered NMFS to file a new BO by February 29, 2012.

The ensuing February 2012 BO shocked YCWA and local political leaders by concluding

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Recent Litigation on the Yuba (Continued from Page 4)

that implementation of the proposed action would “likely jeopardize” the fish species or “adversely modify” designated critical habitat.

NMFS’s BO directs the Corps to implement nearly 30 separate, but related actions. Some of these include; near-term and long-term actions for fish passage at both dams, evaluating the biological impacts of the training walls that keep the lower Yuba River in its channel during floods, and changing lower Yuba River flows through conditions in Corps permits and licenses. The BO even questions the Yuba Accord in-stream flows, which many had thought resolved decades of litigation, and which was supported by numerous parties, including NMFS.

NMFS’s BO calls for the Corps to take extensive actions to improve fish passage at Daguerre Point Dam and to provide fish passage for the first time ever at Englebright Dam. Under the BO, the Corps must “develop and implement [a strategy] to reintroduce federally listed anadromous salmonids to historic habitats in the Yuba River upstream from Daguerre and Englebright Dams by Dec. 1, 2013,” according to the BO. Ultimately, it said, “volitional fish passage” at the dams is the “preferred approach,” and the agency is requiring that “dam removal or modification” be considered in the long term.

YCWA Concerns

YCWA believes that the NMFS BO broadly interpreted the Corps’ operations and maintenance of these dams to include their “mere pres-

ence.” Using this broad interpretation, NMFS incorrectly concluded that the Corps’ ongoing activities jeopardizes the existence of spring run Chinook salmon, steelhead and green sturgeon and their habitats in the Yuba River watershed.

“NMFS surely understands that the Corps’ discretionary actions with respect to these facilities are quite limited,” said Aikens. “These debris dams require no operation and very little maintenance.”

As a result of the BO’s flawed analysis, YCWA believes the BO has become a vehicle for implementing a range of questionable recovery actions that have not been responsibly evaluated, authorized, or funded.

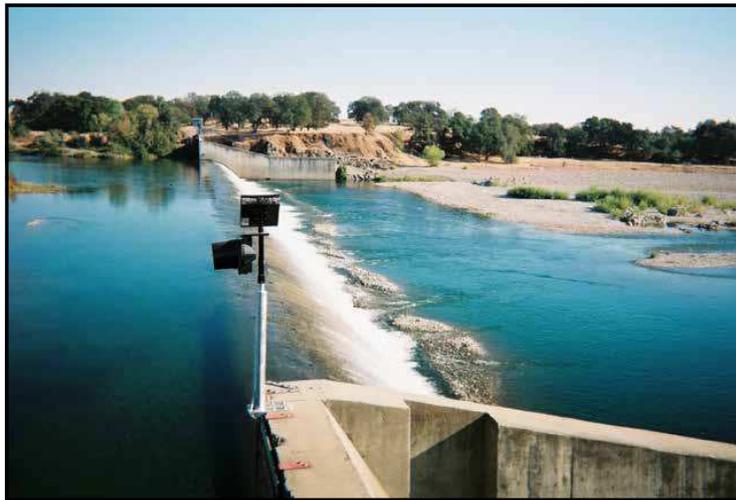
According to YCWA officials, NMFS’s BO does not provide specific details for all of these

actions. Instead, they say, it directs the Corps to design and implement the required actions and plans without an upfront analysis of their social, economic or environmental consequences, their anticipated benefits or costs, or even practical alternatives.

“These actions could range from tens of millions of dollars to hundreds of millions and their social and environmental impacts could be even more costly,” said Mary Jane Griego, Chair of the YCWA board of directors.

Because the Corps does not have explicit Congressional authority or funding to implement many of these actions, it is uncertain how or when they will comply with the BO.

“We, and the Corps, have clearly said to



Daguerre Point Dam.
(Source: D. Simondynes)

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Critical Flaws in the Opinion (Continued from Page 5)

NMFS that their BO does not rely upon the best available scientific information, contradicts collaboratively developed science, is counterproductive to salmon restoration and may cause real social, economic and environmental consequences to California's economy and environment," said Aikens.

Critical Flaws in the Biological Opinion

YCWA officials point to three critical flaws in the NMFS BO.

First, NMFS improperly requires the Corps to address nearly every human and non-human "stressor" on these species, rather than just the Corps' discretionary "actions" of maintaining Daguerre and Englebright dams. The NMFS BO infers that the adverse effects of a lack of riparian vegetation on the river, poaching, off-road recreational vehicles and even invasive species are the Corps' responsibility to address.

Second, for many of the thirty actions the BO directs the Corps to perform, the Corps likely does not have clear legal authority or the budget to implement, and some include deadlines that fail to provide the Corps time to comply with the Endangered Species Act or National Environmental Policy Act.

Finally, the BO includes an array of factually incorrect statements, unsubstantiated arguments, reliance on outdated, incomplete or flawed information, and fails to use the best available scientific and commercial information.

"We are disappointed that the NMFS BO ignores collaborative science from the Yuba Accord River Management Team (RMT) and the Yuba Salmon Forum, which includes representatives from the California Department of Fish and Game, and the University of California at Davis," said Aikens.

YCWA believes the NMFS BO threatens the Lower Yuba River Accord by challenging collaborative science-based instream flows that NMFS helped to develop, along with other state and federal agencies, and conservation groups.

The BO also directs the Corps to establish a new entity to the Accord's RMT, which could complicate the existing collaborative scientific research program. And finally, by challenging the Accord's instream flow program, NMFS BO may threaten YCWA's ability to transfer water, including a minimum transfer of 60,000 acre-feet every year for fish and wildlife uses in the Bay-Delta.

Other Impacts

The impacts of this BO are numerous and have not been sufficiently evaluated by NMFS, according to YCWA. The BO introduces a level



Englebright Dam on the Yuba River.
(Source: U.S. Army Corps of Engineers)

of uncertainty into the management and use of water by local farmers who irrigate roughly 100,000 acres of land to raise rice, peaches, plums, walnuts, livestock and other crops. The BO will redirect the effort, energy and resources of YCWA and many others away from voluntary, collaborative work on fisheries restoration in the Yuba River watershed (including the Yuba Salmon Forum and aforementioned North Yuba Reintroduction Initiative).

Importantly, this BO raises expectations that dams will be removed without responsibly addressing the real consequences that such actions

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Other Impacts (Continued from Page 6)

could have upon California's economy and environment.

For example, Englebright Reservoir contains 28 million cubic yards of contaminated mining debris that would need to be removed so it wouldn't be released into the Yuba, Feather and Sacramento Rivers, and the Bay-Delta, creating an unacceptable flood risk and environmental catastrophe. Arsenic, mercury and other chemicals are believed to be in the massive amount of debris.

"Flood protection, farming, and recreation are essential to our economy", said Ms Griego. "It is unfortunate NMFS chose to direct the Corps to take actions that could impact these essential activities without considering real alternatives that would have a greater chance of success. Our community deserves to know how much these actions would cost, what social and environmental impacts they would have, and whether California would benefit from them."



U.S. Representative Wally Herger
(Source: Rep. Wally Herger)

Implications for Other Water Users

Of importance to water users throughout the Western U.S. is the "effects analysis" contained in the NMFS BO, which improperly includes effects of the ongoing existence of Corps dams as effects of the proposed action. Including effects of ongoing existences of dams as "project effects" conflicts with Ninth Circuit Court precedent and another BO prepared by NMFS in 2009 for the Operations Criteria and Plan (OCAP).

"If federal fisheries agencies start treating the effects of existence of dams as effects of proposed actions – especially if the proposed action is just operations and maintenance of dams and

not their existence – a whole new dose of uncertainty will be injected into Western water management," said Dan Keppen, executive director of the Family Farm Alliance.

California Politicians Weigh In

U.S. Rep. Wally Herger, whose district includes this area, recently sent a letter to NOAA and NMFS, taking the agencies to task for the approach used in determining its dam removal stance.

"In what appears to be pre-determined, and thus questionable, the opinion's stated preference is for the removal of Englebright Dam," wrote Mr. Herger. "Instead, the opinion should have focused on potential effects to federally listed fish species and their designated critical habitat that would result from Corps' proposed action, namely the ongoing operation and maintenance of Englebright Dam."

Mr. Herger called the regulatory uncertainty and social, economic and environmental consequences from this BO "unacceptable."

"I will look forward to your prompt reply explaining how your plan to address the serious process and substance deficiencies in this opinion," his letter concluded.

Colusa County Supervisor Kim Vann, candidate for Congress in California's new 3rd district – which includes parts of Yuba County - also weighed in on the matter.

"I agree with Congressman Herger that the consequences of this biological opinion are unacceptable, and strongly support his efforts to ensure that clear answers as to how this decision

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Rewards for Sticking with Agenda (Cont'd from Pg 7)

was made and how these agencies intend to mitigate the serious problems it raises are delivered,” Vann said in a recent statement.

Rewards for Sticking with an Agenda

SYRCL has pushed hard for over 20 years, in a variety of forums, to remove Englebright Dam. The NMFS BO is the latest such vehicle to advance that agenda.

“For two decades we’ve been working in Congress, the courtroom and the collaborative science table to showcase the salmon restoration potential on the Yuba River,” said Jason Rainey, Executive Director of SYRCL, in May 2011. “Today there is a confluence of federal processes and scientific consensus directed at the Corps’ dams.”

SYRCL and other environmental organizations continue to push their agenda to eventually remove Englebright Dam. And, as is often the case in Western water litigation matters, the environmental groups who sued the federal government and helped force the creation of the new NMFS BO have scored a legal victory and will apparently reap financial gain for their efforts, at the expense of taxpayers.

The Marysville *Appeal-Democrat* newspaper reported in April that attorneys for the prevailing plaintiffs initially asked for \$2.3 million under the ESA. The request went to Judge Karlton in Sacramento, who came up with his ruling in March. Judge Karlton's opinion noted that attorneys for the plaintiffs have spent 5,800 hours on the case, so far, which he reduced by 20 percent. In the end, he approved a payment to the plaintiffs of \$1.87 million by the federal government.

Summary and Next Steps

The NMFS BO creates some extremely difficult issues for YCWA to address. It presents scientific conclusions that conflict with other ongoing, collaborative research efforts. The effects analysis does not match the proposed action.

And, it directs the Corps of Engineers to impose instream flow and fish passage measures on YCWA. Thus, the BO creates an unsettling precedent that will undermine many future activities in the Yuba River watershed.

Randy Olsen, with the Corps’ Sacramento District office, said his agency’s legal mandate at Englebright Dam and Daguerre Point Dam is limited to operations and maintenance. Because there is fish passage at Daguerre, additional authorization would be required for ‘modified’ fish passage there. Getting fish past Englebright will also require congressional approval and funding, according to the Corps.

“Fish passage is not in our authorization at Englebright. It’s not part of the project purpose,” Olsen said.

YCWA believes NMFS should reinitiate their consultation with the Corps of Engineers, focusing exclusively on the operations and maintenance of the Corps at these two facilities and using the best available scientific information. A new BO based on this information could be credible and scientifically justified.

While YCWA’s concerns regarding the BO and the consultation are many, the agency remains hopeful that NMFS will endeavor to work collaboratively with Yuba River stakeholders in the future, regardless of the outcome of this BO.

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