

Separating the Environmental Baseline from the Proposed Action

The subject of separating the scope and effects of the environmental baseline and the proposed action has received a significant amount of attention throughout this project's consultation history. Over the past several months, NMFS has conducted an intensive review to consider how the effects associated with the continued existence of structures such as dams, and any non-discretionary actions required in connection with their operations, should be treated in a Section 7 consultation. In summary, there are three applied legal and analytic principles that should be applied to inform how they are treated. These principles are as follows:

1. In general, effects attributable to the existence of the dams or to non-discretionary operations are subsumed within the effects already 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 their continuing effects into the future.
2. The Corps should clearly describe the scope of discretion over the proposed action and conduct a rigorous exercise to establish areas of non-discretion. The Corps bears a high burden of proof to demonstrate areas of no discretion, and it is incumbent upon the Corps to demonstrate that it clearly lacks discretion over its activities.
3. Where the scope of the Corps' discretion is not clear, effects should be attributed to proposed action.

In general terms, this means that from an analytic perspective, the past, present and future presence and effects associated with Daguerre and Englebright dams should be included in the *Environmental Baseline* sections of the biological assessment and biological opinion, and therefore not considered to be part of or an effect of the Corps' proposed action. However, it is often difficult to clearly describe a fine line of difference between baseline conditions and a project's operations. Therefore it is important for the Corps, to be very clear about the boundaries of their discretion (or non-discretion) and to articulate specifically how the Corps is prohibited from taking actions associated with the continued existence of dams, and not simply that there is no specific authority. If it is not possible for the Corps to clearly separate these areas, then the Corps should attribute those effects to the proposed action.