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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

COALITION FOR A SUSTAINABLE DELTA,  
BELBRIDGE WATER STORAGE DISTRICT,  
BERRENDA MESA WATER STORAGE  
DISTRICT, LOST HILLS WATER  
DISTRICT, WHEELER RIDGE MARICOPA  
WATER STORAGE DISTRICT, and DEE  
DILLON

Plaintiffs,

v.

DONALD KOCH, in his official  
capacity as Director of the  
California Department of Fish and  
Game,

Defendant,

CENTRAL DELTA WATER AGENCY, et al.,

Defendant-Intervenors,

CALIFORNIA SPORTFISHING PROTECTION  
ALLIANCE, et al.,

Defendant-Intervenors.

1:08-CV-00397 OWW  
GSA

MEMORANDUM DECISION  
DENYING PLAINTIFFS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
(DOC. 57)

I. INTRODUCTION

This case challenges the California Department of  
Fish and Game's ("CDFG") enforcement of state sport-  
fishing regulations that protect striped bass populations

1 within the Sacramento-San Joaquin Delta. Plaintiffs, a  
2 coalition of water users led by the Coalition for a  
3 Sustainable Delta ("Coalition"), complain that CDFG's  
4 enforcement of these regulations violates the Endangered  
5 Species Act ("ESA"), because striped bass prey upon at  
6 least four species listed under the ESA, including the  
7 Sacramento River winter-run Chinook salmon, Central  
8 Valley spring-run Chinook salmon, Central Valley  
9 steelhead, and delta smelt (the "Listed Species").

10 Plaintiffs move for summary judgment on the following  
11 discrete issues, the resolution of which they assert  
12 "will narrow the issues in the case and provide the  
13 parties with guidance as to how to proceed":

14 (1) [T]hat those portions of the Central Valley  
15 Improvement Act ("CVPIA"), Pub. L. 102-575, 106  
16 Stat. 4600, Title 34, 106 Stat 4706-31 (1992),  
17 pertaining to anadromous fish, do not exempt  
18 CDFG's enforcement of striped bass sport-fishing  
19 regulations from the take prohibitions under  
20 Section 9 of the ESA, 16 U.S.C. § 1538  
21 (a) (1) (B);

22 (2) [T]hat it is a violation of the ESA to  
23 "take" a single endangered Sacramento-River  
24 winter-run [C]hinook salmon, threatened Central  
25 Valley spring-run [C]hinook salmon, threatened  
26 Central Valley steelhead, or threatened delta  
27 smelt without prior take authorization from the  
28 appropriate federal Wildlife Agency;

(3) [T]hat it is a violation of the ESA for a  
government or government agency or entity to  
"take" a federally listed species through the  
exercise of its regulatory authority without  
first receiving take authorization from the  
appropriate federal Wildlife Agency; and

(4) [T]hat Mr. Dillon has standing under Article  
III of the United States Constitution to pursue  
this litigation.

28 Doc. 57-2 at 1-2.

1 Defendant Donald Koch, Director of CDFG, ("State  
2 Defendant") opposes summary adjudication on the second,  
3 third, and fourth issues, but takes no position on the  
4 CVPIA affirmative defense, which is asserted only by  
5 Defendant-Intervenors Central Delta Water Agency, et al.  
6 ("Central Delta"). Doc. 65. By stipulation, State  
7 Defendant also filed a supplemental opposition,  
8 addressing recent discovery addressing Mr. Dillon's  
9 standing. Doc. 69. Central Delta joins the State  
10 Defendant's opposition, but separately opposes summary  
11 adjudication on its CVPIA affirmative defense. Doc. 66.  
12 Defendant-Intervenors California Sportfishing Protection  
13 Alliance, et al., ("CSPA"), filed a separate brief  
14 opposing summary adjudication on the first and second  
15 issues, but take no position on the CVPIA affirmative  
16 defense or Dee Dillon's standing. Doc. 67.<sup>1</sup>

17  
18 **II. BACKGROUND**

19 The striped bass (*Morone saxatilis*) is a non-native  
20 species introduced from the New Jersey coast to the  
21 California waters near Martinez in 1879. Fuchs Decl.,  
22 Doc. 65-5, Exh. A (Striped Bass Restoration and

23  
24 <sup>1</sup> CSPA filed the declaration of Bill Jennings in support of its  
25 opposition to summary adjudication on the single take (second) and  
26 take by regulatory authority (third) issues. Doc. 67-2. Plaintiffs  
27 object to Jennings' declaration on numerous grounds. Doc. 75.  
28 Because, as discussed below, the second and third issues are not  
cognizable on summary judgment, it is not necessary to resolve  
Plaintiffs' objections at this time. If CSPA, or any other party,  
relies upon the Jennings declaration in future proceedings,  
Plaintiffs may renew their objections. No other evidentiary  
objections were made in connection with this motion for partial  
summary adjudication.

1 Management Plan) at 1. Upon introduction, the species  
2 multiplied rapidly, with abundance reaching approximately  
3 3 million adults by the early 1960s. *Id.*, Exh. B  
4 (Conservation Plan for the CDFG Striped Bass Management  
5 Program ("Conservation Plan")) at 21. Since the 1960s,  
6 the striped bass population has experienced a decline,  
7 with the adult population eroding to 775,000 by 1996.  
8 *Id.*, Exh. C (Endangered Species Act, Section 7  
9 Consultation Biological and Conference Opinion) at 1.  
10 More recent surveys indicate that the adult striped bass  
11 population now numbers approximately one million fish.  
12 *Nobriga Decl.*, Doc. 65-4, at ¶22.

13 Pursuant to Article 4, section 20 of the California  
14 Constitution, the California Legislature delegated to the  
15 California Fish and Game Commission (the "Commission")  
16 "the power to regulate the taking or possession of birds,  
17 mammals, fish, amphibians, and reptiles," Cal. Fish &  
18 Game Code § 200, and the regulatory authority to  
19 establish seasons, bag limits, and the "manner and the  
20 means" of take for sport fish, including the striped  
21 bass, Cal. Fish & Game Code § 205. Pursuant to these  
22 authorities, the Commission established sport-fishing  
23 regulations for the striped bass that prohibit anglers  
24 from taking the species in certain areas and in certain  
25 situations. 14 Cal. Code Regs. §§ 5.75, 27.85. Current  
26 striped bass sport-fishing regulations impose catch  
27 limitations, size limitations, and gear restrictions on  
28 striped bass anglers. *Id.* For example, anglers may not

1 take striped bass from within the Delta that are less  
2 than 18 inches in length and may only catch and keep two  
3 striped bass in excess of 18 inches in length. *Id.* CDFG  
4 is responsible for enforcing the sport-fishing  
5 regulations. Plaintiffs' Statement of Undisputed  
6 Material Facts ("PSUF") 2. Consistent with his  
7 responsibilities, Defendant Koch has enforced and  
8 continues to enforce the striped bass sport-fishing  
9 regulations. PSUF 3.

10 The 1999 Conservation Plan proposed a striped bass  
11 stocking program that would have stocked 1.275 million  
12 yearling or hatchery-reared bass for a five-year period,  
13 with reduced stocking in the following five years.  
14 Conservation Plan at 40. In 2000, CDFG obtained from the  
15 U.S. Fish and Wildlife Service ("FWS") and the National  
16 Marine Fisheries Service ("NMFS") separate incidental  
17 take permits under the ESA for the Striped Bass  
18 Management Program. Fuchs Decl., Exhs. D and E. NMFS  
19 prepared a Biological and Conference Opinion pursuant to  
20 Section 7 of the ESA, which expressed concern about and  
21 required mitigation for striped bass predation of Listed  
22 Species due to the CDFG stocking program. Fuchs Decl.,  
23 Exh. C. at 4-5, 31-39. CDFG halted its striped bass  
24 stocking program in 2002 and the program has not been  
25 reinitiated. Fuchs Decl., Exh. F (2003 Annual Report for  
26 California Department of Fish and Game's Striped Bass  
27 Management Program) at 1, 5.

28 Plaintiffs maintain that the striped bass sport-

1 fishing regulations have contributed to the maintenance  
2 of an artificially high population of striped bass in the  
3 Delta. PSUF 9. CDFG disputes this assertion, pointing  
4 to analyses indicating that enforcement of the present  
5 striped bass regulations, alone, will not stabilize the  
6 striped bass population over the long-run. For example,  
7 the Conservation Plan concluded that CDFG management  
8 efforts that did not include an artificial striped bass  
9 stocking program would result in a long-term decline in  
10 the adult striped bass population to 515,000 adults.  
11 Conservation Plan at 37. The plan further concluded that  
12 maintaining the striped bass population at stable levels  
13 would require much more restrictive sport-fishing  
14 regulations than are presently enforced. *Id.* at 117.

15 It is undisputed that populations of the Listed  
16 Species have declined in recent years. For example, the  
17 delta smelt population as measured by abundance indices  
18 relied upon by FWS has declined by two to three orders of  
19 magnitude from historical highs. PSUF 13; see also  
20 *Natural Resources Defense Council v. Kempthorne*, 506 F.  
21 Supp. 2d 322, 334-35 (E.D. Cal. 2007). Delta smelt are  
22 currently at a historic low and considered to be in  
23 "critical condition." PSUF 14. The Sacramento River  
24 winter-run Chinook salmon, Central Valley spring-run  
25 Chinook salmon, and Central Valley steelhead populations  
26 have also suffered sharp declines in abundance. *Pac.*  
27 *Coast Fed'n of Fishermen's Assns. v. Gutierrez*, 606 F.  
28 Supp. 2d 1195, 1218-1224 (E.D. Cal. 2008).

1           It is undisputed that striped bass prey on Listed  
2 Species. PSUF 10. Plaintiffs maintain that by promoting  
3 and maintaining an artificially high population of  
4 striped bass in the Delta, the striped bass sport-fishing  
5 regulations have also artificially increased striped bass  
6 predation of the Listed Species. PSUF 11. However,  
7 while CDFG concedes that evidence shows that the Listed  
8 Species are among the species that constitute the striped  
9 bass' food source, the Listed Species "are not common in  
10 the striped bass diet and striped bass predation is not  
11 responsible for their current status." Fuchs Dec., Exh.  
12 G (Biological Assessment for the California Department of  
13 Fish and Game Striped Bass Management Program, June 1995-  
14 June 1996 ("BA")) at 54-56. As the Conservation Plan  
15 observed, "[s]almon and striped bass populations  
16 coexisted in much greater abundance than the populations  
17 existing today and available historical information on  
18 population trends does not suggest that high periods in  
19 striped bass abundance coincided with lower populations  
20 of salmon as would be expected if striped bass were a  
21 major factor limiting salmon abundance." Conservation  
22 Plan at 26. In fact, statistical analysis of species  
23 abundance data referenced in the Conservation Plan  
24 disclosed a positive, rather than a negative, correlation  
25 between striped bass abundance and salmon abundance. The  
26 authors of the analysis concluded that "[w]hile it is  
27 difficult to interpret the causes for and therefore the  
28 meaning of such correlations, this positive correlation

1 certainly indicates that striped bass predation is not a  
2 dominant factor controlling the salmon population." *Id.*  
3 at 27; see also BA at 41-45.

4 CDFG submits the declaration of CDFG biologist  
5 Matthew Nobriga to support its opposition to Plaintiff's  
6 motion for partial summary judgment. Nobriga opines that  
7 "[i]t is logical that if predation by one species is  
8 strong enough to cause declines in another that the  
9 abundance of the prey species would go down when the  
10 abundance of the predator goes up." Nobriga Decl. at  
11 ¶11. Using a statistical method known as linear  
12 regression, Nobriga reviewed the relationship between  
13 striped bass abundance and the abundance of winter-run  
14 salmon, spring-run salmon, and Delta smelt. As in the  
15 Conservation Plan, these regression analyses disclosed  
16 the presence of a positive, not a negative, relationship,  
17 between striped bass abundance and winter-run salmon  
18 abundance. The analyses did not find any statistical  
19 relationship between striped bass abundance and spring-  
20 run salmon abundance or striped bass abundance and Delta  
21 smelt abundance. *Id.* at ¶¶ 16-17.

22 Nobriga also summarizes the results of a 2003 study  
23 of the relationship between striped bass abundance and  
24 winter-run salmon abundance, conducted by biologists  
25 Lindley and Mohr. This study concluded that even the  
26 complete elimination of the striped bass population from  
27 the Bay-Delta system would only increase winter-run  
28 recovery probabilities by slightly more than three



1 percent and that the winter run would still have about a  
2 one in five chance of extinction in the next 50 years.  
3 *Id.* at ¶22.

4 The only negative relationship disclosed by the  
5 Nobriga regression analyses was between Delta smelt  
6 abundance and the abundance of Mississippi silversides, a  
7 small fish that preys on Delta smelt eggs and larvae.  
8 Nobriga opines this negative relationship "is evidence  
9 that silverside abundance may have reduced the per capita  
10 number of smelt surviving to the summer." *Id.* at ¶15.  
11 Nobriga notes that, while striped bass do eat delta  
12 smelt, they also eat their predators and competitors,  
13 like the Mississippi silverslide. *Id.* at ¶10. From  
14 this, suggests that it is possible that the elimination  
15 of striped bass from the Bay-Delta system could increase  
16 silverside abundance, which would increase silverside  
17 predation of the Delta smelt. *Id.* at ¶ 10. Increased  
18 silverside predation of the Delta smelt could potentially  
19 offset any reduced striped bass predation of the smelt.

20  
21 **III. STANDARD OF DECISION**

22 A motion for summary judgment and a motion for  
23 partial summary judgment (sometimes called summary  
24 adjudication) are governed by the same standards.  
25 *California v. Campbell*, 138 F.3d 772, 780-81 (9th Cir.  
26 1998); *Costa v. Nat'l Action Fin. Servs.*, 2007 WL  
27 4526510, at \*2 (E.D. Cal. Dec. 19, 2007). Summary  
28

1 judgment is appropriate when "the pleadings, the  
2 discovery and disclosure materials on file, and any  
3 affidavits show that there is no genuine issue as to any  
4 material fact and that the movant is entitled to judgment  
5 as a matter of law." Fed. R. Civ. P. 56(c). A party  
6 moving for summary judgment "always bears the initial  
7 responsibility of informing the district court of the  
8 basis for its motion, and identifying those portions of  
9 the pleadings, depositions, answers to interrogatories,  
10 and admissions on file, together with the affidavits, if  
11 any, which it believes demonstrate the absence of a  
12 genuine issue of material fact." *Celotex Corp. v.*  
13 *Catrett*, 477 U.S. 317, 323 (1986) (internal quotation  
14 marks omitted).

17 Where the movant has the burden of proof on an issue  
18 at trial, it must "affirmatively demonstrate that no  
19 reasonable trier of fact could find other than for the  
20 moving party." *Soremekun v. Thrifty Payless, Inc.*, 509  
21 F.3d 978, 984 (9th Cir. 2007); see also *S. Cal. Gas Co.*  
22 *v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003)  
23 (noting that a party moving for summary judgment on claim  
24 on which it has the burden at trial "must establish  
25 beyond controversy every essential element" of the claim)  
26 (internal quotation marks omitted). With respect to an  
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1 issue as to which the non-moving party has the burden of  
2 proof, the movant "can prevail merely by pointing out  
3 that there is an absence of evidence to support the  
4 nonmoving party's case." *Soremekun*, 509 F.3d at 984.

5  
6 When a motion for summary judgment is properly made  
7 and supported, the non-movant cannot defeat the motion by  
8 resting upon the allegations or denials of its own  
9 pleading, rather the "non-moving party must set forth, by  
10 affidavit or as otherwise provided in Rule 56, 'specific  
11 facts showing that there is a genuine issue for trial.'" *Id.*  
12 *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
13 242, 250 (1986)). "Conclusory, speculative testimony in  
14 affidavits and moving papers is insufficient to raise  
15 genuine issues of fact and defeat summary judgment." *Id.*

16  
17 To defeat a motion for summary judgment, the non-  
18 moving party must show there exists a genuine dispute (or  
19 issue) of material fact. A fact is "material" if it  
20 "might affect the outcome of the suit under the governing  
21 law." *Anderson*, 477 U.S. at 248. "[S]ummary judgment  
22 will not lie if [a] dispute about a material fact is  
23 'genuine,' that is, if the evidence is such that a  
24 reasonable jury could return a verdict for the nonmoving  
25 party." *Id.* at 248. In ruling on a motion for summary  
26 judgment, the district court does not make credibility  
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1 determinations; rather, the "evidence of the non-movant  
2 is to be believed, and all justifiable inferences are to  
3 be drawn in his favor." *Id.* at 255.

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6 **IV. ANALYSIS**

7 **A. Two of the Four Requested Determinations are Not**  
8 **Amenable to Summary Judgment.**

9 Federal Rule of Civil Procedure 56(a) provides that a  
10 plaintiff may move "for summary judgment on all or part  
11 of [a] claim." Plaintiff cites a number of cases for the  
12 unremarkable proposition that a party may move for  
13 partial summary judgment on a single issue of law or fact  
14 relevant to a particular claim or defense. Critically,  
15 however, in each cited case, legal rules were applied to  
16 specific facts to find a claim or issue undisputed as a  
17 matter of law. See *Gillette v. Delmore*, 886 F.2d 1194,  
18 1197-99 (9th Cir. 1988) (denying motion for summary  
19 adjudication as to whether specific phone call made by  
20 Plaintiff was protected speech because material facts  
21 were disputed); *Deimer v. Cincinnati Sub-Zero Products*,  
22 990 F.2d 342, 344-46 (7th Cir. 1993) (denying motion for  
23 summary judgment on issue of causation, finding that  
24 material issues of fact existed); *Minority Police*  
25 *Officers Ass'n of South Bend v. City of South Bend*, 721  
26 F.2d 197, 201-202 (7th Cir. 1983) (summarily adjudicating  
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1 issue of standing, rejecting plaintiffs' theory that  
2 minority police officers share interests with minorities  
3 applying to become officer); *First Nat'l Ins. Co. v.*  
4 *Federal Deposit Ins. Corp.*, 977 F. Supp. 1051, 1055-59  
5 (S.D. Cal. 1997) (granting partial summary judgment on  
6 several issues, as opposed to causes of action, to narrow  
7 issues at trial, applying various legal doctrines to the  
8 specific facts of that case); *S. Pac. Transp. Co. v.*  
9 *California (Caltrans)*, 790 F. Supp. 983, 984 (C.D. Cal.  
10 1991) (determining, on summary judgment, that the  
11 petroleum exclusion in the Comprehensive Environmental  
12 Response and Liability Act ("CERCLA") applies to  
13 unrefined and refined gasoline, used petroleum products,  
14 and petroleum-laden soil, substances at issue in that  
15 case).

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18 Plaintiffs also cite *Disandro v. Morrison-Knudsen*  
19 *Co., Inc.*, 588 F. Supp. 889, 892 (D. Haw. 1984), and  
20 *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d  
21 13, 18 (D.D.C. 2004), for the proposition that it is  
22 appropriate to summarily adjudicate a "pure" legal issue  
23 to narrow the issues in a case and advance the progress  
24 of the litigation. In *Disandro*, the district court  
25 entertained plaintiff's request, styled as a motion for  
26 partial summary judgment, on the issues of whether a  
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1 particular statute required proof of defendant's scienter  
2 and/or plaintiff's reliance. Defendant argued that  
3 ruling on these discrete issues of law would amount to an  
4 advisory opinion in violation of Article III's case or  
5 controversy requirement. *Id.* at 893. This argument was  
6 rejected based on *Lies v. Farrell Lines, Inc.*, 641 F.2d  
7 765, 768-69 & n.3 (9th Cir. 1981), recognizing that "[i]t  
8 is appropriate to decide a few limited issues by summary  
9 judgment, even if those issues are not entirely  
10 dispositive of any one claim ... [as] summary judgment  
11 can thus serve to set the issues for trial." However,  
12 the quoted *Lies* language interprets Rule 56(d)(1), which  
13 permits a court to deem certain facts established if  
14 those facts appear to be "without substantial  
15 controversy." See *Lies* 641 F.2d at 768. *Lies* is not  
16 authority for the issuance of partial summary judgment on  
17 an abstract issue of law (i.e., one entirely divorced  
18 from the facts of the case under consideration).  
19 *Disandro's* misplaced reliance on *Lies* renders its holding  
20 unpersuasive.

21  
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23  
24 *Philip Morris USA*, a RICO case, summarily adjudicated  
25 the "strict legal issue" of whether a defendant's  
26 liability for conspiracy under the RICO statute required  
27 that the defendant participate in the management of the  
28

1 enterprise. 327 F. Supp. 2d at 18. Citing *Warner v.*  
2 *United States*, 698 F. Supp. 877, 879 (S.D. Fla. 1988),  
3 this issue was deemed amenable to summary adjudication  
4 because its resolution could "narrow the issues in a  
5 case, advance the progress of the litigation, and provide  
6 the parties with some guidance as to how they proceed  
7 with the case." 327 F. Supp. 2d at 17. But *Warner*, like  
8 *Lies*, concerned the application of rule 56(d), which  
9 permits the court to determine specific facts, not  
10 abstract issues of law. *Philip Morris* is no more  
11 persuasive than *Disandro*.

12  
13 Here, Plaintiffs request determinations of the  
14 following, abstract questions of law: (1) whether the  
15 "take" of a single endangered listed fish without prior  
16 take authorization from the appropriate federal wildlife  
17 agency violates the ESA; and  
18  
19 (2) whether a government agency or entity violates the  
20 ESA by "taking" a federally listed species through the  
21 exercise of its regulatory authority without first  
22 obtaining take authorization from the appropriate federal  
23 Wildlife Agency.

24  
25 As to the first issue, although the First Amended  
26 Complaint ("FAC"), Doc. 46, and the Plaintiffs' Statement  
27 of Undisputed Facts, Doc. 57-2, focus on alleged  
28

1 population-level effects of the striped bass sport-  
2 fishing regulations on the Listed Species, the FAC also  
3 alleges:

4 113. The ESA prohibits all take of all  
5 ESA-listed species, even of a single  
6 individual of the species. *Loggerhead*  
7 *Turtle v. County Council of Volusia*  
8 *County*, 896 F. Supp. 1170, 1180 (M.D.  
9 Fla. 1995); 16 U.S.C. § 1538.

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10 115. By enforcing regulations to  
11 protect and increase the non-native  
12 striped bass population, defendant is  
13 taking the Listed Species in violation  
14 of section 9 of the ESA.

15 FAC at ¶¶ 113, 115. Plaintiffs seek early adjudication  
16 of the "single take" issue to vindicate their position  
17 that "in order to succeed on the merits, Plaintiffs need  
18 only prove that striped bass predation of Listed Species  
19 is greater, by one fish, than if the sport-fishing  
20 regulations were not enforced." Doc. 79-2 at 3-4.<sup>2</sup>

21 This is an abstract question, as the motion is  
22 supported by no undisputed facts that could possibly  
23 support such a finding. In other words, Plaintiffs  
24 motion would require that the court hypothetically  
25 assume, for purposes of this motion, that that the  
26 striped bass sport-fishing regulations caused an

27 <sup>2</sup> At oral argument, Plaintiffs' counsel suggested that the intent  
28 of this argument was, in fact, to establish that minute population-  
level effects, e.g., 0.01 percent, would be sufficient to establish  
a violation of the ESA. But, Plaintiffs cite only single take cases  
in support of their motion for partial summary judgment. Whether a  
certain percentage effect would satisfy the population-level effects  
standard turns on the application of population-level impact  
jurisprudence.



1 individual angler to release (or not catch) one  
2 particular striped bass, which then, in turn, consumed  
3 one particular, individual Listed Species, and determine  
4 the legal effect of such a hypothetical case. Plaintiffs  
5 have not presented such evidence, precluding summary  
6 adjudication of whether "take" of a single listed fish  
7 violates ESA section 9. On summary judgment, a district  
8 court may not assume facts that do not exist or cannot be  
9 proved to decide abstract questions of law.

11 The facts supporting Plaintiffs' alternative theory  
12 of take -- that the sport-fishing regulations have  
13 population-level effects on the Listed Species -- are  
14 highly disputed. Although striped bass may eat delta  
15 smelt, they also eat delta smelt predators and  
16 competitors. Nobriga Decl. at ¶10. As Mr. Nobriga  
17 states: "[M]ajor food web perturbations can cause changes  
18 that were not predictable in advance." *Id.* Mr. Nobriga  
19 concludes that "it is impossible to forecast the  
20 population responses of the Bay-Delta food web to the  
21 removal of striped bass - one of its keystone species."  
22 *Id.* at ¶24

25 Federal courts are courts of limited jurisdiction,  
26 and "must refrain from deciding abstract or hypothetical  
27 controversies and from rendering impermissible advisory  
28

1 opinions with respect to such controversies." See *Earth*  
2 *Island Inst. v. Ruthenbeck*, 490 F.3d 687, 694 (9th Cir.  
3 2007), rev'd on other grounds, *Summers v. Earth Island*  
4 *Inst.*, 129 S. Ct. 1142 (2009) (citing *Flast v. Cohen*, 392  
5 U.S. 83, 96 (1968)); see also *In re Michaelson*, 511 F.2d  
6 882, 893 (9th Cir. 1975) ("This Court does not intend to  
7 and cannot, issue an advisory opinion on a hypothetical  
8 fact situation."); *Matter of Fed Pak Systems, Inc.*, 80  
9 F.3d 207, 211-12 (7th Cir. 1996) (federal court "lacks the  
10 constitutional power to render advisory opinions or to  
11 decide abstract, academic, or hypothetical questions").  
12

13       The second request presents the same problem:  
14 whether it is unlawful for a government or government  
15 agency or entity to take a Listed Species through the  
16 exercise of its regulatory authority without first  
17 receiving ESA take authorization. A district court  
18 cannot summarily adjudicate, in the abstract, whether  
19 "the exercise of [an agency's] regulatory authority"  
20 results in a take. This inquiry does not require  
21 application of undisputed facts established in this case  
22 to the law. Whether the specific exercise of regulatory  
23 authority that has occurred in this case resulted in an  
24 unlawful take of any of the Listed Species is not raised  
25 by the present motion. The facts that underlie that  
26  
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28

1 question are disputed.

2 Plaintiffs' motion for summary adjudication is DENIED  
3 WITHOUT PREJUDICE as to the single take (second) and take  
4 by regulatory authority (third) issues.

5 B. CVPIA Affirmative Defense.

6 Central Delta asserts the following affirmative  
7 defense:

8  
9 The provisions of the Central Valley Project  
10 Improvement Act, Pub.L. 102-575, 106 Stat. 4600,  
11 Title 34, 106 Stat. 4706-31 (1992) pertaining to  
12 anadromous fish, which are defined to include  
13 striped bass, [] are a bar to any action to  
14 enforce any inconsistent provisions of the  
15 Endangered Species Act.

16 Doc. 20 at 13. Plaintiffs request summary adjudication  
17 to foreclose this affirmative defense, the operative  
18 effect of which would be to exempt CDFG's enforcement of  
19 striped bass sport-fishing regulations from the take  
20 prohibitions under Section 9 of the ESA, 16 U.S.C. § 1538  
21 (a) (1) (B), and the requirement that CDFG obtain an  
22 incidental take permit.

23 The CVPIA contains numerous provisions calling for  
24 protection and enhancement of striped bass within the  
25 Sacramento-San Joaquin Delta. CVPIA section 3403(a)  
26 defines the term "anadromous fish" to include "striped  
27 bass," making applicable section 3406(b) (1)'s maintenance  
28 and restoration provisions. That section requires the

1 Secretary of Interior to "develop within three years of  
2 enactment and implement a program which makes all  
3 reasonable efforts to ensure that, by the year 2002,  
4 natural production of anadromous fish in Central Valley  
5 rivers and streams will be sustainable, on a long-term  
6 basis, at levels not less than twice the average levels  
7 attained during the period of 1967-1991." To this end,  
8 it is undisputed that FWS has established a doubling goal  
9 for striped bass of 2,500,000 fish. McDaniel Decl., Doc.  
10 66-4, at ¶3 & Ex. B (Final Restoration Plan for  
11 Anadromous Fish Restoration Program, January 9, 2001) at  
12 9-10. It is also undisputed that this goal has not been  
13 achieved. *Id.* at Ex. C (Anadromous Fish Restoration  
14 Program Doubling Graphs for striped bass).

17 Section 3406(b)(1)(B) provides that "the Secretary is  
18 authorized and directed to modify Central Valley Project  
19 operations to provide flows of suitable quality,  
20 quantity, and timing to protect all life stages of  
21 anadromous fish...." Section 3406(b)(1)(D)(2) requires  
22 that the Secretary "upon enactment of this title dedicate  
23 and manage annually 800,000 acre-feet of Central Valley  
24 Project yield for the primary purpose of implementing the  
25 fish, wildlife, and habitat restoration purposes and  
26 measures authorized by this title...." This provision  
27  
28

1 has been interpreted to require that the Secretary give  
2 primacy to its anadromous fish doubling program in the  
3 allocation of the 800,000 acre-foot CVP yield dedication.  
4 See *San Luis & Delta Mendota Water Auth. v. U.S. Dept. of*  
5 *the Interior*, --- F. Supp. 2d ---, 2009 WL 1362652 (E.D.  
6 Cal. 2009); *Bay Institute of San Francisco v. United*  
7 *States*, 87 Fed. Appx. 637 (9th Cir. Jan. 23, 2004).  
8 Because striped bass are included in the statutory  
9 definition of "anadromous fish," they are intended and  
10 designated beneficiaries of these efforts. CVPIA §  
11 3403(a).<sup>3</sup>  
12  
13

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14 <sup>3</sup> Additional, specific requirements for the protection and  
15 restoration of anadromous fish, including striped bass, are found in  
16 section 3406(b)(8) (to implement "short pulses of increased water  
17 flows to increase the survival of migrating anadromous fish moving  
18 into and through the Sacramento-San Joaquin Delta and Central Valley  
19 rivers and streams"); section 3406(b)(9) (that the Secretary "develop  
20 and implement a program to eliminate, to the extent possible, losses  
21 of anadromous fish due to flow fluctuations caused by the operation  
22 of any Central Valley Project storage or re-regulating facility");  
23 section 3406(b)(19) (that the Secretary "reevaluate existing  
24 operational criteria in order to maintain minimum carryover storage  
25 at Sacramento and Trinity river reservoirs to protect and restore  
26 the anadromous fish of the Sacramento and Trinity Rivers in  
27 accordance with the mandates and requirements of this  
28 subsection..."); section 3406(c)(1) (that the Secretary "develop a  
comprehensive plan, to reestablish where necessary and to sustain  
naturally reproducing anadromous fisheries from Friant Dam to [the  
San Joaquin River's] confluence with the San Francisco  
Bay/Sacramento-San Joaquin Delta Estuary"); section 3406(e)(1) (that  
the Secretary investigate "measures to maintain suitable  
temperatures for anadromous fish survival in the Sacramento and San  
Joaquin rivers and their tributaries, and the Sacramento-San Joaquin  
Delta by controlling or relocating the discharge of irrigation  
return flows and sewage effluent..."); section 3406(e)(5) (for  
investigation of "measures to provide for modified operations and  
new or improved control structures at the Delta Cross Channel and  
Georgiana Slough to assist in the successful migration of anadromous  
fish"); section 3406(f) (that "[t]he Secretary, in consultation with  
the Secretary of Commerce, the State of California, appropriate  
Indian tribes, and other appropriate public and private entities,  
shall investigate and report on all effects of the Central Valley

1 Section 3406(b) (14) is directed specifically to  
2 striped bass, requiring the Secretary to "develop and  
3 implement a program which provides for modified  
4 operations and new or improved control structures at the  
5 Delta Cross Channel and Georgiana Slough during times  
6 when significant numbers of striped bass eggs, larvae,  
7 and juveniles approach the Sacramento River intake to the  
8 Delta Cross Channel or Georgiana Slough."

10 Certain CVPIA provisions require the Secretary to  
11 coordinate with state agencies to protect anadromous fish  
12 in general and striped bass in particular. For example,  
13 Section 3406(b) (21) requires that the Secretary "assist  
14 the State of California in efforts to develop and  
15 implement measures to avoid losses of juvenile anadromous  
16 fish resulting from unscreened or inadequately screened  
17 diversions on the Sacramento and San Joaquin rivers,  
18 their tributaries, the Sacramento-San Joaquin Delta, and  
19 the Suisun Marsh." Similarly, section 3406(b) (18)  
21 requires that the Secretary "if requested by the State of  
22 California, assist in developing and implementing  
23 management measures to restore the striped bass fishery  
24

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26 Project on anadromous fish populations..."); and section 3406(g) (for  
27 the modeling of "measures needed to restore anadromous fisheries to  
28 optimum and sustainable levels in accordance with the restored  
carrying capacities of Central Valley rivers..." and "measures  
designed to reach sustainable harvest levels of resident and  
anadromous fish....").

1 of the Bay-Delta estuary." Such measures must be  
2 "coordinated with efforts to protect and restore native  
3 fisheries." *Id.*

4 Central Delta is correct that "[i]t cannot be  
5 reasonably disputed that Congress intended to protect and  
6 restore striped bass." Doc. 66 at 5. However, Congress  
7 also expressed its intention in CVPIA § 3406(b), that the  
8 Secretary "operate the Central Valley Project to meet all  
9 obligations under state and federal law, including but  
10 not limited to the federal Endangered Species Act...."  
11 In light of the fact that the CVPIA expressly requires  
12 compliance with the ESA, Plaintiffs argue that their ESA  
13 claims cannot be barred as a matter of law by the CVPIA.  
14 Doc. 57-2 at 5-7. Central Delta rejoins that the more  
15 specific, and more-recently enacted, provisions of the  
16 CVPIA requiring restoration of the striped bass fishery  
17 should prevail over the ESA's earlier-enacted, general  
18 requirements.  
19  
20

21 Plaintiffs cite *Morton v. C.R. Mancari*, 417 U.S. 535,  
22 550-551 (1974), for the proposition that "courts are not  
23 at liberty to pick and choose among congressional  
24 enactments, and when two statutes are capable of co-  
25 existence, it is the duty of the courts, absent a clearly  
26 expressed congressional intention to the contrary, to  
27  
28

1 regard each as effective." *Mancari* and its progeny  
2 concern the repeal by implication of an earlier, specific  
3 provision, by a later-enacted, general one. Here, the  
4 issue is whether a later, specific provision renders  
5 inapplicable an earlier-enacted general one. Courts have  
6 "a duty to construe statutes harmoniously" whenever  
7 possible. 2B N. Singer & J. Singer, *Sutherland Statutes*  
8 and *Statutory Construction* § 53:1 (7th ed. 2008).

10 Central Delta is correct that the CVPIA is the more  
11 recent and more specific expression of Congressional  
12 intent. Central Delta suggests that *Rodgers v. United*  
13 *States*, 185 U.S. 83, 89 (1902) sets forth the applicable  
14 canon of statutory construction:  
15

16 Where there are two acts or provisions, one of  
17 which is special and particular, and certainly  
18 includes the matter in question, and the other  
19 general, which, if standing alone, would include  
20 the same matter and thus conflict with the  
21 special act or provision, the special must be  
taken as intended to constitute an exception to  
the general act or provision, especially when  
such general and special acts or provisions are  
contemporaneous, as the legislature is not to be  
presumed to have intended a conflict.

22 Central Delta ignores the law that a later, more specific  
23 statute only trumps an earlier general one where the two  
24 statutes are in conflict.

25 Can the numerous CVPIA provisions directing the  
26 Secretary of the Interior, in consultation with other  
27 federal agencies, to protect and enhance the striped bass  
28 population, be harmonized with application of section 9's



1 take prohibition to CDFG's enforcement of the striped  
2 bass sport-fishing regulations and more general  
3 application of the ESA? On Plaintiffs' motion for  
4 summary adjudication on an affirmative defense for which  
5 Central Delta has the burden of proof at trial,  
6 Plaintiffs must show "an absence of evidence to support  
7 the nonmoving party's case." *Soremekun*, 509 F.3d at 984.  
8 Plaintiffs maintain, and have presented evidence to  
9 support their claim, that State Defendant's enforcement  
10 of the sport-fishing regulations necessarily take Listed  
11 Species, and that lawful application of the ESA to State  
12 Defendant's enforcement activities will require  
13 elimination of (or substantial modification to) those  
14 sport-fishing regulations, which are causing jeopardy to  
15 Listed Species. The State rejoins that the current  
16 sport-fishing regulations are critical to the maintenance  
17 of current striped bass abundance levels. The State's  
18 evidence suggests that the continued enforcement of these  
19 regulations, and/or the promulgation of more stringent  
20 protections, may be necessary to achieve the 2,500,000  
21 striped bass population goal promulgated by the Service.

22 This presents a material factual dispute over the  
23 effects of CDFG's striped bass regulations on the bass  
24 and Listed Species populations. The express language and  
25 the legislative purpose of the CVPIA do not evince an  
26 intent to abrogate application of the ESA. Only after  
27 the facts are developed will it be possible to determine  
28 if a conflict in operation exists between implementation

1 of the ESA to the sport-fishing regulations and achieving  
2 the CVPIA objectives by application of those regulations.  
3 Plaintiffs' motion for summary adjudication of Central  
4 Delta's CVPIA affirmative defense is DENIED WITHOUT  
5 PREJUDICE.

6  
7 C. Standing of Dee Dillon.

8 To maintain an action in federal court, Plaintiffs  
9 must have Article III standing. See *Lujan v. Nat'l*  
10 *Wildlife Fed'n*, 497 U.S. 871, 872 (1990).<sup>4</sup> "[T]o satisfy  
11 Article III's standing requirements, a plaintiff must  
12 show (1) [he] has suffered an 'injury in fact' that is  
13 (a) concrete and particularized and (b) actual or  
14 imminent, not conjectural or hypothetical; (2) the injury  
15 is fairly traceable to the challenged action of the  
16 defendant; and (3) it is likely, as opposed to merely  
17 speculative, that the injury will be redressed by a  
18 favorable decision." *Laidlaw*, 528 U.S. at 180-81.

19  
20 The burden of establishing these three elements falls  
21 upon the party asserting federal jurisdiction. *Lujan v.*  
22 *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "[E]ach  
23

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24 <sup>4</sup> In addition to the Article III requirements, plaintiffs  
25 bringing suit under the Administrative Procedure Act, 5 U.S.C. §  
26 706, must establish that they fall within the "zone of interest" of  
27 the statute under which they bring their lawsuit. See *City of*  
28 *Sausalito v. O'Neill*, 386 F.3d 1186, at 1199 (9th Cir. 2004).  
However, where Plaintiffs' suit arises under the ESA's citizen suit  
provision, which allows "any person" to commence a civil suit, the  
zone of interest test is negated, or at least expanded to include  
"any person." *Bennet v. Spear*, 520 U.S. 154, 164 (1997).

1 element of Article III standing 'must be supported in the  
2 same way as any other matter on which the plaintiff bears  
3 the burden of proof, i.e., with the manner and degree of  
4 evidence required at the successive stages of the  
5 litigation.'" *Bennett v. Spear*, 520 U.S. 154, 167 (1997)  
6 (quoting *Lujan*, 504 U.S. at 561). On summary judgment,  
7 plaintiff "must show there is no genuine dispute as to  
8 material facts regarding their standing and that they  
9 have standing as a matter of law." *Citizens for a Better*  
10 *Env't.-Cal. v. Union Oil of Cal.*, 996 F. Supp. 934, 937  
11 (N.D. Cal. 1997); cf. *Defenders of Wildlife v. Gutierrez*,  
12 532 F.3d 913, 924 (D.C. Cir. 2008) ("In reviewing the  
13 standing question, the court must be careful not to  
14 decide the questions on the merits for or against  
15 plaintiff, and must therefore assume that on the merits  
16 the plaintiffs would be successful in their claims.").

19 When a plaintiff is an object of the challenged  
20 regulatory action, standing is usually not challenging to  
21 prove. *Lujan*, 504 U.S. at 562. When a plaintiff's  
22 asserted injury "arises from the government's allegedly  
23 unlawful regulation (or lack of regulation) of someone  
24 else, much more is needed." *Id.*

26 In that circumstance, causation and  
27 redressability ordinarily hinge on the response  
28 of the regulated (or regulable) third party to  
the government action or inaction -- and perhaps  
on the response of others as well. The

1 existence of one or more of the essential  
2 elements of standing "depends on the unfettered  
3 choices made by independent actors not before  
4 the courts and whose exercise of broad and  
5 legitimate discretion the courts cannot presume  
6 either to control or to predict"; and it becomes  
7 the burden of the plaintiff to adduce facts  
8 showing that those choices have been or will be  
9 made in such manner as to produce causation and  
10 permit redressability of injury. Thus, when the  
11 plaintiff is not himself the object of the  
12 government action or inaction he challenges,  
13 standing is not precluded, but it is ordinarily  
14 "substantially more difficult" to establish.

15 *Id.* (internal citations omitted).

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1. Injury-In-Fact.

To satisfy the "injury in fact" requirement, Plaintiffs must provide evidence of either actual or threatened injury. See *United States v. Ensign*, 491 F.3d 1109, 1116-17 (9th Cir. 2007). A plaintiff claiming environmental injury demonstrates injury in fact if he uses the affected area and is a person "for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). To satisfy this burden, Mr. Dillon does not need to show actual harm; "an increased risk of harm can itself be injury in fact sufficient for standing." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000); see also *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2004) (injury in fact existed where agency's issuance of a permit authorizing an oil company to build an addition

1 to its oil refinery dock increased the risk of an oil  
2 spill, an event that would harm plaintiffs' interests).  
3 To "require actual evidence of environmental harm, rather  
4 than an increased risk based on a violation of [a]  
5 statute, misunderstands the nature of environmental harm  
6 and would unduly limit the enforcement of statutory  
7 environmental protections." *Ocean Advocates*, 402 F.3d at  
8 860.

9 Here, Mr. Dillon declares that he has visited the  
10 Delta "to appreciate the natural environment, to escape  
11 from the urban environment, and to engage in numerous  
12 recreational activities, including recreational boating,  
13 swimming, snorkeling, kayaking, and wildlife viewing."  
14 Dillon Decl., Doc. 57-5, at ¶3. Through these activities  
15 he has "been able to gain significant exposure to the  
16 Sacramento River winter-run chinook salmon, Central  
17 Valley spring-run chinook salmon, Central Valley  
18 steelhead, and delta smelt ("Listed Species"). When [he]  
19 encounters the Listed Species [he] is generally filled  
20 with a sense of appreciation and satisfaction." *Id.* Mr.  
21 Dillon Continues:

22 My encounters with the Listed Species have  
23 occurred through a variety of different  
24 circumstances. For example, I have witnessed  
25 salmon migrating through the Delta from a kayak,  
26 and viewed delta smelt while riding on a trawl  
27 vessel. I have also viewed Listed Species while  
28 photographing the Delta's diverse wildlife, and  
while swimming along the Delta's banks. These  
are but a few examples of my various  
experiences, and are in no way intended to be a  
comprehensive list.

1 *Id.* at ¶4. He further states that "the decline of the  
2 Listed Species, which I have personally witnessed over  
3 the last seven years, has negatively impacted my use and  
4 enjoyment of the Delta. For example, as a result of the  
5 decline of the Listed Species, my ability to fish for and  
6 view salmon has been significantly impaired." *Id.* at ¶6.  
7 Mr. Dillon is a person "for whom the aesthetic and  
8 recreational values of the area will be lessened by the  
9 challenged activity." *Friends of the Earth v. Laidlaw*  
10 *Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000).

11 The Supreme Court recently examined the "injury in  
12 fact" requirement in *Summers v. Earth Island Institute*,  
13 129 S. Ct. 1142 (2009). *Summers* addressed whether  
14 environmental organizations had standing to challenge a  
15 U.S. Forest Service ("Service") regulation that exempted  
16 certain types of projects from the Service's notice,  
17 comment, and appeal process. *Id.* at 1147. The Court  
18 first reviewed an affidavit in which one of the  
19 plaintiffs asserted that he had suffered injury in the  
20 past from development on Forest Service land. This was  
21 rejected as a basis for standing, because, among other  
22 things, "it relates to past injury rather than imminent  
23 and future injury that is sought to be enjoined." *Id.* at  
24 1150. In addition, another plaintiff's claim that he  
25 "want[s] to" visit specific sites in the Allegheny  
26 National Forest was found insufficiently specific. "This  
27 vague desire to return is insufficient to satisfy the  
28 requirement of imminent injury: 'Such 'some day'

1 intentions—without any description of concrete plans or  
2 indeed any specification of when the some day will be—do  
3 not support a finding of the ‘actual or imminent’ injury  
4 that our cases require.’” *Id.* at 1150-51 (quoting *Lujan*,  
5 504 U.S. at 564).

6 In support of their motion for partial summary  
7 judgment on the issue of standing, Plaintiffs originally  
8 submitted only Mr. Dillon’s declaration. His declaration  
9 arguably did not satisfy *Summers* because, although Mr.  
10 Dillon “plans to continue frequenting the Delta,” Dillon  
11 Decl., Doc. 57-5, at ¶ 6, he does not set forth any  
12 specific facts describing “concrete plans” for doing so.  
13 However, on May 27, 2009, Mr. Dillon filed responses to  
14 State Defendant’s interrogatories, in which he describes  
15 specific plans to return to the Delta to fish for Listed  
16 Species over the 2009 Labor Day weekend. See Second  
17 Fuchs. Decl., Doc. 69-2, at Ex. A. This is sufficient  
18 evidence of Mr. Dillon’s “concrete plans.” State  
19 Defendants no longer contest Mr. Dillon’s injury in fact.  
20 Mr. Dillon satisfies the injury in fact requirement for  
21 purposes of standing.

22  
23 2. Causation.

24 The second standing requirement, causation, requires  
25 that the injury be “fairly traceable” to the challenged  
26 action of the defendant, and not be “the result of the  
27 independent action of some third party not before the  
28 court.” *Tyler v. Cuomo*, 236 F. 3d 1124, 1132 (9th Cir.

1 2000).<sup>5</sup> The causation element is lacking where an  
2 "injury caused by a third party is too tenuously  
3 connected to the acts of the defendant." *Citizens for*  
4 *Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961,  
5 975 (9th Cir. 2003). For the purposes of determining  
6 standing, while the causal connection cannot "be too  
7 speculative, or rely on conjecture about the behavior of  
8 other parties, [it] need not be so airtight ... as to  
9 demonstrate that the plaintiffs would succeed on the  
10 merits.'" *Ocean Advocates*, 402 F.3d at 860.

11 *National Audubon Society v. Davis*, 307 F.3d 835 (9th  
12 Cir. 2002), provides guidance. The plaintiffs in *Davis*,  
13 bird enthusiasts, alleged that a California law banning  
14 the use of leghold traps to capture or kill wildlife  
15 violated the Migratory Bird Treaty Act. *Id.* at 842-843.  
16 Prior to the passage of that California law, federal  
17 officials used leghold traps against predators to protect  
18 several bird species. *Id.* at 844. The Ninth Circuit  
19 held that plaintiffs had standing to challenge the  
20 leghold trap ban, finding their injury was "fairly  
21

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22 <sup>5</sup> When a plaintiff seeks to vindicate a procedural harm, rather  
23 than a substantive right, the causation and redressibility  
24 requirements are relaxed. *Lujan*, 504 U.S. at 573 n.7; *Salmon*  
25 *Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th  
26 Cir. 2008). For example, a claim that a federal agency failed to  
27 engage in required consultation under ESA section 7(a)(2) is  
28 procedural in nature and would be subject to this relaxed standard.  
*Defenders of Wildlife v. EPA*, 420 F.3d 946, 957-58 (9th Cir. 2005),  
reversed on other grounds by *Home Builders v. Defenders of Wildlife*,  
551 U.S. 644 (2007). Here, Plaintiffs claim that State Defendant's  
enforcement of the sport-fishing regulations resulted in  
unauthorized take in violation of ESA section 9. No party has  
argued that this is an allegation of procedural, rather than  
substantive, harm under the ESA.



1 traceable" to the proposition because:

2 [T]he federal government removed traps in direct  
3 response to Proposition 4 (whether under direct  
4 "threat of prosecution" or not). Removal of the  
5 traps leads to a larger population of predators,  
6 which in turn decreases the number of birds and  
7 other protected wildlife.

8 *Id.* at 849. "This chain of causation has more than one  
9 link, but it is not hypothetical or tenuous; nor do  
10 appellants challenge its plausibility." *Id.*<sup>6</sup>

11 Here, it is Plaintiffs' burden to establish that  
12 their theory of causation is at least "plausible." *Id.*  
13 See also *Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 867 (9th  
14 Cir. 2003) ("A plaintiff who shows that a causal relation  
15 is 'probable' has standing, even if the chain cannot be  
16 definitively established."). Plaintiffs do not have to  
17 establish causation by a preponderance of the evidence  
18 required to prevail on the merits. *Ocean Advocates*, 402  
19 F.3d at 860 (while the causal connection cannot "be too  
20 speculative, or rely on conjecture about the behavior of  
21 other parties, [it] need not be so airtight ... as to  
22 demonstrate that the plaintiffs would succeed on the  
23 merits." ).<sup>7</sup> Because Plaintiffs are moving for summary

22 <sup>6</sup> *Davis* undermines State Defendants' suggestion that plaintiffs'  
23 causation showing is weakened by the presence of a non-human in the  
24 causal chain. So long as there is evidence that the third party,  
25 whether possessing a four-chambered heart or not, will behave in a  
26 predictable manner, the causal chain is not necessarily rendered  
27 "tenuous" for purposes of the standing analysis.

28 <sup>7</sup> The parties' unhelpfully rely on numerous cases deciding  
causation on the merits, including *Cold Mountain v. Garber*, 375 F.3d  
884 (9th Cir. 2004), *Pyramid Lake Paiute Tribe of Indians v. U.S.*  
*Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990), *Palila v.*  
*Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th  
Cir. 1981), and *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir.  
1993), as complete proof of causation is not required to establish

1 judgment, to prevail, there must be no material facts  
2 that call into question the plausibility of their theory  
3 of causation.

4 CDFG's Conservation Plan states that by modifying the  
5 striped bass minimum size limits from 18 to 26 inches,  
6 the striped bass population will increase by almost  
7 210,000 fish. Conservation Plan at 117. If true, the  
8 nature and extent of the sport-fishing regulations have a  
9 cognizable impact on the striped bass population. CDFG  
10 counters that the Conservation Plan also concluded that  
11 CDFG management efforts that do not include an artificial  
12 striped bass stocking program would result in the long-  
13 term decline of the adult striped bass population to  
14 515,000 adults. Doc. 65 at 3 (citing Conservation Plan  
15 at 37). The Conservation Plan additionally concludes  
16 that maintaining the striped bass population at stable  
17 levels requires much more restrictive sport-fishing  
18 regulations than are presently in force. *Id.* (citing  
19 Conservation Plan at 117).<sup>8</sup>

20 Plaintiffs' evidence of a link between higher striped  
21 bass abundance and increased Listed Species mortality is  
22

23 standing.

<sup>8</sup> The declaration of Bill Jennings, filed by CSPA, challenges  
24 whether removal of the sport-fishing regulations will necessarily  
25 lead to a decrease in striped bass population. Specifically,  
26 Jennings opines that he is "optimistic" that sport fishermen may  
27 self regulate and protect the striped bass fishery even in the  
28 absence of the regulations. Jennings Decl. at ¶7. But, CSPA  
submitted Jennings' declaration in connection with its opposition to  
Plaintiffs' request for summary adjudication of the single take and  
take by regulatory authority issues. CSPA explicitly declined to  
oppose Plaintiffs' standing. Accordingly, the Jennings declaration  
will not be considered in this context.

1 materially disputed. For example, CDFG's Conservation  
2 Plan concluded that a striped bass population of 765,000  
3 adults maintained through an artificial stocking program  
4 would consume 6 percent of the Sacramento River winter-  
5 run Chinook salmon population, 3.1 percent of the Central  
6 Valley Spring-run Chinook salmon population, and 5.3  
7 percent of the delta smelt population. Conservation Plan  
8 at 45, 56, 70. Striped bass predation upon the Listed  
9 Species will be slightly lower in the absence of the  
10 stocking program, but will still be present and will  
11 range from 3.4-4.7 percent of the winter-run, 2.3 percent  
12 of the spring-run, and 3.6 percent of the delta smelt.  
13 *Id.* DFG reaffirmed these estimates in its Status Review  
14 of the Longfin Smelt, released January 2009. Second  
15 Rubin Decl., Doc. 78, Ex. 13 at 28. These statistics  
16 support Plaintiffs' contention that increased striped  
17 bass populations adversely affect the Listed Species'  
18 abundance.

19 However, the statistical analyses described in the  
20 Declaration of Matthew L. Nobriga raise questions about  
21 Plaintiffs' assertion that ending the enforcement of the  
22 striped bass sport-fishing regulations will cause a  
23 measurable increase in the abundance of the Listed  
24 Species. Nobriga opines that it is possible that  
25 reductions in striped bass populations will have  
26 unintended, negative effects on Listed Species abundance.  
27 Specifically, Nobriga emphasizes that, while striped bass  
28 prey on delta smelt, they also prey on one of the delta

1 smelt's primary predators and competitors, the  
2 Mississippi silverslide. Nobriga Decl. at ¶¶ 7, 10.  
3 Nobriga opines that allowing depletion of the striped  
4 bass population may actually lead to decreased delta  
5 smelt abundance, because striped bass predation of  
6 Mississippi silverslide would be reduced. *Id.* at ¶ 10.

7 Nobriga references research performed by others  
8 contradicting the hypothesis that striped bass predation  
9 had a major influence on salmon survival. *Id.* at ¶12.  
10 Nobriga also performed his own regression analyses of the  
11 relationship between striped bass populations and those  
12 of the Listed Species, evidencing a positive relationship  
13 between striped bass abundance and winter-run abundance,  
14 and no relationship between striped bass abundance and  
15 either spring run, or delta smelt abundance. *Id.* at ¶¶  
16 16-17.

17 The Nobriga Declaration raises serious questions  
18 about the plausibility of Plaintiffs' causal theory by  
19 challenging Plaintiffs' fundamental assertion that there  
20 is some, measurable link between increased striped bass  
21 abundance and Listed Species mortality. This is all that  
22 is required to successfully oppose Plaintiffs' motion for  
23 summary adjudication on the issue of standing based on  
24 the extent of the dispute over causation.

25  
26 3. Redressibility.

27 To satisfy the final requirement of Article III  
28 standing, a plaintiff must show it is "likely that a

1 favorable court decision will redress the injury to the  
2 plaintiff." *Lujan*, 504 U.S. at 560; see also *Steel Co.*  
3 *v. Citizens for a Better Env't*, 523 U.S. 83 at 107  
4 ("Relief that does not remedy the injury suffered cannot  
5 bootstrap a plaintiffs into federal court; that is the  
6 very essence of the redressibility requirement").  
7 "Redressibility requires an analysis of whether the court  
8 has the power to right or to prevent the claimed injury."  
9 *Gonzales v. Gorsuch*, 688 F. 2d 1263, 1267 (9th Cir.  
10 1982). A plaintiff need only show that the requested  
11 relief is "likely" to redress his injury, "not that a  
12 favorable decision will inevitably redress his injury."  
13 *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994)  
14 (emphasis added and emphasis deleted from original).  
15 "There is no redressability, and thus no standing, where  
16 ... any prospective benefits depend on an independent  
17 actor who retains broad and legitimate discretion the  
18 courts cannot presume either to control or to predict."  
19 *Glanton v. AdvancePCS, Inc.*, 465 F.3d 1123, 1125 (9th  
20 Cir. 2006); see also *United States v. Larson*, 302 F.3d  
21 1016, 1019 (9th Cir. 2002).

22 Even a small improvement to the Listed Species'  
23 survival would be sufficient. See *Massachusetts v. EPA*,  
24 539 U.S. 497, 525 (2007) (for the purposes of standing, a  
25 favorable decision need only slow the increase or  
26 marginally reduce the risk of injury to plaintiff); see  
27 also *Sierra Club v. Franklin County Power of Ill., LLC*,  
28 546 F.3d 918, 927-28 (7th Cir. 2008) (environmental

1 plaintiff's injury would be redressed by favorable  
2 decision requiring more stringent emissions controls,  
3 even though defendant would likely be allowed to continue  
4 polluting); *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d  
5 328, 329 (7th Cir. 1993) ("even a small probability of  
6 injury is sufficient to create a case or controversy ...  
7 provided of course that the relief sought would, if  
8 granted, reduce the probability."); *Natural Res. Def.*  
9 *Council v. Kempthorne*, No. 1:05-cv-1207, 2007 WL 4462395,  
10 at \*14-15 (E.D. Cal. Dec. 14, 2007) (holding that even  
11 though the Court could not determine "whether the  
12 operations of the CVP and SWP export facilities are the  
13 principal cause of the decline in the delta smelt or  
14 whether other factors beyond the control of the Projects  
15 are the principal cause ..., the impact from Project  
16 operations is at least a concurrent cause which  
17 jeopardizes the existence of the Delta smelt and  
18 endangers its survival and its critical habitat, which  
19 necessitates remedial action.").

20 Here, whether a favorable decision in this case,  
21 e.g., enjoining enforcement of the striped bass sport-  
22 fishing regulations, would redress to any extent the  
23 claimed injury to Mr. Dillon's aesthetic enjoyment of the  
24 Listed Species is materially disputed.

25 Plaintiffs' motion for summary adjudication of Dee  
26 Dillon's standing is DENIED WITHOUT PREJUDICE. This  
27 ruling does not prevent Dillon from maintaining these  
28 cases, as, for pleading purposes, his standing

1 colligations are accepted as true.

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V. CONCLUSION

4 For the reasons set forth above, Plaintiffs' motion  
5 for summary adjudication is DENIED WITHOUT PREJUDICE in  
6 its entirety.

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8 SO ORDERED

9 Dated: July 16, 2009

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/s/ Oliver W. Wanger  
Oliver W. Wanger  
United States District Judge

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