UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

COALITION FOR A SUSTAINABLE DELTA, *et al.*, **Plaintiffs,** **v.** **JOHN CARLSON, JR., in his official capacity as Executive Director of the California Fish and Game Commission, *et al.*,** **Defendants,** **CENTRAL DELTA WATER AGENCY, *et al.*,** **Defendant-Intervenors,** **CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, *et al.*,** **Defendant-Intervenors.**	**1:08-CV-00397 OWW GSA** **MEMORANDUM DECISION AND ORDER RE STATE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (DOC. 24).**

I. INTRODUCTION

Plaintiffs in this case are a coalition of agricultural water users in the San Joaquin Valley that contract for State Water Project ("SWP") water deliveries from the Delta; an umbrella organization, the Coalition for a Sustainable Delta, purporting to represent these water users (collectively the "Coalition"); and one individual, Dee Dillon, who uses and enjoys

the Delta for recreational and aesthetic purposes. On January 29, 2008, Plaintiffs filed a lawsuit pursuant to 16 U.S.C. § 1540(g)(3)(A), the citizen suit provision of the Endangered Species Act ("ESA"), seeking declaratory and injunctive relief, against John Carlson, Jr., in his official capacity as Executive Director the California Fish and Game Commission (the "Commission"); Richard Rogers, Cindy Gustafson, Jim Kellogg, and Michael Sutton, in their official capacities as Members of the Commission; and John McCamman, in his official capacity as Interim Director of the California Department of Fish and Game ("CDFG"). (*See* Doc. 1.)[1]

Before the court for decision is State Defendants' motion for judgment on the pleadings. (Doc. 24, filed May 5, 2008.) State defendants argue that: (1) neither the Coalition nor Dee Dillon have standing to sue; (2) the individual defendants named in their official capacities as Members of the Commission are absolutely immune from suit by virtue of the legislative immunity doctrine; and (3) the Eleventh Amendment otherwise bars suit against the Commission's Members and Executive Director.

II. BACKGROUND

The crux of the Coalition's Complaint is that the Commission's promulgation and CDFG's maintenance and enforcement of striped bass fishing regulations cause the unlawful "take" of four species of ESA "listed" fish, including the Sacramento River

[1] The Commission and CDFG were originally named as defendants, but were dismissed by stipulation of the parties, (Doc. 12), leaving only officials of these two agencies as defendants.

winter-run Chinook salmon ("winter-run"), the Central Valley spring-run Chinook salmon ("spring-run"), the Central Valley steelhead ("steelhead"), and the Delta smelt (collectively, "Listed Species"). Through the adoption and enforcement of the striped bass fishing regulations, which include bag and size limitations, the Complaint alleges that the Commission and CDFG have allowed and encouraged the population of the non-native striped bass to thrive in the Delta. According to the Complaint, the striped bass prey upon and consume the Listed Species, and this is one of several causes of the population declines of the Listed Species.

III. STANDARD OF REVIEW

A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings after the pleadings are closed. Judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. *Honey v. Distelrath*, 195 F.3d 531 (9th Cir. 1999). The court must assume the truthfulness of the material facts alleged in the complaint. All inferences reasonably drawn from these facts must be construed in favor of the responding party. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993).

As with a motion to dismiss pursuant to Rule 12(b)(6), if matters outside of the pleadings are presented to and not excluded by the court on a motion for judgment on the pleadings, the motion shall be treated as one for summary judgment. Fed. R. Civ. P. 12(c). Nevertheless, a court may take judicial notice of matters of public record, including "records and reports of

administrative bodies" without converting the motion to one for summary judgment. *See Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (applying Rule 12(b)(6)).

IV. DISCUSSION

A. Standing.

1. General Legal Standard.

Standing is a judicially created doctrine that is an essential part of the case-or-controversy requirement of Article III. *Pritikin v. Dept. of Energy*, 254 F.3d 791, 796 (9th Cir. 2001). "To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1984). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

The doctrine of standing "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). The court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990); *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002).

To have standing, a plaintiff must show three elements.

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual

> or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted).

The Supreme Court has described a plaintiff's burden of proving standing at various stages of a case as follows:

> Since [the standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Id. at 561; *see also Churchill County v. Babbitt*, 150 F.3d 1072, 1077 (9th Cir. 1998).

2. Standing of the Coalition.

a. Injury in Fact.

State defendants do not challenge the Coalition's ability to satisfy the injury in fact element. (Doc. 39 at 2-3, filed July 7, 2008.) Nevertheless, the district court has a *sua sponte* duty to address the requirements of standing. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002). Here, the

Complaint alleges that:

> **Plaintiff Coalition for a Sustainable Delta ("Coalition") is comprised of agricultural water users in the San Joaquin Valley. Coalition members depend on State Water Project ("SWP") deliveries from the Delta to the San Joaquin Valley for their water supply. The continued operation of the SWP is, in turn, dependent on the overall health of the Delta and its ecosystem, which includes the maintenance of viable populations of species living in the Delta and protected by the ESA, such as the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt. In 2007, a federal district court ruled that deliveries of SWP water to parties with water contracts, such as the Coalition members, must be reduced substantially to protect the delta smelt. *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D. Cal. 2007). Recently, the California Department of Water Resources reported that in an average water year, the court's order in *NRDC v. Kempthorne* would reduce water exports from the Delta by 22 to 30 percent. Department of Water Resources Advisory, DWR Releases Water Delivery Impact Estimates Following [the] Wanger Decision (Dec. 24, 2007). Violations of the ESA by defendants, including the take of the Federally-Protected species, contribute to a decline in the health of the Delta ecosystem. Furthermore, such violations contribute to declines of the populations of species in the Delta protected by the ESA. The illegal and unmitigated take of the Federally-Protected species, including the delta smelt, by defendants injures the Coalition because it reduces the population of the Federally-Protected species thereby worsening the baseline status of the species, which must be taken into account by FWS and NMFS when they determine whether proposed SWP exports from the Delta comply with the ESA. Therefore, defendants' ESA violations threaten deliveries of SWP water to members of the Coalition. In sum, because the CFGC and CDFG have contributed to the decline of the delta smelt population by violating the ESA, they have contributed to the reduction in SWP water deliveries to members of the Coalition. Reduced deliveries of SWP water have an economic impact on members of the Coalition. Thus, Coalition members have been, and will continue to be, harmed by defendants' violations of the ESA.**

(Doc. 1 (Compl.) at ¶40.) The complaint also alleges that each of the Coalitions' members, Belridge Water Storage District ("BWSD"), Berrenda Mesa Water District ("BMWD"), Lost Hills Water District ("LHWD"), and Wheeler-Ridge Maricopa Water Storage

District ("WRMWSD"), all of which are California Water Storage Districts, "depend[] on SWP deliveries from the Delta to the San Joaquin Valley for their water supply," and are injured as described above in the paragraph concerning the Coalition as a whole. (*Id.* ¶ 41-44.)

These allegations are sufficient to satisfy the injury in fact requirement, as the Coalition and its members are arguably injured by reduced water deliveries caused, in part, by actions undertaken to protect the Listed Species. *See Bennet v. Spear*, 520 U.S. 154, 168 (9th Cir. 1997)(injury in fact test satisfied where petitioner alleged that agency action reduced the amount of water available and, as a result, adversely affected plaintiffs' water supply).

b. Causal Connection.

Constitutional standing requires a showing of "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560-561. More specifically, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal quotations omitted).

"When the suit is one challenging the legality of government action or inaction, [and] plaintiff is himself an object of the action (or forgone action) at issue... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561-62. This is not the case here, as Plaintiffs are not in any way the object of the challenged striped bass regulations.

Where, in contrast, "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."

> **In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," (Citations omitted.) and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.**

***Id.* at 562 (emphasis in original).**

Nevertheless, a "chain of causation [may have] more than one link," so as long as the connection between the injury and cause is not "hypothetical or tenuous." *Nat'l Audubon Soc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002). In *Davis*, the Ninth Circuit found that the Audubon Society, an organization dedicated to protection and observation of birds, had standing to challenge a regulation that forbade the use of a certain type of game trap because "[r]emoval of the traps leads to a larger population of predators, which in turn decreases the number of birds and other protected wildlife." *Id.* The Ninth Circuit reasoned: "This chain of causation has more than one link, but it is not hypothetical or tenuous; nor do appellants challenge its plausibility." *Id.*

Similarly, in *Ocean Advocates v. U.S. Army Corps of Engineers,* 402 F.3d 846 (9th Cir. 2005), the Ninth Circuit found that an environmental organization had standing to challenge the issuance by the Corps of Engineers of a permit to construct an

extension to an existing oil refinery dock. It was undisputed that the extension would be built if permitted; that its construction would increase traffic to the dock over time; and that, when considered alone or in tandem with other industrial projects in the area, the increased traffic would contribute to the risk of an oil spill. *Id.* at 860. While acknowledging that "other factors may also cause additional tanker traffic and increase the attendant risk of an oil spill," the Ninth Circuit found there was a sufficient causal connection between the issuance of the permit and plaintiffs' injuries, reasoning that the link between the new platform and increased traffic was not tenuous or abstract. *Id.* "The causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of litigation as to demonstrate that the plaintiffs would succeed on the merits." *Id.*; *see also Loggerhead Turtle v. County Council of Volusia County, Florida*, 148 F.3d 1231, 1249 (9th Cir. 1998)(environmental organization showed sufficient causal connection to challenge county's decision to exempt certain municipalities within its boundaries from artificial beachfront lighting regulations designed to protect sea turtles; the fact that the municipalities had supplemental authority to enact more onerous lighting standards did not sever the "fairly traceable" connection between the county's regulatory actions and the alleged harm).

State Defendants argue that the Ninth circuit applies a strict "but for" test when evaluating causation in cases involving independent action by third parties, citing *Idaho*

***Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). In *that case*, the Ninth Circuit examined whether an environmental organization had standing to challenge whether an agency's decision to recommend against designating a certain area as wilderness. 956 F.2d at 1518. The Ninth Circuit held that, in contrast to cases in which the injury was not "fairly traceable" to the challenged action or resulted from the "independent action of some third party not before the court," the injury to the plaintiff would not have occurred "but for" the agency's decision to recommend against wilderness designation. *Id.* However, the Ninth Circuit did not indicate that a "but for" causal connection was necessary to achieve standing, only that it was sufficient. Subsequent case law, including *Ocean Advocates,* 402 F.3d 846, and *Loggerhead Turtle*, 148 F.3d at 1249, make no mention of a "but for" test.**

Nor does another case relied upon by State Defendants, *Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002), in which county employees challenged a union's improper notice of a fee deduction from their paychecks under a labor agreement. Among other things, plaintiffs sought to invalidate an employer indemnification clause within the agreement. *Id.* Notwithstanding the stipulated fact that the employer would not have entered into the agreement without the indemnification clause, the Ninth Circuit held that the plaintiffs lacked standing to contest the clause because the "causal relationship" between the clause and the plaintiffs' claimed injury was "too remote." *Id.* According to the Ninth Circuit, the plaintiffs' lacked standing because their alleged "injury was not caused by

the employer's entry into the collective bargaining agreement; it was caused by the unions' inadequate notice of the expenditures on which the agency fees were based." *Id.* This case merely supports the proposition that where a causal connection is too tenuous, standing does not exist.

Plaintiffs cite *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), for the proposition that an injury should be considered "fairly traceable" even though it merely contributed to the alleged injury. In *Massachusetts v. EPA*, numerous environmental organizations, states, and local governments challenged a decision by the EPA not to adopt a rule regulating greenhouse gas emissions from new motor vehicles. Massachusetts argued that it was injured by EPA's decision, because the decision resulted in greater quantities of greenhouse gases being emitted into the atmosphere, thereby exacerbating the problem of climate change and contributing to the possibility that rising sea levels would permanently or temporarily inundate parts of Massachusetts. *Id.* at 1455-56. In challenging this chain of causation, the EPA asserted that "its decision not to regulate greenhouse gas emissions from new motor vehicles contribute[d] so insignificantly to [the alleged] injuries that the agency [could not] be haled into federal court to answer for them." *Id.* at 1457. While the Supreme Court conceded that any decrease resulting from an EPA issued regulation would more than likely be offset by increases in greenhouse gas emissions from developing nations, it held that Massachusetts' injury was fairly traceable to the EPA's decision. *Id.*

However, *Massachusetts v. EPA* was premised on "the special

position and interest of Massachusetts." The Court reasoned: "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." *Id.* at 1453-1454. Massachusetts, the Court said, has an "independent interest in all the earth and air within its domain." *Id.* at 1454. The Court noted that, although a sovereign state, upon joining the Union, Massachusetts relinquished some of its sovereign prerogatives and thus "cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted." *Id.*

> These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7601(b)(1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.

Id. at 1454-1455 (emphasis added). Because standing in *Massachusetts v. EPA* was premised on this "special position and interest," it is of limited relevance to this case, brought by private citizens.

Here, the Coalition and its members assert that they are being harmed because the striped bass regulations protect striped

bass, which prey upon listed species, which predation, in turn, affects the "baseline" condition of those species. This less robust baseline, according to the Complaint, "must be taken into account by FWS and NMFS when they determine whether proposed SWP exports from the Delta comply with the ESA. Therefore, defendants' ESA violations threaten deliveries of SWP water to members of the Coalition." (Doc. 1 at ¶40.) "In sum," the Complaint alleges, "because the [the Commission] and CDFG have contributed to the decline of the delta smelt population by violating the ESA, they have contributed to the reduction in SWP water deliveries to members of the Coalition. Reduced deliveries of SWP water have an economic impact on members of the Coalition." (*Id.*)

Although "this chain of causation has more than one link, [] it is not hypothetical or tenuous," *Davis*, 307 F.3d at 849, nor do state defendants "challenge its plausibility." *Id.* Instead, State Defendants make several arguments in the context of the causation element, e.g., that the invalidation of the striped bass regulations would have no direct effect on the *Kempthorne* interim remedies order nor would it necessarily alter future biological opinions (Doc. 25 at 9), that are more relevant to the issue of redressibility and are addressed below.

The Coalition's economic injuries are fairly traceable to the enforcement of the striped bass regulations.

c. Redressibility.

Constitutional standing also requires a showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561

(internal citations and quotations omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Where the "redress[]" of injury "depends on the unfettered choices made by independent actors not before the courts," a court should "have much less confidence in concluding that relief is likely to follow from a favorable decision." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 614-615 (1989).

The Ninth Circuit has explored the issue of redressibility in many cases. In *Glanton v. AdvancePCS, Inc.*, 465 F.3d 1123, 1225 (9th Cir. 2006), plaintiffs were company employees who participated in company-sponsored prescription drug plans. The plaintiffs contended that the drug benefits management company that administered the plans on behalf of their employers had overcharged their employers for drugs, forcing the employees to pay higher co-payments or contributions to their employers than appropriate. *Id.* The Ninth Circuit dismissed plaintiffs' claims for lack of standing because there was no reason to believe that the employing companies would actually have reduced employee co-payments or contributions, even if the plaintiffs had prevailed in their action against the drug benefits management company:

> There is no redressability, and thus no standing, where (as is the case here) any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict.

Id. at 1125.

In *Nuclear Information & Research Service v. Nuclear*

***Regulatory Commission ("NRC")*, 457 F.3d 941, 955 (9th Cir. 2006), plaintiffs challenged the NRC's decision to revise regulations governing the exemption standards for the transportation of radioactive material, claiming that NRC failed to comply with its obligations under the National Environmental Policy Act (NEPA). NRC argued that plaintiffs failed the redressability prong of *Lujan* because radioactive material is subject not only to the NRC rules, but also to the related rules of another agency, the Department of Transportation ("DOT"). *Id.* at 955. NRC argued that because the DOT rules were not properly before the Ninth Circuit, plaintiffs injury would not be redressed by having the NRC rules invalidated. *Id.* Plaintiffs countered that they need only show that if NRC is required to conduct an appropriate environmental analysis, such analysis could result in a different exemption rule or no exemption, and noted that because NRC's environmental analysis was the basis for both NRC and DOT's rulemakings, setting aside NRC's NEPA investigation would remedy NIRS's substantive challenge to the DOT rule. The Ninth Circuit sided with the agency:**

> **Redressability depends on whether the court has the ability to remedy the alleged harm. *Hall*, 266 F.3d at 975. In most NEPA cases, a petitioner "who asserts inadequacy of a government agency's environmental studies ... need not show that further analysis by the government would result in a different conclusion. It suffices that ... the [agency's] decision could be influenced by the environmental considerations that [the relevant statute] requires an agency to study." *Id.* at 977 (emphasis added) (citation omitted). However, this is not the usual NEPA case. The parties agreed at oral argument that NRC licensees are required to follow DOT's regulations for the transportation of nuclear material. 10 C.F.R. § 71.5(a) ("Each licensee who transports licensed material outside the site of usage, as specified in the NRC license, or where transport is on public highways, or who delivers**

> licensed material to a carrier for transport, shall comply with the applicable requirements of the DOT regulations in 49 CFR parts 107, 171 through 180, and 390 through 397, appropriate to the mode of transport."). Thus, even if we were to set aside the current NRC rule and remand to NRC with instructions that it prepare an EIS, nothing requires DOT to revisit its identical exemption standards, which govern the universe of NRC licensees. *See Lujan*, 504 U.S. at 568, 112 S.Ct. 2130 (holding there was no redressability because the Secretary could be ordered to revise his regulation "[b]ut this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question"). As NRC pointed out at oral argument, the DOT rule would control even if the NRC rule was wiped off the books. And the DOT regulation is not before us. We cannot see how an order remanding to NRC would remedy the asserted injury from the IAEA exemption standards because DOT would be under no obligation to reconsider its own, identical rule.

Id. (emphasis added).

Here, for the injury allegedly suffered by the Coalition and its members to be redressed, those water deliveries that have been reduced as a result of actions taken to protect the Delta smelt would need to be restored, at least in part. The *Kempthorne* interim remedies expired on June 20, 2008, and the new Delta smelt BiOp is due out in September 2008. It is total speculation to predict that the district court will be requested to modify or impose any interim operational restrictions on the CVP or SWP. In the ongoing litigation over the winter-run and spring-run Chinook Salmon and Central Valley steelhead, the interim remedies phase of the case has not been reached and no operational changes have been ordered. If any interim remedies were to be imposed, a revised BiOp for those species is due to be issued March 2, 2009.

Similarly, even assuming, *arguendo*, that Plaintiffs are entirely successful in this lawsuit and that the striped bass

regulations are invalidated as a result, it is speculative to assume that the FWS and/or NMFS would materially alter their conclusions regarding the status of the Listed Species and the measures required to prevent jeopardy and adverse modification to their habitat. Although the district court may be asked to review the agencies' revised biological opinions, the agencies are "independent actor[s] [that] retain[] broad and legitimate discretion the courts cannot presume either to control or to predict." *Glanton*, 465 F.3d at 1225. This case is similar to *Glanton*, in that there is no way to know whether the agencies would provide more water to the Coalition and its members if even if Plaintiffs prevail. This is especially so because there are multiple causes affecting the species unrelated to the striped bass.

The Coalition argues that "if the Court invalidates Defendants' striped bass regulations, the Coalition and Water Districts' injury would be redressed, as the Defendants' would no longer be contributing to the reduction in water deliveries via the adoption and enforcement of striped bass sport fishing regulations." (Doc. 36 at 16 (emphasis added).) In support of this assertion, the Coalition again cites *Massachusetts v. EPA*, 127 S. Ct. at 1458, in which the Supreme Court explained that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it." The Supreme Court also found that the fact that developing countries were "poised to increase greenhouse gas emissions substantially over the next century" was

not dispositive on the issue. *Id.* Instead, the Court held that the injury could be redressed because the risk of harm "would be reduced to some extent if petitioners received the relief they [sought]." *Id.*

Plaintiffs argue that, as in *Massachusetts v. EPA*, "even though the remedy sought would not right the entire wrong, the relief sought would reduce the injury - Defendants would no longer be contributing to the reduction in water deliveries. Therefore, the injury can be redressed." (Doc. 36 at 17.) However, because this holding was premised on the special role of Massachusetts as a sovereign, it is of questionable applicability to the present case.

Plaintiffs also cite *Ocean Advocates*, 402 F.3d 846, the oil platform extension project case, where the claimants requested an injunction to restrict tanker traffic to the existing platform and to require the agency to complete appropriate NEPA analyses before permitting the project. The Ninth Circuit reasoned that the injunction would "alleviate [plaintiff's] concern about increased traffic" and that a plaintiff "who asserts inadequacy of a government agency's environmental studies under NEPA need not show that further analysis by the government would result in a different conclusion. It suffices that, as NEPA contemplates, the [agency's] decision could be influenced by the environmental considerations that NEPA requires an agency to study." *Id.* at 860. Unlike *Ocean Advocates*, Plaintiffs do not seek injunctive relief that would redress their injury (nor could they, as injunctive relief in this case would be confined to the present parties, and the CVP operator is not a party). This is not a

NEPA case, nor is a procedural statute challenged, in which correction of the procedural violations effectively redresses the harm.

Here, the Coalition lacks standing to sue because, even if it were to prevail in this case, its injury would not necessarily be redressed. If the regulations were invalidated, even if the striped bass population were reduced to a level that measurably protected salmonid species on which they prey, there are other predators (the pikeminnow) and other causes: operation of the Projects, toxics, in-Delta diverters, alien invasive species, all of which contribute to the species' jeopardy. The present Delta smelt and salmonids jeopardy findings are based on drought conditions and Project operations, as primary causes. The extent to which all other cooperative causes will continue to operate is unknown. There remains total uncertainty whether reduction in the threat of some predators will have more than minimal effect on the protected species. The State Defendants motion for judgment on the pleadings that the Coalition lacks standing is GRANTED, WITH LEAVE TO AMEND.

d. Associational Standing.

The Coalition also must satisfy the requirements of associational standing. "[A]n association has standing to bring suit on behalf of its members when":

> **(a) its members would otherwise have standing to sue in their own right;**
>
> **(b) the interests it seeks to protect are germane to the organization's purpose; and**
>
> **(c) neither the claim asserted not the relief requested requires the participation of individual members in the lawsuit.**

United Food & Commercial Workers v. Brown Group, 517 U.S. 544, 553 (1996). As the members of the Coalition do not satisfy the redressibility requirement, the Coalition does not have standing to bring suit on their behalf.

3. Standing of Dee Dillon.

a. Injury in Fact.

Dee Dillon is the only individual plaintiff in this case. His claims of injury are unrelated to reductions in water deliveries. According to the Complaint:

> In the last six years, Mr. Dillon and his family have visited the Delta approximately 200 times. Mr. Dillon and his family engage in recreational boating, swimming, fishing, and wildlife viewing in the Delta. Mr. Dillon is deeply concerned about the health of the Delta ecosystem as he has personally witnessed its decline over the last six years. Mr. Dillon has engaged in boating for most of his adult life, in both the ocean and in inland waters, and it is his view that the Delta provides a freshwater boating and recreating experience that is different than any other in the western United States. Mr. Dillon is concerned about the continued survival of species in the Delta, including the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead and the delta smelt. Mr. Dillon derives aesthetic, recreational, and conservation benefits from the overall health of the Delta ecosystem, including the fish species that live in the Delta.

(Doc. 1 at ¶ 45.)

State Defendants argue that these allegations are insufficient because they do not contain "concrete allegations that the defendant's allegedly unlawful actions have actually altered the plaintiff's enjoyment of the environment." (Doc. 25 at 12.) *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 182-183 (2000), upheld a claim of standing in a Clean Water Act case

where plaintiffs established that the alleged discharge of pollution actually stopped the plaintiffs from fishing in and otherwise recreating on the water body in question. *Id.* at 182.

State Defendants argue that in environmental injury cases, the Ninth Circuit requires a plaintiff to show that defendant's conduct has "curtailed," "limited," or "deterred" a plaintiff's actions, citing *Nuclear Information*, 457 F.3d at 953, and *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000). State Defendants read these cases too narrowly. In *Nuclear Information*, the Ninth Circuit started with the principle set forth in *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 971 (9th Cir. 2003), that provides "environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the [agency's] policy." The *Nuclear Information* court then examined the record for any evidence of a "geographic nexus" between the plaintiffs and the area where the alleged impact will occur:

> To show a "geographic nexus," petitioners claiming a violation of NEPA must allege that they will suffer harm as a result of their proximity to the area where the alleged environmental impact will occur. We have defined the geographic nexus requirement broadly to permit challenges to actions with wide-reaching geographic effects where the petitioners properly allege, and support with affidavits, that they use the impacted area, even if the impacted area is vast. See Citizens for Better Forestry, 341 F.3d at 971 (holding that "Citizens need not assert that any specific injury will occur in any specific national forest that their members visit," where they "properly alleged, and supported with numerous affidavits" their members' use and enjoyment of a "vast range of national forests")....
>
> None of declarations submitted by members of NIRS, Committee to Bridge the Gap, Public Citizen, or Redwood

> **Alliance explain in any way how their health may be affected by this regulation. They have not alleged with any specificity what geographic areas are most likely to be affected, other than to assert that the regulations impact highways nationwide. Nor have they alleged that they will be exposed to increases in radiation or that they will curtail their use of public highways as a result of the regulation.**

Id. **at 952. Hence, only in the context of searching for any evidence of a "geographic nexus" did the Ninth Circuit ask whether plaintiffs would "curtail" their use of the area in question.**

In *Ecological Rights Foundation*, 230 F.3d at 1149-50, the Ninth Circuit reviewed the status of the law regarding injury in fact:

> **Under Laidlaw...an individual can establish "injury in fact" by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable-that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction-if the area in question remains or becomes environmentally degraded. Factors of residential contiguity and frequency of use may certainly be relevant to that determination, but are not to be evaluated in a one-size-fits-all, mechanistic manner.**
>
> **Daily geographical proximity, for instance, may make actual past recreational use less important in substantiating an "injury in fact," because a person who lives quite nearby is likely to notice and care about the physical beauty of an area he passes often. *See Laidlaw*, 120 S.Ct. at 704 (FOE member alleged injury in fact because "he lived a half-mile from Laidlaw's facility;...he occasionally drove over the North Tyger River, and...it looked and smelled polluted"); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir.1985) (affiant who passed the Hudson River regularly and found its pollution "offensive to his aesthetic values" stated injury in fact). On the other hand, a person who uses an area for recreational purposes does not have to show that he or she lives particularly nearby to establish an injury-in-fact due to possible or feared environmental degradation. Repeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively**

infrequent, to demonstrate that environmental degradation of the area is injurious to that person. *Id.* at 705 (finding that an individual who has canoed in the river and would do so again, closer to the discharge point, were it not for the discharges has made a sufficient "injury-in-fact" showing). An individual who visits Yosemite National Park once a year to hike or rock climb and regards that visit as the highlight of his year is not precluded from litigating to protect the environmental quality of Yosemite Valley simply because he cannot visit more often.

This flexible approach is the only one consistent with the nature of the aesthetic and recreational interests that typically provide the basis for standing in environmental cases. As the Supreme Court has explained, "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." *Sierra Club*, 405 U.S. at 734. Yet, aesthetic perceptions are necessarily personal and subjective, and different individuals who use the same area for recreational purposes may participate in widely varying activities, according to different schedules. Laidlaw confirms that the constitutional law of standing so recognizes, and does not prescribe any particular formula for establishing a sufficiently "concrete and particularized," *Defenders of Wildlife*, 504 U.S. at 560, aesthetic or recreational injury-in-fact.

Evaluating the record in this case in accord with Laidlaw, there is no doubt that both plaintiff organizations have come forward with sufficient factual averments to survive summary judgment on the standing issue. Both Hinderyckx, a member of Mateel, and Evenson, a member of ERF, stated longstanding recreational and aesthetic interests in Yager Creek, the specific place at issue in this case. Both have used the creek for recreational activities several times in the past, and both have alleged that Pacific Lumber's conduct has impaired their enjoyment of those activities. Hinderyckx, like the affiants in Laidlaw, testified that he is deterred from fully enjoying Yager Creek because of his concerns about pollutants discharged from Pacific Lumber's facilities adjacent to the creek; although he likes to fish, he refrains from fishing in the creek because of concerns about pollution, and he is less likely to swim at some places along the creek than he used to be. And both Hinderyckx and Evenson, like the affiants in Laidlaw, expressed an interest in participating in recreational activities in and around Yager Creek in the future, and in continuing to enjoy the beauty of the area.

Id. (emphasis added). State Defendants emphasize that the plaintiffs in *Ecological Rights Foundation* and *Laidlaw* both claimed to be deterred from using the resource in question as a result of the agency action in question. But, nothing in this jurisprudence suggests that "deterrence" from or "curtailment" of use of a resource is a necessary requirement.

Nevertheless, these cases do stand for the proposition that even injuries to aesthetic or recreational enjoyment of an area must be "concrete and particularized." Here, Mr. Dillon merely expresses "concern[] about the continued survival of species in the Delta, including the Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead and the delta smelt..." because he "derives aesthetic, recreational, and conservation benefits from the overall health of the Delta ecosystem, including the fish species that live in the Delta." The allegation that "Defendants' violations of the ESA harm Mr. Dillon's aesthetic, recreational, and conservation interests in the Delta" are conclusory and do not explain in a "concrete and particularized" manner how the striped-bass regulations impact and interfere with his aesthetic and recreational interests.[2] Such allegations need not be detailed at the pleadings stage, but they must be reasonably inferred from factual allegations in the complaint. Here, the Complaint contains only conclusory allegations of injury which do not explain how Mr. Dillon is actually injured by the striped bass

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[2] If Mr. Dillon were, for example, an avid recreational salmon angler, whose enjoyment of fishing was impaired by the striped-bass regulations.

regulations.

b. Causation.

State Defendants argue that Mr. Dillon cannot satisfy the causation requirement, because he fails to allege any causal connection between the State Defendants' enforcement of the striped bass regulations and the "decline" of the "Delta ecosystem" allegedly "witnessed" by Mr. Dillon. The reasons why the Coalition's standing allegations satisfy the causation requirement are equally applicable here. The causal chain is long, but is not "hypothetical or tenuous."

c. Redressibility.

State Defendants contend that the complaint does not contain any claim that the invalidation of the striped bass regulations will halt or materially reverse this claimed "decline" in the "Delta ecosystem." Moreover, the State Defendants maintain that even if the striped bass regulations are invalidated by this litigation, the Complaint does not explain how reversal of those regulations would redress Mr. Dillon's claimed injury as other causes have been held responsible for decline of the species, all of which will be invalidated by a favorable outcome in this case.

In support of this argument, State Defendants cite *Nuclear Info.*, 457 F.3d at 953-955, in which the Ninth Circuit held that causation and redressibility were not shown:

> **[Plaintiffs] fail[ed] to show that its members' concrete interest is threatened by the challenged regulation, rather than by "unregulated transportation of radioactive material" in the abstract. The declarations simply express undifferentiated "concerns"-the same concerns about nuclear hazards shared by the public at large-and speculate that unregulated transportation of radioactive material in general- not this regulation in particular-may present**

unspecified threats to their health.

Id **at 954. According to the State Defendants, this language establishes the proposition that Plaintiffs must allege that the regulation being challenged is "in particular" responsible for the plaintiffs' claimed injury. *Id*. at 954. Just such an allegation is reasonably inferred from the complaint. There is no requirement that he use particular words, let alone the words "in particular."**

State Defendants' motion for judgment on the pleadings that Dee Dillon lacks standing is GRANTED, because he has not satisfied the injury in fact requirement. Mr. Dillon is GRANTED LEAVE TO AMEND his complaint.

B. Legislative Immunity of Commission Members.

State Defendants also move to dismiss the claims against Defendants Rogers, Gustafson, Kellogg, and Sutton, who are Officers or Members of the Commission, on the grounds that they are immune from suit under the doctrine of legislative immunity. The doctrine of legislative immunity provides officials with absolute immunity when they perform legislative or quasi-legislative functions. *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980). This "privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Id*. The immunity is absolute. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501-503 (1975); *Spallone v. United States*, 493 U.S. 265, 278 (1990). The immunity prohibits

claims for damages and declaratory and injunctive relief. *Spallone*, 493 U.S. at 278; *Supreme Court of Va.*, 446 U.S. at 732. The doctrine has no application when an official is acting in an administrative or executive capacity. *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951).

Individuals who are not members of legislative bodies may nonetheless claim the immunity where they have been delegated legislative powers. In *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 394, n.4 and 405 (1979), the Supreme Court held that members of the Tahoe Regional Planning Agency could assert legislative immunity in an action challenging the agency's adoption of a land use ordinance, where the ordinance's adoption was based upon delegated powers from the California and Nevada legislatures. Similarly, *Supreme Court of Virginia*, 446 U.S. at 733-734, held that the Virginia Supreme Court could claim legislative immunity in a challenge to certain state bar rules, where the Virginia court was "merely exercising a delegated power to make rules." In affirming the immunity, the U.S. Supreme Court held that "the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code." *Id.*

In *Bogan v. Scott-Harris*, 523 U.S. 44, 49-54 (1998), the Ninth Circuit analyzed whether a vote for an ordinance eliminating a city official's office was entitled to "legislative" immunity. Among other things, the Ninth Circuit reasoned that the ordinance "in substance, bore all the hallmarks of traditional legislation:"

> **It reflected a discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents; it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office; and, in eliminating respondent's office, it governed in a field where legislators traditionally have power to act...**

***Id.* at 55.**

Here, the legal authority to promulgate the contested striped bass regulations is based upon specific authority delegated to the Commission by the California Legislature. Section 200 of the California Fish and Game Code states, in part, that "[t]here is delegated to the Commission the power to regulate the taking or possession of...fish...to the extent and in the manner prescribed in this article." Section 202 provides that "[t]he commission shall exercise its powers under this article by regulations made and promulgated pursuant to this article." Cal. Fish and Game Code, § 202. Section 205 expressly grants the Commission the authority to "[e]stablish, change or abolish bag limits, possession limits, and size limits" for fish species. Cal. Fish and Game Code, § 205. Based upon this delegated authority, the Commission has adopted regulations setting bag limits and size limits for striped bass. Cal. Code Regs., tit. 14, § 5.75.

Plaintiffs assert that "on its face," Cal. Fish & Game Code Section 200 "appears to delegate to the Commissioners <u>both</u> legislative and executive functions," citing the American Heritage Dictionary of the English Language 1471 (Joseph P. Pickett *et al.*, eds., 4th ed. 2000), for its definition of "regulate" as "to control or direct according to rule, principle,

or law." Plaintiffs argue that the word "regulate" should be read broadly at this stage of the litigation to encompass both legislative and executive (i.e., enforcement) powers.

However, the language of the Complaint characterizes the Commission's role with respect to striped bass in quasi-legislative terms. The complaint describes the Commission as having "regulatory authority" to adopt striped bass regulations; as having adopted such regulations; and as having approved a "striped bass policy." (Complaint at ¶¶ 30 and 33.) The complaint contains no allegations that the Commission or the individual Commission members have taken any steps to enforce or otherwise implement the striped bass regulations. Section 200's language, "giving permission to "regulate the taking or possession of...fish" is amplified by section 202, which specifies that "[t]he commission shall exercise its powers under this article by regulations made and promulgated pursuant to this article." (Emphasis added). Section 202 mentions nothing about enforcement.

The Commission's rule-making by regulations, as alleged in the complaint, have "all the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55. The Commission's adoption or amendment of a striped bass regulation or policy is a "discretionary, policymaking decision," distinctively legislative in character. *Id*. As the Ninth Circuit has observed, "statewide...policymaking for the community at large" constitutes the "quintessential legislative acts." *Chappell v. Robins*, 73 F.3d 918, 921 (9th Cir. 1996); *see also Yakus v. United States*, 321 U.S. 414, 424 (1944) ("The essentials of the legislative

function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.").

State Defendants' motion for judgment on the pleadings that the doctrine of legislative immunity bars Plaintiffs' claims against the Commission Members and the Commissions' Executive Director is GRANTED. State Defendants do not dispute that the doctrine of legislative immunity does not extend to or bar the claims against John McCamman, named in his official capacity as Interim Director of CDFG, because CDFG is responsible for enforcing, rather than promulgating, the striped bass regulations.

Initially, Plaintiffs requested the opportunity to propound limited discovery to ascertain the responsibilities of the Commission before the Court rules on the issue of legislative immunity. At oral argument, Plaintiffs conceded that they can ascertain such information via a public records requests prior to determining whether it is appropriate to re-name these defendants in an amended complaint. Federal Rule of Civil Procedure 11 provides that an attorney has a duty to research in good faith the facts and law before filing a complaint.

C. Eleventh Amendment Immunity of Commission Members.

The doctrine of state sovereign immunity prohibits suits in federal court against the State or entities of the State. *Puerto Rico Authority v. Metcalf & Eddy*, 506 U.S. 139, 144 (1993). In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court enunciated the "state officials" exception to the Eleventh Amendment bar

against suits directed at the states in federal court:

> [I]ndividuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Id. at 155-156. In asserting this exception, a plaintiff must show that:

> In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

Id. at 157. The *Ex parte Young* exception applies to both federal constitutional violations and federal statutory violations. *Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030, 1034 (9th Cir. 1985).

The Ninth Circuit has repeatedly applied this "enforcement connection" requirement under Ex Parte Young to bar actions against state officials where the plaintiffs have not alleged or established that the individuals are "clothed with some duty in regard to the enforcement of the laws of the State..." *Id.* at 156 (emphasis added). In *Davis*, 307 F.3d at 847, the Ninth Circuit affirmed the dismissal of the Governor of California and the California Resources Secretary, given the absence of any showing that either had "direct authority and practical ability to enforce the challenged statute." *Id.* at 846 and 847. Similarly, in *Yakima Indian Nation v. Locke*, 176 F.3d 467, 469-470 (9th Cir. 1999), the Ninth Circuit affirmed the dismissal

of the Governor of Washington as a defendant in an action challenging the state's lottery because "[n]owhere in [the relevant] statutes is there any indication that the governor has the responsibility of operating the state lottery or determining where the tickets would be sold." *Id.* at 470.

Although Plaintiffs have generally alleged a violation of federal statutory law, the Complaint does not contain any specific allegations that the individual Commission members or the Commission's Executive Director, John Carlson, Jr., are "clothed with some duty in regard to the enforcement of the laws of the State" or have any "connection with the enforcement" of state law. *Ex Parte Young*, 209 U.S. 156-57.

A review of California Fish and Game Code provisions cited by State Defendants reveals no indication that Commission Members or Executive Director have any enforcement duties as to the striped bass regulations. Cal. Fish and Game Code, §§ 200, 202, 205, 702-704, and 850-851.

Plaintiffs' only response is to point out that "Defendants fail to cite any authority to support the proposition that such allegations are necessary at the pleading stage." But, the Commission's enforcement authority is a question of law that may be resolved at the pleadings stage. Should Plaintiffs discover new legal authority regarding the Commission's role, they may so allege in an amended complaint.

State Defendants' motion for judgment on the pleadings that the Eleventh Amendment bars Plaintiffs' claims against the Commission Members and Executive Director is GRANTED. State Defendants do not dispute that the Eleventh Amendment does not

bar the claims against John McCamman, named in his official capacity as Interim Director of CDFG, because CDFG is responsible for enforcing the striped bass regulations.

Again, Plaintiffs requested the opportunity to propound limited discovery to ascertain the responsibilities of the Commission before the Court rules on this issue. At oral argument, Plaintiffs conceded that they can ascertain such information via a public records requests prior to determining whether it is appropriate to re-name these defendants in an amended complaint.

V. CONCLUSION

For the reasons set forth above, the State Defendants' motion for judgment on the pleadings is GRANTED. Neither the Coalition or Dee Dillon have alleged facts sufficient for standing and the claims against the Commission and its individual Members and Executive director are barred by both legislative and immunity and the Eleventh Amendment. Plaintiffs are GRANTED LEAVE TO AMEND, if they can do so within the requirements of Rule 11, within thirty (30) days.

IT IS SO ORDERED.

Dated: July 23, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE