

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SEAN K WHITE,
Plaintiff,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, et al.,
Defendants.

Case No. [22-cv-06143-JSC](#)

**ORDER RE: MOTION TO DISMISS
OR STAY**

Re: Dkt. No. 15

Plaintiff brings this lawsuit under the Endangered Species Act of 1973. He alleges Defendants failed to comply with that law and are unlawfully “taking” protected salmon species. Defendants move to dismiss, arguing Plaintiff’s claims are “prudentially moot” because the Army Corps have reinstated the consultation process with the National Marine Fisheries Service. In the alternative, Defendants request the Court stay the matter pending that processes’ completion. After reviewing the papers submitted and having had the benefit of oral argument on March 2, 2023, the Court DENIES Defendants’ motion. A live controversy remains, and a stay is not warranted at this time.

BACKGROUND

I. Statutory Background

The Endangered Species Act of 1973 (“ESA”) “contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 690 (1995) (citing 16 U.S.C. § 1531). Through the ESA, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized

1 caution.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Two ESA provisions (and
2 their accompanying regulations) are relevant here: Section 7 and Section 9.

3 **A. Section 7**

4 Section 7(a)(2) is “the heart of the ESA.” *W. Watersheds Project v. Kraayenbrink*, 632
5 F.3d 472, 495 (9th Cir. 2011). It requires federal agencies to ensure any action they authorize,
6 fund, or carry out “is not likely to jeopardize the continued existence of any endangered species or
7 threatened species or result in the destruction or adverse modification of designated critical
8 habitats.” 16 U.S.C. § 1536(a)(2).

9 Specifically, “Section 7 imposes on all agencies a duty to consult with either the Fish and
10 Wildlife Service or the [National Oceanic and Atmospheric Administration’s] Fisheries Service
11 before engaging in any discretionary action that may affect a listed species or critical habitat.”
12 *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012). Consultation
13 can be either formal or informal. 50 C.F.R. §§ 402.13, 402.14. If, after a “Biological Assessment,”
14 an agency determines its action “is not likely to adversely affect any listed species or critical
15 habitat” and the consulting agency agrees in writing, informal consultation is complete and no
16 further action is required. *Id.* § 402.13(a). But if either the acting agency or the consulting agency
17 deems the action is “likely to adversely affect” a listed species or its critical habitat, the agency
18 considering an action must engage in “formal consultation” with the consulting agency. *Id.* §
19 402.14(b)(1).

20 Formal consultation begins when an agency transmits a written request to the consulting
21 agency containing all relevant data required under 50 C.F.R. § 402.14(c). In response, the
22 consulting agency must prepare a biological opinion “detailing how the agency action affects the
23 species or its critical habitat.” 16 U.S.C. 1536(b)(4). The opinion must also determine whether the
24 action is likely to “jeopardize the continued existence of” a listed species or destroy or adversely
25 modify critical habitats. 50 C.F.R. § 402.14(h). When formal consultation concludes, the
26 consulting agency issues its biological opinion regarding the likelihood of jeopardy to the listed
27 species or of destruction or adverse modification of critical habitats. *Id.* § 402.14(e).

1 **B. Section 9**

2 ESA Section 9 makes it unlawful for any person to “take” endangered species or engage in
3 other prohibited acts regarding species protected under the ESA. 16 U.S.C. § 1538(a)(1)(B). The
4 ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,
5 or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); *see also Ctr. for Biological*
6 *Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1141–42 (9th Cir. 2016) (describing statutory
7 scheme).

8 But not all “takes” are prohibited. *Cold Mountain v. Garber*, 375 F.3d 884, 888 (9th Cir.
9 2004), *as amended* (Aug. 9, 2004). If, after consultation under Section 7, the consulting agency
10 finds an agency action does not jeopardize a species but may result in “incidental take,” a
11 consulting agency issues an “incidental take statement.” *Id.* Any taking in compliance with an
12 incidental take statement’s terms and conditions is then exempt from the general take prohibition
13 of ESA Section 9. 16 U.S.C. § 1536(b)(4)(iv), (o)(2).

14 **II. Complaint Allegations**

15 The Coyote Valley Dam is an earthen dam that impounds water from the East Fork of the
16 Russian River and water imported from the Eel River watershed. (Dkt. No. 1 ¶ 33.) The City of
17 Ukiah, California lies immediately below the dam. (*Id.*) Prior to the dam’s construction, Ukiah
18 suffered from floods during high periods of rain. (*Id.*) The Army Corps completed the dam in
19 1957 and manage it today. (*Id.*) The ability to capture especially high flood flows behind the dam
20 prevents large-scale flooding in Ukiah. (*Id.*)

21 **A. The 2008 Biological Opinion**

22 Consistent with the Endangered Species Act, the Army Corps requested a biological
23 opinion (“the 2008 Opinion”) from the National Marine Fisheries Service regarding the impact of
24 the dam’s flood control operations on listed species. (*Id.* ¶ 34; *see also* Dkt. No. 1-1.) The
25 National Marine Fisheries Service determined the operations were likely to affect three species of
26 endangered or threatened “salmonids.” (*Id.* ¶¶ 34-35; Dkt. No. 1-1 at 11.)

27 Relevant here, the 2008 Opinion identified a risk from “turbid water.” (*Id.*) In short, when
28 the Coyote Valley Dam releases water, that water may have high sediment levels. (Dkt. No. 1

1 ¶ 55.) Such sediment “can directly affect salmonids by abrading and clogging gills, and indirectly
2 cause reduced feeding, avoidance reactions, destruction of food supplies, reduced egg and alevin
3 survival, and changed rearing habitat.” (Dkt. No. 1-1 at 75.) The 2008 Opinion anticipated
4 turbidity from the Coyote Valley Dam would adversely impact the listed salmonids, but “the
5 precise magnitude of the impact, while expected to be low, [was] unknown.” (*Id.* at 341.)

6 **B. The Incidental Take Statement**

7 The National Marine Fisheries Service then provided the Army Corps with an “Incidental
8 Take Statement.” (Dkt. No. 1 ¶ 36.) That statement covered “taking of listed salmonids that is
9 likely to occur due to the implementation of [the Army Corp’s proposed operations].” (*Id.*) But the
10 Incidental Take Statement included eight “Reasonable and Prudent Measures” deemed “necessary
11 and appropriate to minimize the likelihood of take on [the listed salmonids].” (*Id.*) The Incidental
12 Take Statement emphasized that to remain eligible for the Endangered Species Act exemption
13 under Section 7(o)(2), the Reasonable and Prudent Measures “must be undertaken” and were
14 “nondiscretionary.” (Dkt. No. 1-1 at 315.)

15 Reasonable and Prudent Measure No. 4 (“Measure 4”) addressed turbidity. (*Id.* at 340.) It
16 contained ten “Terms and Conditions.” (*Id.* at 341-342.) These terms include conducting a
17 “bathymetric survey of Lake Mendocino” to determine if dredging is a reasonable alternative to
18 reduce turbidity levels within two years; installing turbidity meters in specific locations before
19 2009; publishing turbidity data for 10 years; reporting on turbidity monitoring; analyzing turbidity
20 data to determine if flood control operations increase turbidity; submitting that data to the
21 Fisheries Service annually; drafting a plan to minimize any adverse effects found on the relevant
22 species; and implementing plans to minimize and avoid adverse effects by 2014. (*Id.*) Plaintiff
23 alleges the Army Corps failed to comply with Measure 4 other than (belatedly) completing the
24 bathymetric survey. (Dkt. No. 1 ¶¶ 42-53.)

25 **III. Procedural Background**

26 **A. Plaintiff’s Action**

27 Plaintiff is a resident of Ukiah, California. (*Id.* ¶ 9.) Plaintiff sent Defendants a “Sixty-Day
28 Notice of Violation of the Endangered Species Act” on August 1, 2022. (Dkt. No. 21-1.) The

1 notice identified Defendants’ alleged failure to comply with Measure 4. Plaintiff asserted that
2 because Defendant failed to comply with Measure 4, Defendants had violated Sections 9 and 7 of
3 the ESA. Thus, Plaintiff indicated he would file suit for declaratory and injunctive relief under the
4 ESA to prevent further “unauthorized take” of the listed salmonids below the dam.

5 On October 18, 2022, Plaintiff filed suit under the ESA’s citizen suit provision. 16 U.S.C.
6 1540(g). Plaintiff alleged Defendants are in violation of ESA Section 7 and the Administrative
7 Procedure Act (“APA”) § 706. (Dkt. No. 1 ¶¶ 82-88.) And Plaintiff alleged Defendants are in
8 violation of ESA Section 9 because Defendants’ failure to abide by the Incidental Take Statement
9 voids Defendants’ exemption from the ESA’s take prohibition and makes their actions an
10 “unauthorized take” of the listed species. (*Id.* ¶¶ 78-81.)

11 Plaintiff requests four forms of relief in the complaint: (1) declaratory relief that the Army
12 Corps is violating Section 9 of the ESA’s prohibition against unauthorized take through flood
13 control operations at the Dam; (2) an injunction against Lt. Spellmon, Chief of Engineers, from
14 continuing to make releases of water from Coyote Valley Dam where such releases will cause
15 unauthorized take of listed salmonids; (3) an injunction ordering Defendants to reinitiate formal
16 consultation on the effects of flood control operations at Coyotes Valley Dam; and (4) an
17 injunction ordering the Army Corps to comply with Measure 4. (*Id.* at 29.)

18 **B. Defendants’ Response**

19 Defendants represented they intend to pursue formal consultation regarding the Coyote
20 Valley Dam’s effect on the listed salmonids. Defendants provide two affidavits to support this
21 representation.¹ (Dkt. Nos. 15-1; 15-2.) One affidavit—from Dr. Tessa Eve Beach, Environmental
22 Services Branch Chief for the Army Corps’ San Francisco District—notes the Army Corps intends
23 to re-initiate consultation with the National Marine Fisheries Service as of February 28, 2023.

24
25 ¹ In considering a 12(b)(1) motion challenging the facts supporting subject-matter jurisdiction, a
26 court may consider extra-pleading materials submitted by the parties. *Assoc. of American Medical*
27 *Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *see also McCarthy v. United*
28 *States*, 850 F.2d 558, 560 (9th Cir. 1988) (“Moreover, when considering a motion to dismiss
pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may
review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the
existence of jurisdiction.”). The Court may weigh the evidence without converting the motion into
one for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

1 (Dkt. No. 15-1 ¶ 7.) The other affidavit—from Robert Coey, Supervising Fisheries Biologist and
 2 Branch Chief for the National Marine Fisheries Service’s California Coastal Office—declares that
 3 if consultation began in February 2023, he expects consultation will conclude in March 2024.

4 (Dkt. No. 15-2 ¶ 6.) Coey estimated this timeframe because “[t]he last consultation resulted in
 5 NMFS’s conclusion that the action was expected to jeopardize the continued existence of a listed
 6 species, and with that background and our initial review of the draft administrative [Biological
 7 Assessment], the consultation is expected to again be complex.” (*Id.*) At oral argument,
 8 Defendants confirmed the Army Corps had, in fact, re-initiated consultation in February 2023.

9 DISCUSSION

10 Defendants move to dismiss the litigation as prudentially moot because Defendants
 11 reinitiated consultation under the ESA. In the alternative, Defendants request the Court stay the
 12 litigation pending the completion of consultation. Both requests are denied.

13 I. Defendants’ Motion to Dismiss under Rule 12(b)(1)

14 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court’s
 15 subject matter jurisdiction over the action. Because this dispute presents a justiciable controversy,
 16 Defendants’ motion to dismiss fails.

17 A. Prudential Mootness

18 Defendants move to dismiss based on “prudential mootness.” Constitutional mootness is a
 19 jurisdictional issue requiring the Court to determine whether a case or controversy exists under
 20 Article III of the Constitution. *Maldonado v. Lynch*, 786 F.3d 1155, 1160 (9th Cir. 2015). A case
 21 must present a live controversy to resist dismissal for mootness. *Id.* “The party asserting mootness
 22 bears the burden of establishing that there is no effective relief that the court can provide.” *Forest*
 23 *Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). The burden to establish mootness is
 24 heavy. “[A] case is not moot where any effective relief may be granted.” *Id.*

25 “The doctrine of prudential mootness permits a court to ‘dismiss an [action] not
 26 technically moot if circumstances have changed since the beginning of litigation that forestall any
 27 occasion for meaningful relief. . . .” *Deutsche Bank Nat. Tr. Co. v. F.D.I.C.*, 744 F.3d 1124, 1135
 28 (9th Cir. 2014) (*quoting Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1142 (9th Cir.

1 2009)). Nearly every circuit has adopted prudential mootness in some form. *People Not*
 2 *Politicians Oregon v. Clarno*, 826 F. App’x 581, 587 n.2 (9th Cir. 2020) (Nelson, J., dissenting)
 3 (collecting cases).

4 But, unlike constitutional mootness, the prudential mootness doctrine is discretionary. *See*
 5 *Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1142 (“[W]e are not required to dismiss a
 6 live controversy as moot merely because it may become moot in the near future.”) Indeed, the
 7 Ninth Circuit has found a suit prudentially moot only once, when no assets remained for
 8 distribution in a bankruptcy proceeding. *See Deutsche Bank*, 744 F.3d at 1135. So, given its
 9 sparing use in this circuit, it remains contested whether prudential mootness is a generally
 10 applicable doctrine or limited to the bankruptcy context alone. *Compare Maldonado*, 786 F.3d at
 11 1161 n.5 (declining to apply prudential mootness after *Deutsche Bank* stating, “we have not
 12 adopted prudential mootness *per se*” and “we have applied prudential mootness only in the
 13 bankruptcy context”) *with id.* at 1165-66 (Gould, J., dissenting) (urging its application) *and*
 14 *Clarno*, 826 F. App’x at 587 (Nelson, J., dissenting) (same).

15 Plaintiff urges the Court to reject prudential mootness outright. But the Court need not go
 16 that far. Even if prudential mootness is recognized in the Ninth Circuit, it does not apply here.

17 **B. Application**

18 Defendants have not established Plaintiff is (or soon will be) without any effective relief.
 19 The Army Corps and the National Marine Fisheries Service commenced formal consultation in
 20 February 2023. The consultation is expected to result in the reissuance of a Biological Opinion
 21 and (potentially) an Incidental Take Statement by March 2024. Defendants argue no effective
 22 relief remains to remedy Plaintiff’s Section 7 claim because Defendants already reinitiated formal
 23 consultation. And, because an Incidental Take Statement (if complied with) would exempt the
 24 Army Corps from the ESA’s take prohibition going forward, Defendants argue Plaintiff’s Section
 25 9 claim will also be moot soon. Put differently, Defendants claim they have already given
 26 Plaintiff what he can get under the ESA (or will do so soon when consultation is complete). Thus,
 27 Defendants argue Plaintiff’s claims are (or soon will be) moot. The Court disagrees.

28 **1. The Section 7 Claim**

1 As to the Section 7 claim, “the appropriate remedy for violations of the ESA consultation
2 requirements is an injunction pending compliance with the ESA.” *Washington Toxics Coal. v.*
3 *Env’t Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005) *abrogated on other grounds as*
4 *recognized in Cottonwood Env’t L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091–92 (9th Cir.
5 2015); *see also* 16 U.S.C. § 1536(d) (allowing for injunctions after initiation of consultation). In
6 *Washington Toxics*, for example, the Ninth Circuit affirmed an injunction barring the EPA from
7 acting until the *completion* of formal consultation and the issuance of a biological opinion
8 sanctioning the practice. *Washington Toxics*, 413 F.3d at 1031, 1035 (“[I]t is the very
9 maintenance of the ‘status’ quo that is alleged to be harming endangered species.”). Plaintiff
10 seeks the same remedy here—namely, an order enjoining the Army Corps “from continuing to
11 make releases of water from the Dam where such releases will cause the unauthorized take of
12 [I]isted [s]almonids.” (Dkt. No. 1 at 29.)²

13 Thus, Defendants are incorrect that a court may *only* order an agency that violated ESA
14 Section 7 to reinitiate consultation. (Dkt. No. 15 at 21.) A court may *also* order an agency to halt
15 certain activities until that consultation is complete. *See, e.g., Yurok Tribe v. United States Bureau*
16 *of Reclamation*, 231 F. Supp. 3d 450, 490 (N.D. Cal. 2017), *order clarified sub nom. Tribe v.*
17 *United States Bureau of Reclamation*, 319 F. Supp. 3d 1168 (N.D. Cal. 2018) (entering a
18 preliminary injunction pending completion of formal consultation). So, the Section 7 dispute
19 remains live even though Defendants reinitiated consultation.

20 2. The Section 9 Claim

21 Declaratory and injunctive relief are also available as to Plaintiff’s Section 9 claim because
22 Plaintiff pled facts supporting an inference that unlawful taking may occur before the consultation
23 is complete. (*See* Dkt. No. 1 ¶¶ 36-38, 55, 57,68-70, 81.) *Compare All. for Wild Rockies v.*
24 *Burman*, 477 F. Supp. 3d 1151, 1158 (D. Mont. 2020) (“*Rockies (I)*”) (denying motion to dismiss
25

26 ² At oral argument and in their reply, Defendants contended Plaintiff raised this injunction theory
27 for the first time in opposition to the motion to dismiss. (Dkt. No. 21 at 14.) That is not correct.
28 Plaintiff requested this specific form of injunctive relief in his complaint. (Dkt. No. 1 at 29.) And,
as discussed below, his notice of intent to sue fairly put Defendants on notice that he would seek
injunctive relief to remedy the identified violations.

1 as prudentially moot because injunctive “and/or” declaratory relief remained after defendants
 2 initiated—but had not completed—formal consultation) *with All. for Wild Rockies v. Burman*, 499
 3 F. Supp. 3d 786 (D. Mont. 2020) (“*Rockies (II)*”) (granting motion to dismiss declaratory relief
 4 claim as constitutionally moot in the same matter where formal consultation was, in fact,
 5 completed).

6 **C. Defendants’ arguments are unpersuasive.**

7 **1. The initiation of consultation does not moot injunctive relief.**

8 First, Defendants argue an injunction “will no longer be relevant once NMFS issues an
 9 updated Incidental Take Statement which will authorize the relevant incidental take.” (Dkt. No.
 10 15 at 9.) This argument rests on “conjecture.” *Rockies (I)*, 477 F. Supp. 3d at 1158. There is no
 11 certainty as to the timing or result of the consultation process. *If* the National Marine Fisheries
 12 Service completes its consultation in 2024 *and* issues another incidental take statement, then the
 13 case *may* become moot. Regarding timing, the last formal consultation regarding the Coyote
 14 Valley Dam lasted four years; and the current process—according to Defendants’ own
 15 witnesses—is expected to be similarly complex. (Dkt. No. 15-2 ¶ 6.) Thus, there is no guarantee
 16 Defendants will complete consultation by March 2024. So, what happens in the meantime? *See*
 17 *Rockies (I)*, 477 F. Supp. 3d at 1158 (finding prudential mootness did not apply when Biological
 18 Opinion was expected one month later and the offending dam was inoperable because the ESA
 19 permits agencies to mutually agree to extend the consultation period, the dam could be fixed, and
 20 harm could occur in the intervening period).

21 Prudence does not counsel mootness under such contingent circumstances. *See id.*
 22 (declining “to engage in conjecture to presume the consultation will eliminate [the plaintiff’s]
 23 ability to receive any meaningful relief.”). Thus, because a status quo preserving injunction could
 24 provide Plaintiff meaningful relief pending completion of the relevant consultation, Defendants’
 25 argument on this point fails.

26 **2. Non-Discretionary Action**

27 Defendants also argue an injunction altering dam operations may not be feasible, given
 28 other statutory duties assigned to the Army Corps. Defendants explain:

1 While authorized purposes differ for each dam, at this Dam,
2 Congress' authorized purposes are flood control, water conservation,
3 and related purposes. *Id.* Water Control Manuals are prepared for each
4 dam, pursuant to Engineering Regulation 1110-2-240, p. 3-1. The
5 manuals specify how the Dam and Lake Mendocino reservoir will be
6 operated to adhere to the authorized purposes. *Id.* Accordingly, the
7 Court cannot just order the Corps to deviate from the current Water
8 Control Manual and cease or modify the carefully developed flood
9 control operations. **Depending on the circumstances, such an order
10 would not only be inadvisable, but could potentially be in conflict
11 with actions the Corps is required to take under its flood control
12 obligations.**

13 (Dkt. No. 21 at 15) (emphasis added). Put differently, citizen suits are only authorized to
14 challenge non-discretionary agency actions. *See Bennett v. Spear*, 520 U.S. 154, 155 (1997)(citing
15 § 1540(g)(1)(C)). Thus, Defendants argue an injunction *could* cause conflict with other statutory
16 duties the Army Corps is required to undertake. *See San Luis & Delta-Mendota Water Auth. v.*
17 *Jewell*, 747 F.3d 581, 645 n.49 (9th Cir. 2014) (noting that a court may not issue an injunction
18 enforcing the NEPA if doing so would cause an agency to violate other statutory requirements).

19 This argument fails. By Defendants' own admission, it is uncertain whether any potential
20 injunction would create an irreconcilable conflict with a non-discretionary agency duty. That an
21 injunction *may* not ultimately be viable does not mean the underlying claim is moot.

22 3. Plaintiff met the ESA's procedural requirements.

23 Defendants also argue Plaintiff failed to comply with the ESA's procedural requirements
24 when requesting injunctive relief. In Defendants' reply brief, Defendants claim (for the first time)
25 this Court lacks jurisdiction over Plaintiff's requests for injunctive relief because "they were not in
26 Plaintiff's notice of intent ("NOI") to sue nor are they reasonably related to claims contained in
27 that notice of intent to sue."³ (Dkt. No. 21 at 14.) The Court disagrees.

28 The ESA does contain strict procedural requirements. "A private citizen may bring suit to
remedy a violation of the ESA, provided that it gives written notice of the alleged violation or

³ Defendants raised this argument as to other requests for injunctive relief (including a request for status reports on consultation and a request to withdraw the 2008 Biological Opinion and Incidental Take Statement). (Dkt. No. 21 at 14.) Because the Court finds a live controversy exists as to Plaintiff's request for an injunction regarding Dam operations, the Court need not reach the viability of these other potential forms of relief at this stage. The Court also need not address Plaintiff's argument that these injuries are capable of repetition yet avoiding review.

1 violations upon which the suit is based at least sixty days before suit is filed.” *Klamath-Siskiyou*
 2 *Wildlands Ctr. V. MacWhorter*, 797 F.3d 645, 647 (9th Cir. 2015); *see also* 16 U.S.C. §
 3 1540(g)(2)(A)(i) (“No action may be commenced . . . prior to sixty days after written notice of the
 4 violation has been given to the Secretary, and to any alleged violator. . .”). The sixty-day notice
 5 requirement is jurisdictional. *Sw. Ctr. For Biological Diversity v. U.S. Bureau of Reclamation*
 6 (“*Southwest*”), 143 F.3d 515, 520 (9th Cir.1998). “A failure to strictly comply with the notice
 7 requirement acts as an absolute bar to bringing suit under the ESA.” *Id.* To provide proper notice
 8 of an alleged violation, a would-be plaintiff must:

9
 10 “[a]t a minimum . . . provide sufficient information . . . so that the
 11 [notified parties] could identify and attempt to abate the violation.”
 12 *Soutwest*, 143 F.3d at 522 (citing *Pub. Interest Research Grp. Of N.J.,*
 13 *Inc. v. Hercules, Inc. (Hercules)*, 50 F.3d 1239, 1249 (3d Cir. 1995)).
 14 A citizen “is not required to list every specific aspect or detail of
 15 every alleged violation. Nor is the citizen required to describe every
 16 ramification of a violation.” *Cnty. Ass’n for Restoration of the Env’t*
 17 *v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002) (quoting
 18 *Hercules*, 50 F.3d at 1248). Rather, the analysis turns on the “overall
 19 sufficiency” of the notice. *Id.*; *see also Marbled Murrelet v. Babbitt*,
 20 83 F.3d 1068, 1073 (9th Cir.1996) (examining “the letter as a whole”
 21 for sufficiency of notice). A reviewing court may examine both the
 22 notice itself and the behavior of its recipients to determine whether
 23 they understood or reasonably should have understood the alleged
 24 violations.

18 *Klamath-Siskiyou*, 797 F.3d at 651 (cleaned up).

19 Plaintiff’s notice meets that standard. Plaintiff’s letter specifically identified the alleged
 20 violating activities (Defendants’ turbid water releases at the dam, Defendants’ failure to abide by
 21 Measure 4, and the alleged resulting “unauthorized” take of salmonids), the time frame of the
 22 violations (from 2008 onward), and his intent to sue (for injunctive and declaratory relief). (Dkt.
 23 No. 21-1.) Defendants argue because Plaintiff challenged non-compliance with Measure 4 (which
 24 deals with turbidity) rather than Measure 3 (which concerns flood control operations), Plaintiff
 25 cannot now seek an injunction to limit flood control operations’ effects (i.e., turbidity) on the
 26 salmonids. That argument is unpersuasive. 16 U.S.C. § 1540(g)(2)(A) requires Plaintiff give
 27 notice of “the violation,” not every remedy sought because of that violation. Plaintiff did so. And,
 28 as discussed above, the remedy for ESA violations like noncompliance with Measure 4 (or

1 unlawful takings under Section 9) can be an injunction to protect species. 16 U.S.C. § 1540(1).
 2 Defendants cite no authority limiting the scope of such an injunction in the manner they suggest.

3 Defendants' sole cited authority is inapposite. Defendants cite *Center For Biological*
 4 *Diversity v. Marina Point Development Company* for the proposition that "when a notice told the
 5 defendant that it had committed one specific violation, the defendant was not 'required to
 6 speculate as to all possible attacks . . . that might be added to a citizen suit' at a later time." 566
 7 F.3d 794, 802 (9th Cir. 2009) (quoting *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137,
 8 1143 (9th Cir. 2002). But, in that case, the flaw in the notice letter was a failure to specify the
 9 relevant dates and specific law violations at issue. *Id.* Here, in contrast, Plaintiff gives detailed
 10 notice of the alleged violation and his intent to seek injunctive relief under specific provisions in
 11 the ESA to protect the listed species from unlawful takes. So, unlike in *Marina Point*, Plaintiff's
 12 letter put Defendant on notice as to the content of the alleged violation. *See* 16 U.S.C. §
 13 1540(g)(2)(A)(i)

14 * * *

15 In sum, Defendants' motion to dismiss is DENIED because effective relief remains
 16 possible if Plaintiff prevails.

17 **II. Defendants' Motion to Stay Litigation**

18 In the alternative, Defendant asks the Court to stay the litigation until consultation is
 19 complete. The Court declines to do so.

20 "[T]he power to stay proceedings is incidental to the power inherent in every court to
 21 control the disposition of the cause on its docket with economy of time and effort for itself, for
 22 counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In determining
 23 whether a stay is warranted, courts should balance the risk of hardship to the parties and evaluate
 24 the likelihood that a stay will serve the interests of judicial economy. *Lockyer v. Mirant Corp.*, 398
 25 F.3d 1098, 1112 (9th Cir. 2005). If "there is even a fair possibility that the stay will work damage
 26 to someone else, the party seeking the stay must make out a clear case of hardship or inequity."
 27 *Lockyer*, 398 F.3d at 1112 (internal quotations omitted).

28 Contrary to Defendants' position, a stay could harm Plaintiff by allowing Defendants "to

1 engage in unlawful behavior with no concrete end date.” *Rockies I*, 477 F. Supp. 3d at 1158-59.
2 Plaintiff pleads such harms are possible. (*See* Dkt. No. 1 ¶¶ 36-38, 55, 57,68-70, 81.) In response,
3 Defendants only cite litigation burdens. But the Ninth Circuit has previously found the
4 requirements of litigation are insufficient to establish hardship. *See Lockyer*, 398 F.3d at 1112
5 (“[B]eing required to defend a suit, without more, does not constitute a clear case of hardship or
6 inequity.”) (cleaned up). Thus, on balance, the Court denies Defendants’ motion for a stay.

7 **CONCLUSION**

8 Defendants’ motion to dismiss, or in the alternative stay, is DENIED. The Court sets an
9 initial case management conference via Zoom Video for March 30, 2023 at 1:30 p.m. A joint case
10 management statement is due one week in advance.

11 **IT IS SO ORDERED.**

12 This Order disposes of Docket Number 15.

13 Dated: March 3, 2023

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15 JACQUELINE SCOTT CORLEY
16 United States District Judge
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United States District Court
Northern District of California