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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.

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. 67.¹

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 ¹ 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.

4 5 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.

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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
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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
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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.

10 ***

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

16 FAC at ¶¶ 113, 115. Plaintiffs seek early adjudication
17 of the "single take" issue to vindicate their position
18 that "in order to succeed on the merits, Plaintiffs need
19 only prove that striped bass predation of Listed Species
20 is greater, by one fish, than if the sport-fishing
21 regulations were not enforced." Doc. 79-2 at 3-4.²

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

28 ² At oral argument, Plaintiffs' counsel suggested that the intent
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
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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).³
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14 ³ 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

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).⁴ "[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

24 ⁴ 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 *Envtl. 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).⁵ 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

22 ⁵ 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.*⁶

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.").⁷ Because Plaintiffs are moving for summary

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

29 ⁷ The parties' unhelpfully rely on numerous cases deciding
30 causation on the merits, including *Cold Mountain v. Garber*, 375 F.3d
31 884 (9th Cir. 2004), *Pyramid Lake Paiute Tribe of Indians v. U.S.*
32 *Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990), *Palila v.*
33 *Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th
34 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).⁸

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

23 standing.

⁸ 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.

2

3

V. CONCLUSION

4

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6

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

7

8

SO ORDERED

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Dated: July 16, 2009

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