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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

COALITION FOR A SUSTAINABLE )  
DELTA, a California non-profit )  
corporation; BELDRIDGE WATER )  
STORAGE DISCTRICT, a California )  
Water Storage District; )  
BERRENDA MESA WATER DISTRICT, a )  
California Water District; )  
CAWELO WATER DISTRICT, a )  
California Water District; )  
NORTH OF THE RIVER MUNICIPAL )  
WATER DISTRICT, a California )  
Municipal Water District; )  
WHEELER RIDGE-MARICOPA WATER )  
STORAGE DISTRICT, a California )  
Water Storage District; and DEE )  
DILLON, an individual, )  
  
Plaintiffs, )  
  
v. )  
  
CITY OF STOCKTON, a municipal )  
corporation; and COUNTY OF SAN )  
JOAQUIN, a political )  
subdivision of the State of )  
California, )  
  
Defendants. )

2:09-CV-00466-JAM-DAD  
ORDER DENYING DEFENDANT COUNTY  
OF SAN JOAQUIN'S MOTION TO  
DISMISS

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1           The issue before the Court is defendant County of San  
2 Joaquin's ("Defendant") motion to dismiss ("Motion") plaintiffs'  
3 complaint. Plaintiffs, Coalition for a Sustainable Delta, five  
4 water districts on the Sacramento-San Joaquin Delta, and  
5 Coalition member Dee Dillon (collectively "Plaintiffs"), brought  
6 this action against Defendant and City of Stockton alleging  
7 illegal discharges of pollutants into the Sacramento-San Joaquin  
8 Delta ("Delta"), violating the Clean Water Act ("CWA"), 33  
9 U.S.C. §§ 1311, et seq., and the Endangered Species Act ("ESA"),  
10 16 U.S.C. §§ 1531, et seq. Defendant, moving to dismiss the  
11 Complaint for lack of subject-matter jurisdiction pursuant to  
12 Federal Rule of Civil Procedure 12(b)(1), argues that Plaintiffs  
13 fail to satisfy the notice requirements of both the CWA and the  
14 ESA, and moreover, that Plaintiffs, excluding one of the five  
15 water districts, have no standing to prosecute the ESA claims.

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19           It is unclear why Defendant identifies only four of five  
20 water districts as targets of the ESA standing argument in its  
21 Motion (North of the River, Beldridge, Cawelo, and Wheeler  
22 Ridge-Maricopa), and then identifies a different set of four  
23 water districts in its Reply (Berrenda, Beldridge, Cawelo, and  
24 Wheeler Ridge-Maricopa). See Id. at 2:6-11; Reply, Docket # 43,  
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1 1:13-21. Notwithstanding Defendant's inconsistent filings, the  
2 Motion to Dismiss Plaintiffs' Complaint is DENIED.<sup>1</sup>

3 I. FACTUAL AND PROCEDURAL BACKGROUND

4 Plaintiffs provided Defendant with a letter on October 17,  
5 2008 intending to give notice of Defendant's violations of the  
6 CWA and the ESA pursuant to the requirements of 33 U.S.C. §  
7 1365(b) and 16 U.S.C. § 1540(g). Complaint, Docket at 1, Ex. 1.  
8 Plaintiffs' letter alleged that Defendant failed to comply with  
9 the terms of permits ("MS4 Permits") issued by the California  
10 Regional Water Quality Control Board, Central Valley Region,  
11 that limit and set conditions on discharges into the Delta and  
12 that Defendant was illegally contaminating the Delta. Id., Exh.  
13 1, at 6-10. Plaintiffs' letter also provided a set of data with  
14 dates, types of pollutants, locations, and amounts of pollution  
15 being discharged by Defendant and alleged that the discharges of  
16 those pollutants constituted a "take" of various endangered fish  
17 species in the Delta, including the Sacramento River Winter-Run  
18 Chinook Salmon, the Central Valley Spring-Run Chinook Salmon,  
19 the Central Valley Steelhead, and the Delta Smelt ("Listed  
20 Species"). Id., Exh. 1, at 6-10, Attch. A.  
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28 <sup>1</sup> Because oral argument will not be of material assistance,  
the court orders this matter submitted on the briefs. E.D. Cal.  
L.R. 78-230(h).

1 Plaintiffs filed suit in this Court for injunctive relief  
2 and civil penalties on February 18, 2009, over sixty days after  
3 providing Defendant with the October 17, 2008 letter. In the  
4 Complaint, Plaintiffs allege that discharges from the stormwater  
5 sewage system of Defendant exceed the limits and conditions set  
6 on those discharges by the MS4 Permits, that those exceedences  
7 violate the CWA, and that pollution resulting from Defendant's  
8 discharges harms the Listed Species in violation of the ESA.  
9 Id. at ¶¶ 7-16. Plaintiffs claim injuries in the form of  
10 decreased water quality in the Delta, also resulting in  
11 decreased water deliveries to the water districts, and damage to  
12 the esthetic, recreational, and conservation benefits of the  
13 Delta ecosystem. Id. at ¶¶ 17-33. Plaintiffs request that the  
14 Court "enjoin[] . . . San Joaquin County from violating the ESA"  
15 and the MS4 Permits and order injunctive relief. Id. at ¶¶  
16 209(g)-(l). See also Id. at ¶¶ 190, 196, 202, and 208.

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20 Defendant now moves to dismiss the Complaint, arguing that  
21 the October 17, 2008 letter did not provide sufficient notice of  
22 the Complaint's CWA and ESA claims, and that even if there were  
23 sufficient notice for the ESA claims, Plaintiffs lack standing  
24 to bring suit because Plaintiffs' requested relief is not  
25 redressable by a Court order since Defendant has no direct  
26 authority to increase water exports to the Delta. Plaintiffs  
27 opposed the Motion.  
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1 II. OPINION

2 Pursuant to Federal Rule of Civil Procedure 12(b)(1), a  
3 defendant may move to dismiss a complaint for lack of subject-  
4 matter jurisdiction. Such a 12(b)(1) defense may be facial or  
5 factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039  
6 (9th Cir. 2004). A facial attack challenges subject-matter  
7 jurisdiction solely on the basis of the allegations in the  
8 complaint, while a factual attack "disputes the truth of the  
9 allegations that, by themselves, would otherwise invoke federal  
10 jurisdiction." Id.

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13 Here, despite both parties including extrinsic evidence in  
14 their filings in the forms of declarations and affidavits,  
15 Defendant makes a facial attack. Defendant asserts that  
16 Plaintiffs' Complaint is, on its face, insufficient to invoke  
17 federal jurisdiction because Plaintiffs failed to provide  
18 sufficient CWA and ESA statutory notice and because Plaintiffs  
19 lack standing to pursue their ESA claims. In reviewing a facial  
20 attack, a court must take the allegations in the plaintiff's  
21 complaint as true. Wolfe v. Strankman, 392 F.3d 358, 362 (9th  
22 Cir. 2004) (citing Bollard v. Cal. Province of the Soc'y of  
23 Jesus, 196 F.3d 940, 944-45 (9th Cir. 1999)). A court does not,  
24 however, accept the truth of legal conclusions "merely because  
25 they are cast in the form of factual allegations." Doe v. Holy  
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1 See, 557 F.3d 1066, 1073 (9th Cir. 2009) (quoting Warren v. Fox  
2 Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)).

3 A. Sufficiency of CWA Notice

4 No CWA action may be commenced prior to sixty days after  
5 the plaintiff has given notice of the alleged violations to the  
6 defendant. 33 U.S.C. §§ 1365(a), (b)(1)(A). The purpose of  
7 this notice requirement is to provide the recipient with enough  
8 information so that it may bring itself into compliance with the  
9 CWA prior to the filing of a lawsuit. Hallstrom v. Tillamook  
10 County, 493 U.S. 20, 29 (1989); Community Ass'n for Restoration  
11 of the Env't. v. Henry Bosma Dairy, 305 F.3d 943, 950 (9th Cir.  
12 2002). Therefore, notice must include "sufficient information  
13 to permit the recipient to identify the specific standard,  
14 limitation, or order alleged to constitute a violation" of the  
15 CWA. 40 C.F.R. § 135.3(a). Courts have found CWA notice  
16 sufficient where a plaintiff describes the problem at issue,  
17 identifies the pollutants at issue, and points out the  
18 locations, dates and practices at the source of the problem.  
19 Waterkeepers N. Cal. v. AG Indus. Mfg., 375 F.3d 913, 917-18  
20 (9th Cir. 2004); Natural Resources Defense Council v. Southwest  
21 Marine, Inc., 236 F.3d 985 (9th Cir. 2000).

22 Defendant argues that Plaintiffs "utterly failed to provide  
23 any information [in the October 17, 2008 notice letter] to  
24 support alleged violations of the CWA . . . ." Motion, Docket  
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1 at 23, 12:13-14. Defendant also argues that since the CWA only  
2 requires compliance with MS4 Permit *procedures*, rather than the  
3 *limits* set in those permits, even if the data attached to the  
4 notice letter shows excessive discharges that data is  
5 insufficient to allege a violation of the CWA. Id. at 13:16-28.

7 Contrary to Defendant's claim, Plaintiffs have provided  
8 sufficient information with which Defendant was notified of the  
9 allegations now at issue in this lawsuit. "The point of the  
10 [CWA's] notice requirement is not to *prove* violations, it is to  
11 inform the polluter about what it is doing wrong . . . ."

13 Waterkeepers N. Cal. v. AG Indus. Mfg., 375 F.3d 913, 917-18  
14 (9th Cir. 2004). Here, Plaintiffs, in their notice, allege  
15 failure to "comply with the terms of the MS4 Permits" by  
16 contributing to pollution and excessive stormwater discharges,  
17 failing to "adequately and effectively implement the [Storm  
18 Water Management Plans ("SWMPs")]," and "failing to adequately  
19 and effectively implement the plans and management measures set  
20 forth in the MS4 Permits." Complaint, Exh. 1, 6. The data  
21 attached as Attachment A to the October 17, 2008 letter provides  
22 detailed information about the dates, pollutants, and  
23 measurements of the alleged illegal discharges. Id., Exh. 1,  
24 Attch. A. Plaintiffs identify the required "plans and  
25 management measures" set forth by the MS4 permits on page six of  
26 the October 17, 2008 letter, recognizing and then alleging  
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1 violations of the very procedures that Defendant argues are  
2 unaddressed. Id., Exh. 1, at 6. Plaintiffs also allege failure  
3 to "comply with the MS4 Permits with respect to repeated  
4 exceedances of water quality standards by failing to undertake  
5 the required procedures to address exceedances." Id. These  
6 allegations, in conjunction with the attached discharge data,  
7 are sufficient to have put Defendant on notice that Plaintiffs  
8 questioned their compliance with the prohibitions and procedures  
9 set forth in the MS4 permits.  
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12 As such, Defendant's Motion in regards to the sufficiency  
13 of CWA notice is DENIED.

14 B. Sufficiency of ESA Notice

15 The ESA also requires a sixty day notice of the alleged  
16 violations. 16 U.S.C. § 1540(g)(2)(A)(i). The ESA notice, very  
17 similar to the CWA notice, requires that a plaintiff "provide  
18 sufficient information of a violation so that [the recipient]  
19 could identify and attempt to abate the violation" prior to  
20 litigation. Southwest Center for Biological Diversity v. U.S.  
21 Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998). The  
22 Ninth Circuit has found sufficient ESA notice where a plaintiff  
23 alerts a defendant of the actual violation, including specifying  
24 the particular species at risk and the particular operation that  
25 is allegedly harming that species, which is later alleged in  
26 litigation. See Id. at 521.  
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1 Defendant argues that the October 17, 2008 letter did  
2 not provide sufficient information with the required  
3 particularity to inform Defendant of the ESA violations now  
4 asserted. Motion, Docket at 23, 17:8-15. Defendant argues that  
5 the ESA claims made in the letter are entirely factually  
6 contingent on the alleged CWA violations of the MS4 Permits, and  
7 therefore, since the Court should dismiss the CWA claims for  
8 lack of proper notice, the ESA claims should be dismissed as  
9 well. Id. at 17:10-15; Reply, Docket # 43, 8:7-13.  
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12 Defendant cites no law, in the Motion or in the Reply, for  
13 the proposition that an ESA claim hinging on a CWA claim fails  
14 as a result of insufficient CWA notice. See Idaho Rivers United  
15 v. Nat'l Marine Fisheries Serv., 1995 WL 877502, at 7 (W.D.  
16 Wash. Nov. 9, 1995) ("There is no authority cited for the  
17 proposition that, as a matter of law, compliance with an  
18 [Environmental Protection Agency] permit automatically meets the  
19 requirements of the ESA."). Moreover, this Court has found that  
20 Plaintiffs' CWA notice was adequate. Defendant's chain of  
21 logic, which was contingent on dismissal of the CWA claims, is  
22 therefore broken.  
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25 Plaintiffs also provided sufficient notice of their ESA  
26 claims independent of the CWA allegations. Plaintiffs notified  
27 Defendant of the specific Listed Species at risk, Complaint,  
28 Docket # 1, Exh. 1, 6-9, identified the harm as excess

1 pollutants in the Delta, Id. at 7, and alleged that the  
2 pollutants responsible for the harm result from discharges by  
3 Defendant, Id. at 7-8, 10 and Attachment A. Plaintiffs do not  
4 rely on the Defendant's discharges being contrary to the CWA to  
5 say that those discharges harm protected species under the ESA.  
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7 As such, Defendant's Motion with regards to the sufficiency  
8 of ESA notice is DENIED.

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10 C. Redressability of Plaintiffs' ESA Claims

11 In order for a plaintiff to have standing in federal court,  
12 a plaintiff must establish that he has suffered an "injury-in-  
13 fact," that there is a "causal connection" between the injury  
14 and the conduct complained of, and that the "injury will be  
15 redressed by a favorable decision." Bennet v. Spear, 520 U.S.  
16 154, 167 (1997) (citing Lujan v. Defenders of Wildlife, 504 U.S.  
17 555, 560-61 (1992)). Here, Defendant challenges Plaintiffs'  
18 response to the third requirement, the redressability of the  
19 alleged injury. In order to establish redressability in a claim  
20 of substantive violations of the ESA, a plaintiff must  
21 demonstrate a "substantial likelihood that the requested relief  
22 will remedy the alleged injury in fact." Vt. Agency of Natural  
23 Resources v. United States ex rel. Stevens, 529 U.S. 765, 771  
24 (2000) (citing Simon v. Eastern Ky. Welfare Rights Organization,  
25 426 U.S. 26, 41 (1976)) (internal quotations omitted).  
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1 Defendant argues that Plaintiffs<sup>2</sup> request a form of  
2 relief that Defendant alone is unable to accommodate: Namely,  
3 that Defendant "increase[] water exports" to Plaintiffs.  
4 Motion, Docket # 23, 20:24-28. Defendant contends that any  
5 increase in water exports by Defendant is dependent on the  
6 discretion of federal wildlife agencies, third parties not named  
7 in this suit, and that even if the agencies choose to increase  
8 water exports as a result of this litigation there is no  
9 substantial likelihood that those increased exports would  
10 improve Plaintiffs' situations. Id. at 21:1-22:25. For these  
11 reasons, Defendant moves the Court to dismiss the complaint for  
12 lack of standing to pursue the ESA claims.  
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15 The Court declines to do so. Defendant has  
16 mischaracterized Plaintiffs' asserted injuries and requested  
17 remedies. Plaintiffs allege decreased water quality, resulting  
18 in decreased water deliveries, and damage to the esthetic,  
19 recreational, and conservation benefits of the Delta ecosystem.  
20 Complaint, Docket # 1, ¶¶ 17-33. In response to these injuries,  
21 Plaintiffs request that the Court "enjoin[] . . . San Joaquin  
22 County from violating the ESA" and order injunctive relief. Id.  
23 at ¶¶ 209(i)-(l); Id. at ¶¶ 190, 196, 202, and 208.  
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28 <sup>2</sup> Again, it is unclear whether Defendant intends to target  
all the water districts or some combination of four of the five  
water district plaintiffs in its Motion.

1 Plaintiffs do not, as Defendant suggests, request that the  
2 Court order Defendant to increase water exports to the Delta.  
3 Rather, Plaintiffs request compliance with the ESA which only  
4 requires an improvement in the water *quality* of the Delta, not  
5 an increase in the water *quantity*. Id. at ¶ 209(j). While an  
6 increase in water supply may be one potential solution to the  
7 issue (diluting pollution in the Delta and thus reducing the  
8 harm to the Listed Species), it is not the only solution. For  
9 example, Plaintiffs request adherence to the MS4 guidelines as  
10 well as limits on polluting discharges. Id. at ¶¶ 190, 196,  
11 202, 208, and 209(g). Plaintiffs contend that this would  
12 improve water quality in the Delta. A Court order requiring  
13 such adherence would not depend upon or require federal agency  
14 discretion as Defendant suggests. Ultimately, there is  
15 sufficient likelihood that Plaintiffs' claim is redressable by  
16 means other than increasing water exports to the Delta, thus  
17 meeting the standard to deny a motion to dismiss.  
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