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

FELICE PACE, WILDERNESS WATCH,

No. C 12-05610 SI

Plaintiffs,

**ORDER GRANTING MOTION TO FILE
AMENDED COMPLAINT AND
DISMISSING AS MOOT MOTION TO
DISMISS ORIGINAL COMPLAINT**

v.

CHARLTON H. BONHAM, STAFFORD
LEHR, CALIFORNIA DEPARTMENT OF
FISH AND GAME,

Defendants.

On March 15, 2013 the Court heard oral argument on defendants' motion to dismiss. Docket No. 20. After the argument, and while that motion was under consideration, plaintiffs filed a motion to amend. Docket No. 37.¹ Plaintiffs seek to add additional factual allegations, including the allegation that "[m]ortality rates from the aerial stocking of fish often approach 50%, as a result of transport, the drop, or because these stocked fish do not feed or survive well after stocking." Proposed Second Amended Complaint, Docket No. 37-1, ¶ 10.²

¹ The motion to amend is set for hearing on Thursday May 2, 2013. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing.


² Defendants argue that plaintiffs' motion is procedurally improper and should have been styled as a motion for reconsideration or request to submit a supplemental brief. *See* Opposition to Motion to Amend at 1-3. However, while at oral argument on defendants' motion to dismiss the Court's tentative view was the motion to dismiss should be granted and the minute order following the argument noted that the "[M]otion to dismiss is tentatively granted," the Court had not yet issued its final ruling. The Court, therefore, will consider the motion to amend on its merits.

1 The Court finds that the motion to amend should be GRANTED and plaintiffs' Second Amended
2 Complaint can be filed. The Court cannot, at this early stage, determine that leave to amend would be
3 futile, since "a proposed amendment is futile only if no set of facts can be proved under the amendment
4 to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton,*
5 *Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citing *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89
6 (N.D. Cal. 1978)). Given the new allegation regarding the mortality of the stocked fish, the Court finds
7 that further proceedings and factual development will be required to determine whether at least some
8 of the fish being stocked would fall within the definition of "biological materials" that are pollutants
9 under *Association to Protect Hammersley v. Taylor Resources (Hammersley)*, 299 F.3d 1007 (9th Cir.
10 2002).

11 Accordingly, the motion to file the Second Amended Complaint is GRANTED; accordingly, the
12 motion to dismiss the original complaint is MOOT.

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14 **IT IS SO ORDERED.**

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16 Dated: April 30, 2013



SUSAN ILLSTON
United States District Judge

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