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9 Wheeler Ridge-Maricopa Water Storage District, and Dee Dillon

10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF CALIFORNIA

12 COALITION FOR A SUSTAINABLE DELTA,  
13 BELRIDGE WATER STORAGE DISTRICT,  
14 BERRENDA MESA WATER DISTRICT, LOST  
HILLS WATER DISTRICT, WHEELER RIDGE-  
MARICOPA WATER STORAGE DISTRICT, and  
DEE DILLON,

15 Plaintiffs,

16 vs.

17 JOHN McCAMMAN, in his official capacity as  
18 Director of the California Department of Fish and  
Game,

19 Defendant,

20 CENTRAL DELTA WATER AGENCY, et al.

21 Defendant-Intervenors,

22 CALIFORNIA SPORTFISHING PROTECTION  
23 ALLIANCE, et al.,

24 Defendant-Intervenors.

) Case No: 1:08-CV-00397-OWW-GSA  
) (Related to Case Numbers 1:05-cv-OWW-  
) GSA and 1:06-cv-00245-OWW-GSA)

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **PLAINTIFFS' MOTION FOR PARTIAL**  
) **SUMMARY JUDGMENT RE LIABILITY**  
) **(WINTER AND SPRING-RUN SALMON)**  
) **AND STANDING**

) Date: March 22, 2010  
) Time: 10:00 a.m.  
) Courtroom: 3  
) Judge: Hon. Oliver W. Wanger

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1 **I. INTRODUCTION.**

2 Plaintiffs move the Court for summary adjudication that (1) Defendant’s enforcement of the  
3 striped bass sport-fishing regulations violates section 9 of the Endangered Species Act; and (2) Plaintiff  
4 Dee Dillon has standing.

5 As a result of the binding admissions of Defendant’s own experts, along with a wealth of other  
6 supporting evidence, the facts that establish both liability and Plaintiff Dee Dillon’s standing to sue are  
7 now undisputed:

- 8 1. The striped bass sport-fishing regulations, by protecting the Delta’s striped bass  
9 population, increase striped bass predation on at least two of the federally protected  
10 species at issue in this case – Sacramento River winter-run Chinook salmon and Central  
11 Valley spring-run Chinook salmon (the “Listed Salmon”); and
- 12 2. Enjoining the enforcement of the striped bass sport-fishing regulations would likely  
13 benefit the Listed Salmon by reducing striped bass predation on Listed Salmon, by  
14 increasing their survival, or by decreasing the Listed Salmon’s probability of extinction.

15 Accordingly, the Court should now grant partial summary judgment on the issues of liability and  
16 standing with respect to the Listed Salmon, leaving the issues of remedies and liability with respect to  
17 delta smelt and Central Valley steelhead for negotiation with Defendant or further adjudication.<sup>1</sup>

18 The Endangered Species Act (“ESA”) prohibits the “take” of endangered fish and wildlife  
19 without prior authorization,<sup>2</sup> 16 U.S.C. § 1538(a)(1)(B), and authorizes the Executive Branch, acting

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21 <sup>1</sup> Plaintiffs and movants are the Coalition for a Sustainable Delta, Belridge Water Storage District,  
22 Berrenda Mesa Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage  
23 District, and Dee Dillon. Although all of the Plaintiffs are moving on the issue of liability, pursuant to  
24 the parties’ Stipulation and the Court’s Order, only Plaintiff Dee Dillon (“Mr. Dillon”) and the Coalition  
25 for a Sustainable Delta (“Coalition”) are moving on the issue of standing. *See* Order re Plaintiffs’  
26 Standing (Doc. 106) (Dec. 11, 2009) (“Failure by Plaintiffs to establish the standing of Plaintiff Dee  
27 Dillon shall be deemed a failure to establish standing of all of the Plaintiffs, but if Plaintiffs establish the  
28 standing of Plaintiff Dee Dillon, they shall be deemed to establish the standing to sue of Plaintiff  
Coalition, and the Court need not decide the standing of the other plaintiffs”).

<sup>2</sup> The “take” prohibition in section 9 of the ESA extends to any action by any person, corporation, or  
governmental agency that will either directly or indirectly “harass, harm, pursue, hunt, shoot, wound,  
kill, capture or collect, or attempt to engage in such conduct.” 16 U.S.C. §§ 1532(19) (defining “take”),  
1538(g) (prohibiting direct and indirect causes of take). The term “harass” means “an intentional or  
negligent act or omission which creates the *likelihood* of injury to wildlife by annoying it to such an

1 through the U.S Fish and Wildlife Service or National Marine Fisheries Service ("NMFS"), to extend  
2 the take prohibition to threatened species.<sup>3</sup> *Id.* § 1533(d). Defendant John McCamman ("Defendant"),  
3 as Acting Director of the California Department of Fish and Game ("CDFG"),<sup>4</sup> enforces regulations that  
4 result in the take of the Listed Salmon.

5 To prevail on the issue of liability under section 9, Plaintiffs need only prove that the  
6 enforcement of the striped bass sport-fishing regulations is reasonably certain to result in the take of one  
7 or more Listed Salmon. Plaintiffs need not prove death or injury to a specific member of the Listed  
8 Salmon. (See § IV(B-C) below.) The following undisputed facts amply satisfy this burden:

- 9 • Striped prey on the Listed Salmon (see evidence listed in Plaintiffs' Separate Statement  
10 of Undisputed Material Facts in Support of Plaintiffs' Motion ("SUF") 3);
- 11 • Enforcement of the striped bass sport-fishing regulations results in a larger population of  
12 striped bass than there would be absent the regulations (SUF 2);
- 13 • Striped bass predation on the Listed Salmon increases as the striped bass population  
14 increases (SUF 4).

15 Defendant's own experts admit that the striped bass sport-fishing regulations increase striped bass  
16 predation on the Listed Salmon, thereby violating the take prohibition in section 9 of the ESA.

17 To prove standing, a plaintiff is not required to prove that it would prevail on the merits. Instead,  
18 a plaintiff need only prove that there is an increased likelihood of injury resulting from the defendant's  
19 conduct, that the conduct is a fairly-traceable cause of the injury, and that granting the requested relief is  
20 likely to redress the injury asserted. This Court has already found that the harm to Mr. Dillon's  
21 environmental and recreational interests establishes the element of injury. Order Denying Pls.' Mot. for  
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23  
24 extent as to significantly disrupt normal behavior patterns which include, but are not limited to,  
25 breeding, feeding or sheltering." *Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1064 (9th Cir.  
1996) (quoting 50 C.F.R. § 17.3 (emphasis added)).

26 <sup>3</sup> NMFS has by regulation extended the ESA's take prohibition to the threatened Central Valley spring-  
27 run Chinook salmon. See 50 C.F.R. §§ 222.301(b), 223.203(a).

28 <sup>4</sup> In December 2009, Donald Koch resigned from the position of CDFG Director. Since Donald Koch's  
resignation, John McCamman has been acting as the interim Director of CDFG. Pursuant to Federal  
Rule of Civil Procedure ("FRCP") 25(d), upon accepting the position as CDFG Director, John  
McCamman was "automatically substituted as a party" Defendant in this action.

1 Partial Summ. J. (Doc. 57) at 31:20-21 (July 16, 2009); *see also* SUF 5-6. Thus, Mr. Dillon need only  
2 prove that Defendant’s conduct is a probable cause – even if just one of many – of his injury, and that  
3 the requested relief is likely to redress his injury. The evidence more than satisfies these requirements,  
4 as it is undisputed that: (i) striped bass predation is one cause of the decline of the Listed Salmon (SUF  
5 7), and (ii) enjoining the enforcement of the striped bass sport-fishing regulations will likely benefit the  
6 Listed Salmon by reducing striped bass predation on them (SUF 8), increasing their population (SUF 9),  
7 and/or reducing the risk of their extinction (SUF 10).

8 Whereas Plaintiffs filed the prior Motion for Summary Adjudication of Issues dated February 27,  
9 2009, at a time when the parties were in the midst of discovery, Plaintiffs now have the binding  
10 admissions of CDFG’s experts, especially its designee Marty Gingras, to conclusively prove ESA  
11 liability and standing. Accordingly, Plaintiffs request that the Court grant this motion, leaving the issue  
12 of remedies for negotiation with Defendant or further adjudication.<sup>5</sup>

13 **II. SUMMARY JUDGMENT STANDARD.**

14 Under FRCP 56, a party may move for summary judgment on all or part of a claim. FRCP 56(a).  
15 A motion for partial summary judgment, like a motion for summary judgment, is appropriate where  
16 there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of  
17 law. FRCP 56(c)(2); *see also Wang Laboratories v. Mitsubishi Elecs.*, 860 F. Supp. 1448, 1450-51  
18 (C.D. Cal. 1993). “[T]he mere existence of some alleged factual dispute between the parties will not  
19 defeat an otherwise properly supported motion for [partial] summary judgment; the requirement is that  
20 there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48  
21 (1986). An issue of fact is genuine “if the evidence is such that a reasonable jury could return a verdict  
22 for the nonmoving party.” *Id.* at 248. An issue is material if the resolution of the factual dispute affects  
23  
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25  
26 <sup>5</sup> The stipulated Order re Discovery and Injunctive Relief (Doc. 108) (Dec. 17, 2009) states that  
27 Defendants “shall each and all not oppose, by legal argument or evidence, any request by Plaintiffs for  
28 injunctive relief on the grounds that enjoining the enforcement of the striped bass sport-fishing  
regulations would harm the public or the public interest or that the balancing of hardships and interests  
of the parties does not favor the issuance of the injunction.” *Id.* at 2. Plaintiffs anticipate that this Order  
will be relevant to any remedy proceeding.

1 the outcome of the claim or defense under the substantive law governing the case. *Arpin v. Santa Clara*  
2 *Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

3 **III. CDFG IS BOUND BY THE ADMISSIONS OF MARTY GINGRAS, ITS DESIGNEE**  
4 **UNDER FRCP 30(b)(6).**

5 In response to Plaintiffs' FRCP 30(b)(6) ("Rule 30(b)(6)") deposition notices to Defendant,  
6 Defendant designated Marty Gingras, CDFG's Supervising Biologist for the Bay-Delta Region and its  
7 top expert on striped bass predation, to testify on 12 issues, including the effect of (i) the striped bass  
8 sport-fishing regulations on the striped bass population in the Delta and (ii) striped bass predation on the  
9 Listed Salmon. (Rubin Decl. ¶¶ 17, 19, 33-34, Exh. 28 [Depo Notice]; Rubin Decl. ¶ 35, Exh. 29  
10 [Gingras Depo.] at 361:2-22.) During the Rule 30(b)(6) deposition, Mr. Gingras admitted, *inter alia*,  
11 that striped bass predation is one cause of the decline of the Listed Salmon and that reducing striped bass  
12 predation by means of deregulation will probably increase salmon survival and reduce their risk of  
13 extinction. (See evidence cited in §§ IV-V below and SUF 7, 9, 10.) While this Motion is also  
14 supported by a wealth of other admissions of Defendant's witnesses and documents, these crucial  
15 admissions by Mr. Gingras are binding on and cannot be contradicted by Defendant.

16 Rule 30(b)(6) provides that when a party notices the deposition of a government agency or other  
17 entity on specified issues, the entity "must then designate one or more officers, directors, or managing  
18 agents, or designate other persons who consent to testify on its behalf; and . . . [t]he persons designated  
19 must testify about information known or reasonably available to the organization." FRCP 30(b)(6). The  
20 designee is not simply testifying about matters within his or her own personal experience, but rather is  
21 "speaking for the [organization]." *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 94 (D.D.C.  
22 1998) (citing *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)). Thus, numerous cases  
23 hold that an entity is **bound** by the testimony of its Rule 30(b)(6) designee. *See, e.g., id.* ("By  
24 commissioning the designee as the voice of the [agency], the Rule obligates a[n agency] 'to prepare its  
25 designee to be able to give binding answers' on its behalf."); *Great Am. Ins. Co. of N.Y. v. Vegas Const.*  
26 *Co.*, No. 2:06-cv-00911, 2008 U.S. Dist. LEXIS 108488, at \*11 (D. Nev. Mar. 24, 2008) ("A  
27 corporation has a duty under Rule 30(b)(6) to provide a witness who is knowledgeable in order to  
28 provide binding answers on behalf of the corporation."); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992,

1 993 (E.D. La. 2000) (“The designee testifies on behalf of the corporation and holds it accountable  
2 accordingly.”).

3 The duty to prepare a Rule 30(b)(6) designee goes beyond matters personally known to the  
4 witness or matters in which the designated witness was personally involved. *Great Am. Ins. Co.*, 2008  
5 U.S. Dist. LEXIS 108488, at \*12; *Rainey*, 26 F. Supp. 2d at 94; *Buycks-Robertson v. City Bank Fed.*  
6 *Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995); *FCC v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992). It  
7 includes information available to the responding agency by reasonable investigation. *Great Am. Ins.*  
8 *Co.*, 2008 U.S. Dist. LEXIS 108488, at \*12; *Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998). For  
9 these reasons, Defendant cannot contradict its designee Mr. Gingras’ admissions. *Rainey*, 26 F. Supp.  
10 2d at 94; *Taylor*, 166 F.R.D. at 362.<sup>6</sup>

11 **IV. DEFENDANT’S ENFORCEMENT OF THE STRIPED BASS SPORT-FISHING**  
12 **REGULATIONS VIOLATES SECTION 9 OF THE ESA.**

13 **A. REGULATORY ACTION THAT CAUSES A TAKING OF LISTED SALMON**  
14 **VIOLATES THE TAKING PROHIBITION OF THE ESA.**

15 Section 9 of the ESA makes it unlawful for any person to take a Listed Salmon through the  
16 exercise of regulatory authority without first receiving take authorization. Thus, it is a violation of the  
17 ESA for Defendant to cause the take of the Listed Salmon through the exercise of its regulatory  
18 authority without first receiving take authorization from NMFS.

19 In addition to prohibiting “any person” from taking any endangered or threatened species,  
20 section 9 also prohibits “any person” from “*causing*” a taking to be committed. 16 U.S.C.  
21 § 1538(a)(1)(B), (g) (emphasis added). Thus, the plain language of the ESA prohibits “acts of a third  
22 party that bring about the acts exacting a taking.” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997);  
23 *see also Palila v. Haw. Dep’t of Land and Natural Res.*, 639 F.2d 495, 497-98 (9th Cir. 1981) (state’s  
24 goats and sheep sport hunting program violated section 9 of ESA because of impacts of program on  
25

26  
27 <sup>6</sup> Similarly, under the “sham affidavit rule,” Defendant may not defeat summary judgment by  
28 contradicting the deposition admissions of Matthew Nobriga or Defendant’s other experts/witnesses in  
this matter. *E.g. Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (affidavit that  
contradicted earlier deposition testimony could not create a disputed issue of fact and avoid summary  
judgment).

1 habitat of endangered bird). Because the ESA defines “person” broadly to include “any State,” or “any  
 2 officer, employee, agent, department, or instrumentality of . . . any State,” *id.* § 1532(13), “the statute  
 3 . . . prohibits a party, including state officials, from bringing about the acts of another party that exact a  
 4 taking.” *Seattle Audubon Soc’y v. Sutherland*, No. CV06-1608, 2007 U.S. Dist. LEXIS 31880, at \*23-  
 5 24 (W.D. Wash. May 2, 2007); *see also Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1251-53  
 6 (11th Cir. 1998) (if the county’s regulation of beachfront lighting resulted in the take of an endangered  
 7 species, it would violate the ESA); *Strahan*, 127 F.3d at 163-64 (state’s licensing of gillnet and lobster  
 8 pot fishing violated the ESA); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1081 (D. Minn.  
 9 2008) (Minnesota Department of Natural Resources violated section 9 of the ESA by authorizing  
 10 trapping and snaring that could potentially result in take of the protected Canada Lynx). Likewise, the  
 11 Ninth Circuit has held that a state cannot enact and enforce regulations to maintain non-native species  
 12 for sport hunting purposes where the species being protected by the state threatens to harm listed  
 13 species. *Palila*, 639 F.2d at 497-98 (holding state’s practice of maintaining feral goats and sheep for  
 14 sport hunting purposes violated the ESA).

15 **B. TAKE OF ONE OR MORE OF THE LISTED SALMON WITHOUT PRIOR**  
 16 **AUTHORIZATION IS A VIOLATION OF THE ESA.**

17 It is illegal to take even a single member of any of the Listed Salmon without prior take  
 18 authorization. Section 9 of the ESA states that “with respect to any endangered species of fish or  
 19 wildlife listed . . . [,] it is unlawful for any person [to] . . . take any such species within the United States  
 20 or the territorial sea of the United States . . . .” 16 U.S.C. § 1538(a)(1)(B). Provisions exempting  
 21 authorized/permitted take from this section are set forth in sections 7 and 10 of the ESA. Thus, under  
 22 the plain language of section 9, it is a violation of the ESA to take one or more members of an  
 23 endangered species without prior authorization. *See Lamie v. United States Tr.*, 540 U.S. 526, 534  
 24 (2004). The ESA also authorizes NMFS to extend section 9’s take prohibition to threatened species,  
 25 16 U.S.C. § 1533(d), which NMFS has done for the threatened Central Valley spring-run Chinook  
 26 salmon. 50 C.F.R. §§ 222.301(b), 223.203(a).

27 *Every* court to consider the scope of the ESA take prohibition, including the Ninth Circuit, has  
 28 concluded that the unauthorized take of even a single member of a listed species is a violation of

1 section 9. *See, e.g., United States v. Nuesca* and *United States v. Kaneholani*, 945 F.2d 254 (9th Cir.  
 2 1991) (affirming criminal convictions under the ESA for the take of a single Hawaiian monk seal and  
 3 two green sea turtles); *Mausolf v. Babbitt*, 125 F.3d 661, 668 (8th Cir. 1997) (explaining that the ESA  
 4 “prohibits any person, including a governmental agency, from ‘taking’ any individual member of a  
 5 threatened or endangered species population”); *Strahan*, 127 F.3d at 165 (“a single injury to one whale  
 6 is a taking under the ESA”); *The Humane Soc’y of the U.S. v. Lujan*, 768 F. Supp. 360, 361 (D.D.C.  
 7 1991) (“The bald eagle is an endangered species, and ESA makes it unlawful for anyone to ‘take’ a  
 8 specimen of such species”); *Good v. United States*, 39 Fed. Cl. 81, 90 (Fed. Cl. 1997) (“pursuant to  
 9 Section 9 of the ESA, the marsh rabbit’s endangered status made it illegal to ‘take’ (*e.g.*, kill, harm,  
 10 harass) an individual marsh rabbit.”); *Loggerhead Turtle v. County Council of Volusia County*, 896 F.  
 11 Supp. 1170, 1180 (M.D. Fla. 1995) (“Any taking and every taking – even of a single individual of the  
 12 protected species – is prohibited by the Act.” (emphasis omitted)); *Glasser v. Nat’l Marine Fisheries*  
 13 *Serv.*, No. C06-561, 2008 U.S. Dist. LEXIS 54839, at \*7 (W.D. Wash. July 17, 2008); *Save Our Springs*  
 14 *Alliance v. Norton*, No. A-05-CA-683, 2007 U.S. Dist. LEXIS 25566, at \*10 (W.D. Tex. Feb. 20, 2007)  
 15 (“no person may ‘take’ a single Barton Springs salamander without prior authorization under the  
 16 ESA.”).

17 **C. PLAINTIFFS NEED ONLY SHOW A REASONABLY CERTAIN THREAT OF**  
 18 **FUTURE HARM.**

19 Plaintiffs are not required to prove that a particular member of the Listed Salmon has actually  
 20 been harmed to demonstrate liability under section 9 of the ESA. Instead, Plaintiffs need only  
 21 demonstrate “a reasonably certain threat of imminent harm to” a Listed Salmon.<sup>7</sup>

22 \_\_\_\_\_  
 23 <sup>7</sup> Thus, to establish liability under section 9, Plaintiffs need not show that striped bass predation has  
 24 reduced the population levels of the Listed Salmon to a degree that will materially affect subsequent  
 25 abundance or survival, as section 9 prohibits any action that is reasonably certain to result in the take of  
 26 one or more members of a protected species. Additionally, Plaintiffs are not required to show such  
 27 effects on subsequent abundance or survival to establish redressability, as it would raise the standing  
 28 hurdle higher than the necessary showing for success on the merits. *See, e.g., Friends of the Earth v.*  
*Laidlaw*, 528 U.S. 167, 181 (2000) (rejecting argument that would raise the standing hurdle higher than  
 the necessary showing for success on the merits); *Loggerhead Turtle*, 148 F.3d at 1253-54 (holding that  
 plaintiff’s injury was redressable for the purposes of standing, because if the requested relief was  
 granted, fewer protected sea turtles would be harmed). Nonetheless, as discussed in § V below, the clear  
 and uncontradicted testimony of Plaintiffs’ and Defendant’s experts proves that striped bass predation

1 In *Marbled Murrelet v. Pacific Lumber Co.*, an environmental plaintiff filed an action against a  
2 logging company, asserting that the defendant's logging activities would result in the take of listed  
3 marbled murrelets, in violation of the ESA. 83 F.3d at 1062. After finding that the defendant's logging  
4 activities would likely "harass" and "harm" the marbled murrelet, the district court issued an injunction.  
5 *Id.* at 1063. The defendant appealed, arguing that plaintiff failed to prove actual harm to a marbled  
6 murrelet. *Id.* at 1062. The Ninth Circuit rejected the defendant's argument, finding that "a showing of a  
7 future injury to an endangered or threatened species is actionable under the ESA," and that "[a]  
8 reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an  
9 injunction under section 9 of the ESA." *Id.* at 1064-66. The Ninth Circuit found undisputed evidence  
10 that the marbled murrelet was located within the logging area, and that the logging activities "would  
11 likely harm marbled murrelets by impairing their breeding and *increasing the likelihood of attack by*  
12 *predators* on the adult murrelets as well as the young." *Id.* at 1067-68 (emphasis added). Accordingly,  
13 the Ninth Circuit affirmed the district court's injunction, as "there was a reasonable certainty of  
14 imminent harm to [the marbled murrelet] from [defendant's] intended logging operation." *Id.* at 1068.

15 Thus, in order to prevail on their section 9 claims in this case, Plaintiffs need only prove that  
16 there is a reasonably certain threat of imminent harm to a Listed Salmon from the enforcement of the  
17 striped bass sport-fishing regulations. *E.g.*, *Marbled Murrelet*, 83 F.3d at 1066; *Seattle Audubon Soc'y*  
18 *v. Sutherland*, No. C06-1608, 2007 U.S. Dist. LEXIS 55940, at \*42 (W.D. Wash. Aug. 1, 2007) ("To  
19 prevail on the merits of their claim that State Defendants will authorize 'take' of spotted owls, Plaintiffs  
20 must show that the State is likely to approve [actions] that pose a 'reasonably certain threat of imminent  
21 harm' to spotted owls").

22  
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27 has contributed to the decline of the Listed Salmon, and reducing striped bass predation via deregulation  
28 would benefit the Listed Salmon by increasing their populations and by reducing their risk of extinction.  
(*See, e.g.*, Rubin Decl. 35 Exh. 29 [Gingras Depo.] at 401:1-10, 403:6-12, 446:11-22, 447:4-9, 485:9-13,  
552:24-553:3.)



1           **D.     THE STRIPED BASS SPORT-FISHING REGULATIONS RESULT IN THE**  
2           **TAKE OF LISTED SALMON.**

3           Defendant’s enforcement of the striped bass sport-fishing regulations violates section 9 of the  
4 ESA because undisputed evidence proves it is reasonably certain that enforcement of the regulations  
5 increases striped bass predation on the Listed Salmon.

6           Current striped bass sport-fishing regulations impose catch limitations, size limitations, and gear  
7 restrictions on striped bass anglers. Cal. Code Regs. tit. 14, §§ 5.75, 27.85. Under the current striped  
8 bass sport-fishing regulations, anglers are prohibited from taking striped bass from within the Delta that  
9 are less than 18 inches in length and from taking more than two striped bass in excess of 18 inches in  
10 length. *Id.* CDFG, and Defendant as its Director, is responsible for enforcing the striped bass sport-  
11 fishing regulations. SUF 1.

12           As intended, *CDFG’s enforcement of the striped bass sport-fishing regulations has maintained*  
13 *a higher population of striped bass than there would be without the regulations.*<sup>8</sup> This fact is not  
14 disputed by CDFG personnel. *See* SUF 2. For example, CDFG designee Marty Gingras, CDFG  
15 employee Jason DuBois, and CDFG employee Tony Warrington all admitted that eliminating the striped  
16 bass regulations would increase catch of striped bass and reduce the striped bass population. (Rubin  
17 Decl. ¶ 35, Exh. 30 [Gingras Depo.] at 612:3-9; ¶ 30, Exh. 24 [DuBois Depo.] at 83:5-8; ¶ 20, Exh. 14  
18 [Warrington Depo.] at 78:2-10, 86:22-87:2.) Further, the Defendant has admitted as much in response  
19 to discovery, stating that “the striped bass sport-fishing regulations have resulted in a striped bass  
20 population in the Delta that is greater tha[n] what the population would have been in the absence of th[e]  
21 regulations.” (Rubin Decl. ¶ 13, Exh. 10 [Supp. Resp. to Pls.’ RFA] at RFA No. 2.) Prior to this  
22 lawsuit, CDFG refused to eliminate or even modify these regulations because it concluded that without  
23 these regulations, the striped bass population would be “decimated” (Rubin Decl. ¶ 36, Exh. 44 [Delisle  
24 Memo] at 2), and that “lowering the minimum size even just one inch will result in greatly increased  
25  
26

27 <sup>8</sup> Due to multiple causes, the Delta ecosystem faces a “Pelagic Organism Decline” affecting numerous  
28 species, including age-0 striped bass. However, Plaintiffs need not prove that the Delta’s striped bass  
population has recently increased or will increase in order to prevail on the instant motion. Instead,  
Plaintiffs need only prove that there are more striped bass than there would be without the regulations.

1 striped bass catches.” (Rubin Decl. ¶ 37, Exh. 45 [Public Proposed Changes and CDFG  
2 Recommendations] at 1.) As former CDFG employee Dr. Perry Herrgesell aptly stated:

3 The regulations are there. They are based on science. They are based on  
4 catch rates, population abundance. They’re based on this whole  
5 multimillion dollar monitoring program . . . . And if I said anything  
6 different, I would be, you know not honest to myself and to the  
7 department. Regulations are there to protect, and they are protecting the  
8 striped bass population.

9 (Rubin Decl. ¶ 23, Exh. 17 [Herrgesell Depo.] at 50:1-9.)

10 By promoting an artificially high population of striped bass in the Delta, the striped bass sport-  
11 fishing regulations increase striped bass predation on the Listed Salmon. These facts are undisputed:

12 Striped bass predation increases mortality of the Listed Salmon and is one cause of the decline of  
13 these species. (Rubin Decl. ¶ 35, Exhs. 29-30 [Gingras Depo] at 552:25-553:3 (“striped bass predation  
14 is one of many factors contributing to the decline of the listed species”), 607:24-608:6 (same  
15 conclusion), 607:18-20 (“predation by striped bass increases mortality on those listed species”).)

16 Striped bass predation on the Listed Salmon is particularly harmful in the Delta’s degraded ecosystem.  
17 (Rubin Decl., ¶ 24, Exh. 18 [Hanson Expert Report] at 41; ¶ 35, Exh. 29 [Gingras Depo.] at 473:10-11;  
18 ¶ 38, Exh. 46 [Draft Recovery Plan] at ES-2 (identifying “predation of Chinook salmon and steelhead  
19 from introduced species such as striped bass and black bass” as one of four major stressors on those  
20 species); *id.* at 157 (calling for implementation of “programs and measures designed to control non-  
21 native predatory fish,” and specifically identifying striped bass); ¶ 39, Exh. 47 [Independent Review of  
22 the CVPIA] at 24 (“predation by a larger striped bass population on juvenile winter-run chinook may  
23 impede recovery of winter-run chinook”); ¶ 36, Exh. 36 [Article by Nobriga & Feyrer] at 9 (“striped  
24 bass likely remains the most significant predator of Chinook salmon”).)

25 1. Striped bass predation is a major cause of mortality of Listed Salmon. SUF 3 and 7.

26 Despite the shortage of current reliable striped bass diet data (due to CDFG’s failure to study striped  
27 bass predation during the last decade), Plaintiffs’ expert, Dr. Hanson, and CDFG’s experts and designee,  
28 Mr. Nobriga and Mr. Gingras, all arrived at similar and substantial estimates of striped bass predation on  
Delta salmon, as did CDFG biologist David Kohlhorst in his unpublished 1996 bioenergetics estimate of  
predation on winter-run salmon:

Expert	Estimate of Striped Bass Predation on Winter-Run	Estimate of Striped Bass Predation on Spring-Run
Marty Gingras (Defendant’s 30(b)(6) Designee)	5%-25% (Rubin Decl. ¶ 35, Exh. 29 [Gingras Depo.] at 498:13-21)	5%-25% (Rubin Decl. ¶ 35, Exh. 29 [Gingras Depo.] at 498:13-21)
Matthew Nobriga (Defendant’s Expert)	6%-50% (Rubin Decl. ¶ 32, Exh. 26 [Nobriga Depo.] at 119:1-8)	6%-50% (Rubin Decl. ¶ 32, Exh. 26 [Nobriga Depo.] at 119:1-8)
Dr. Charles Hanson (Plaintiffs’ Expert)	21% (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 4, 30-34)	42% (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 4, 34-35)
David Kohlhorst (CDFG Biologist)	30% (Unpublished – see Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 9-10, 60-63)	N/A
See also  Steven T. Lindley & Michael S. Mohr  (Peer Reviewed Article)	9%  (Rubin Decl., ¶ 40, Exh. 48 at 328)	N/A

After reviewing all of the prior striped bass diet and predation studies in the Delta, Dr. Hanson concludes that striped bass predation “is not the sole cause of the declines in listed fish, but it may be the largest cause of mortality to Salmon.” (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 41.) These sizable predation estimates are unsurprising in light of the fact that the population of juvenile and adult striped bass in the Delta is in the millions and striped bass is one of the most voracious predatory fish in

1 the Delta, consuming roughly 10 billion fish per year (Rubin Decl. ¶ 29, Exh. 23 [Hanson Rebuttal  
2 Report] at 8; ¶ 32, Exh. 27 [Nobriga Depo.] at 277:17-279:7; ¶ 35, Exh. 30 [Gingras Depo.] at 626:7-14  
3 (due to the presence of several million striped bass in the Delta, even a small predation rate by striped  
4 bass (e.g., 3 per 1000 striped bass) would still kill many Listed Species); *id.* at 662:1-9 (striped bass food  
5 habits studies found “salmon are common in stomachs of striped bass”). It is significant and troubling  
6 that these estimates are much higher than CDFG’s prior published predation estimates – roughly 2%-8%  
7 for the Listed Salmon – that CDFG relied upon to obtain its permits to stock striped bass a decade ago.  
8 (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 7-8.) However, even if striped bass predation on  
9 Listed Salmon in the Delta only accounts for mortality of a small percentage of those species,  
10 enforcement of the striped bass sport-fishing regulations by CDFG constitutes a violation of law  
11 because, as discussed above, take of one or more of the Listed Salmon violates the ESA.

12 2. Striped bass predation on the Listed Salmon increases as the number of striped bass  
13 increase. SUF 4; (Rubin Decl. ¶ 35, Exh. 29 [Gingras Depo.] at 485:10-13 (agreeing with Dr. Hanson’s  
14 conclusion that reducing striped bass abundance “would reduce total juvenile salmon predation and  
15 mortality, with a corresponding increase in juvenile salmon survival”); ¶ 32, Exh. 27 [Nobriga Depo.] at  
16 259:24-260:6 (agreeing with same conclusion); ¶ 35, Exh. 29 [Gingras Depo.] at 501:9-11 (striped bass  
17 predation “is proportional to striped bass abundance”); ¶ 32, Exh. 27 [Nobriga Depo.] at 292:16-293:5  
18 (fewer striped bass would increase salmon); ¶ 36, Exh. 38 [Draft Conservation Plan] at 111 (“it is  
19 reasonable to assume that predation on winter-run chinook salmon . . . would decrease roughly in  
20 proportion to whatever decline occurred in striped bass abundance”); ¶ 12, Exh. 9 [Resp. to Pls. RFA]  
21 RFA Nos. 6-7 (admitting that “it is probable [that] an increase in striped bass population would result in  
22 an increase in striped bass predation” on the Listed Salmon).)

23 Thus, it is at least reasonably certain that by protecting the striped bass population in the Delta,  
24 Defendant has increased striped bass predation on the Listed Salmon resulting in mortality, in violation  
25 of section 9. The Ninth Circuit’s holding in *Palila v. Hawaii Department of Land and Natural*  
26 *Resources* is factually analogous. For over 30 years, the State of Hawaii maintained a herd of feral  
27 sheep and goats for sport-hunting purposes in the mamane-naio forest of the endangered *palila* bird on  
28 the slopes of Mauna Kea. *Palila*, 639 F.2d at 495. The *Palila* plaintiffs sued the State of Hawaii

1 claiming that the state's practice of maintaining feral goats and sheep in the *palila*'s forest habitat  
2 resulted in the unlawful take of endangered *Palila*. *Id.* at 496-97. The Ninth Circuit found that the  
3 sheep and goats had a destructive impact on the mamane-naio ecosystem, because the animals would  
4 feed on mamane leaves, stems, seedlings and sprouts, thereby denuding the forest and preventing its  
5 regeneration. *Id.* at 496. In light of these findings, the Ninth Circuit held that the state's sport-hunting  
6 management activities violated section 9 of the ESA, because state's hunting managment program  
7 negatively impacted the *palila*'s critical habitat, thereby resulting in the unlawful take of *palila*. *Id.* at  
8 497-98.

9 Like the hunting management activities in *Palila*, Defendant's enforcement of the striped bass  
10 management program (the regulations) negatively impact individual Listed Salmon, and therefore  
11 violates section 9 of the ESA. *E.g.*, *Marbled Murrelet*, 83 F.3d at 1067-68 (ESA liability found because  
12 the activity "would likely harm marbled murrelets by impairing their breeding and **increasing the**  
13 **likelihood of attack by predators**" (emphasis added)); *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 849,  
14 853 (9th Cir. 2002) (state action preempted by the ESA because it would **increase population of**  
15 **predators**, which in turn decreases the number of protected wildlife); *Strahan*, 127 F.3d at 165-66  
16 (State's permitting regime for commercial fishing violated the ESA because fishing activities resulted in  
17 the take of protected Northern Right whales); *Animal Prot. Inst.*, 541 F. Supp. 2d at 1081 (Minnesota  
18 agency violated section 9 by authorizing trapping and snaring that could result in take of the protected  
19 Canada Lynx).<sup>9</sup>

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25 <sup>9</sup> *Cold Mountain v. Garber*, 375 F.3d 884, 890 (9th Cir. 2004), *The American Bald Eagle v. Bhatti*,  
26 9 F.3d 163, 166 (1st Cir. 1993), and *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898  
27 F.2d 1410, 1420 (9th Cir. 1990) held that because plaintiffs failed to prove that the activity challenged  
28 could cause the harm alleged, the plaintiffs' ESA claims also failed. In this case, however, the  
undisputed evidence proves that striped bass prey on the Listed Salmon, that more Listed Salmon are  
eaten by striped bass increases as the striped bass population increases, and that enforcement of the  
striped bass sport-fishing regulations results in a larger striped bass population than there would be  
absent the regulations. SUF 2-4. Thus, *Cold Mountain*, *American Bald Eagle*, and *Pyramid Lake*  
support a finding of liability in this case.

1           **E.     THE CENTRAL VALLEY PROJECT IMPROVEMENT ACT (“CVPIA”) DOES**  
2           **NOT SERVE AS A LEGITIMATE AFFIRMATIVE DEFENSE IN THIS**  
3           **INSTANCE.**

4           Based on a flawed understanding of the CVPIA, the ESA, and the basic canons of statutory  
5 construction, the Central Delta Defendants have asserted that the CVPIA precludes a finding of ESA  
6 liability in this case. (Rubin Decl. ¶ 7, Exh. 4 [Answer of Central Delta Defendants].) As an initial  
7 matter, the CVPIA contains two express references to the ESA, one of which expressly mandates  
8 compliance with the ESA. Pub. L. No. 102-575, §§ 3406(b) and 3406(b)(2); *see also* Rubin Decl. ¶ ,  
9 Exh. 34 [Letter from U.S. Fish and Wildlife] at 2 (explaining that “restoration actions under the AFRP  
10 and overall CVPIA must take endangered species into consideration and abide by the Endangered  
11 Species Act”). Neither the CVPIA nor its legislative history contain any indicia that Congress  
12 intended to repeal or amend the ESA by enacting the CVPIA; in fact, the CVPIA’s references to the  
13 ESA support the contrary interpretation. *E.g. Carcieri v. Salazar*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1058, 1068  
14 (2009). Further, a key purpose of the CVPIA is to protect anadromous species – expressly defined to  
15 include striped bass and the Listed Salmon – by, among other things doubling the populations of each of  
16 those species. (Rubin Decl. ¶ 39, Exh. 47 [Independent Review of the CVPIA] at 22 (“The stated goal  
17 to increase the production of both native salmonids and exotic predators/competitors (e.g., striped bass  
18 and shad) is internally inconsistent”).) Thus, “programs that encourage exotic predatory species such as  
19 striped bass (e.g., California Fish and Game and the CVPIA itself) clearly conflict with *CVPIA and*  
20 *ESA* mandates to protect and rebuild depressed stocks of native salmonids . . . .” (Rubin Decl. ¶ 39,  
21 Exh. 47 [Independent Review of the CVPIA] at 47.) Second, the CVPIA authorizes and directs actions  
22 by the Secretary of the Interior; it does not purport to authorize or direct any actions by the California  
23 Fish and Game Commission or CDFG. *Id.* § 3406. Third, as the striped bass sport-fishing regulations  
24 pre-date the enactment of the CVPIA, they could not have been adopted pursuant to the CVPIA’s  
25 authority. Fourth, the CVPIA and ESA are capable of co-existing. *E.g. Morton v. Mancari*, 417 U.S.  
26 535, 550-551 (1974) (if two statutes are capable of co-existence, both should be regarded as effective).  
27 For example, the CVPIA’s striped bass doubling goal give the Secretary considerable discretion to  
28 develop and implement a program that is consistent with the ESA. *E.g., Nat’l Wildlife Fed’n v. Nat’l*

1 *Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008) (holding that because agency retained  
2 considerable discretion in choosing what specific actions to take to achieve mandated goals, agency was  
3 obligated to satisfy the ESA’s requirements). Finally, Plaintiffs are not seeking to invalidate the CVPIA  
4 or even the Defendant’s ability to enforce striped bass regulations per se. Instead, Plaintiffs are only  
5 seeking to have Defendant comply with his mandatory ESA obligations. Defendant can comply with  
6 these obligations by either securing incidental take authorization from the appropriate federal agencies  
7 (NMFS or U.S. Fish and Wildlife Service) pursuant to section 7 or 10 of the ESA (16 U.S.C. §§ 1536,  
8 1539), or by halting enforcement of the striped bass sport-fishing regulations.

9 **V. PLAINTIFF DEE DILLON HAS CONSTITUTIONAL STANDING.**

10 To satisfy Article III’s “case” or “controversy” requirement, there must be: (1) injury in fact, (2)  
11 a causal connection such that the injury is “fairly traceable” to the defendant’s action, and (3) a  
12 “likelihood” that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154,  
13 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

14 As the Ninth Circuit recently confirmed, a plaintiff is *not* required to prove that he would  
15 succeed on the merits to *summarily adjudicate* his standing to sue. *Farrakhan v. Gregoire*, 590 F.3d  
16 989, 1001 (9th Cir. 2010) (granting summary judgment and noting that “[w]hether Plaintiffs can succeed  
17 on their VRA claim is irrelevant to the question whether they are entitled to bring that claim in the first  
18 place.”). Instead, a plaintiff satisfies its burden by “showing by a preponderance of the evidence that  
19 standing exists.” *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 829 (7th Cir. 1999). Thus, even in  
20 the face of conflicting evidence, a plaintiff will satisfy his burden of proof so long as he shows a  
21 “substantial probability that [he] has been injured, that the defendant caused [his] injury, and that the  
22 court could redress [the] injury.” *Sierra Club & Env’tl. Tech. Council v. EPA*, 292 F.3d 895, 899 (D.C.  
23 Cir. 2002); *see also DMJ Assocs., L.L.C. v. Capasso*, 288 F. Supp. 2d 262, 272 (E.D.N.Y. 2003) (“the  
24 Supreme Court has established a low causation threshold for standing purposes, stating that a  
25 ‘substantial likelihood’ that defendant’s actions caused plaintiff’s harm confers standing” (quoting *Duke*  
26 *Power Co. v. Carolina Env’tl. Study Group*, 438 U.S. 59, 75 n.20 (1978))); *Philadelphia Metal Trades*  
27 *Council v. Allen*, No. 07-145, 2008 U.S. Dist. LEXIS 65135, at \*24 (E.D. Pa. Aug. 25, 2008) (to prevail  
28

1 at summary judgment “a plaintiff need not show beyond a question that a favorable judgment would  
2 redress his or her injury”). As set forth below, Dee Dillon has met and exceeded this burden of proof.

3 **A. This Court Has Already Found that Mr. Dillon has Suffered Injury in Fact.**

4 For the purposes of standing, an environmental plaintiff, such as Mr. Dillon, demonstrates injury  
5 in fact if he uses the affected area and is a person “‘for whom the aesthetic and recreational values of the  
6 area will be lessened’ by the challenged activity.” *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v.*  
7 *Morton*, 405 U.S. 727, 735 (1972)). To satisfy this standard, Mr. Dillon does not need to show actual  
8 harm, as a mere “‘increased risk of harm can itself be injury in fact sufficient for standing.” *Ecological*  
9 *Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000); *see also Ocean Advocates v.*  
10 *U.S. Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2004) *amended* March 4, 2005. As  
11 demonstrated below, and as already held by this Court, “*Mr. Dillon satisfies the injury in fact*  
12 *requirement for purposes of standing.*” Order Denying Pls.’ Mot. for Partial Summ. J. (Doc. 57) at  
13 31:20-21 (emphasis added).

14 Mr. Dillon and his family have visited the Delta over 200 times to engage in various recreational  
15 and conservation activities, including boating, photography, swimming, kayaking, fishing, and wildlife  
16 viewing. SUF 5; (Dillon Decl. ¶ 3.) Mr. Dillon enjoys photographing the Delta’s wildlife and  
17 witnessing runs of salmon that migrate through the Delta, as well as fishing for salmon and other species  
18 of fish in the Delta. SUF 5; (Dillon Decl. ¶¶ 3-5.) Thus, Mr. Dillon’s use and enjoyment of the Delta is  
19 inextricably linked to the prosperity of the Listed Salmon. Consequently, the decline of the Listed  
20 Salmon upsets Mr. Dillon and has negatively impacted Mr. Dillon’s use and enjoyment of the Delta’s  
21 aesthetic, recreational, and conservation benefits. SUF 6; (Dillon Decl. ¶¶ 3, 6.) The decline of the  
22 Listed Salmon has, among other things, impaired Mr. Dillon’s ability to fish for and view salmon and  
23 other native species. (Dillon Decl. ¶ 6.) Despite this ongoing injury, Mr. Dillon has definite and  
24 concrete plans to continue visiting the Delta this year. SUF 5; (Dillon Decl. ¶ 7.) Accordingly, Mr.  
25 Dillon has suffered an injury in fact, as the decline of the Listed Salmon has resulted in not only an  
26 increased risk of harm, but also actual harm. *See, e.g., Natural Res. Def. Council v. EPA*, 542 F.3d  
27 1235, 1245 (9th Cir. 2008) (declarations stating that use and enjoyment of specific waterways had been  
28 diminished established injury in fact); *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*,



1 No. 06-2845, 2007 U.S. Dist. LEXIS 81636, at \*29-30 (E.D. Cal. Oct. 16, 2007) (plaintiffs had standing  
2 because they “alleged that they enjoy the Yuba River and its fish inhabitants” for aesthetic and  
3 recreational purposes, and the federal agency’s failure to issue a biological opinion increased the  
4 likelihood of harm to the protected fish species).

5 **B. The Enforcement of the Striped Bass Sport-Fishing Regulations is One Cause of**  
6 **Mr. Dillon’s Injury.**

7 The striped bass sport-fishing regulations artificially maintain the striped bass population in the  
8 Delta, increasing striped bass predation on the Listed Salmon, causing injury to Mr. Dillon. While this  
9 chain of causation has several links, the causal connection is neither hypothetical nor tenuous, so it  
10 amply satisfies the low causation threshold of Article III.

11 For the purposes of determining standing, while the causal connection cannot “be too  
12 speculative, or rely on conjecture about the behavior of other parties, [it] need not be so airtight . . . as to  
13 demonstrate that the plaintiffs would succeed on the merits.” *Ocean Advocates*, 402 F.3d at 860  
14 (quoting *Ecological Rights Found*, 230 F.3d at 1152); *see also DMJ Assocs.*, 288 F. Supp. 2d at 271-72.  
15 Accordingly, while the injury challenged cannot be *solely* the result of “the independent action of some  
16 third party not before the court,” *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights*  
17 *Org.*, 426 U.S. 26, 41-42 (1976)), a “chain of causation [may have] more than one link” and still satisfy  
18 the standing requirement as long as the connection between the injury and cause is not “hypothetical or  
19 tenuous.” *Davis*, 307 F.3d at 849; *see also Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)  
20 (“We are concerned here not with the length of the chain of causation, but on [*sic*] the plausibility of the  
21 links that comprise the chain.” (quoting *Pub. Citizens v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717  
22 n.31 (D.C. Cir. 1977))). In fact, as the Ninth Circuit has explained, “[a] plaintiff who shows that a  
23 causal relation is ‘probable’ has standing, even if the chain cannot be definitively established.” *Envtl.*  
24 *Def. Ctr. v. EPA*, 344 F.3d 832, 867 (9th Cir. 2003); *see also Order Denying Pls.’ Mot. for Partial*  
25 *Summ. J.* (Doc. 57) at 33:8-20 (explaining that Plaintiffs only have to “establish that their theory of  
26 causation is at least ‘plausible’”).

27 Mr. Dillon is harmed by the decline of the Listed Salmon. SUF 5-6; (Dillon Decl. ¶¶ 3, 5-6.) As  
28 demonstrated above in § IV(D) (Regulations Result in Take of Listed Salmon), Defendant and its

1 experts admit that the striped bass sport-fishing regulations, which are enforced by the Defendant  
2 (SUF 1), contribute to the decline of the Listed Salmon by increasing striped bass predation on them.  
3 SUF 2, 4, 7; (Rubin Decl. ¶ 35, Exhs. 29-30 [Gingras Depo.] at 552:25-553:3 (“striped bass predation is  
4 one of many factors contributing to the decline of the listed species”); 607:18-20 (“predation by striped  
5 bass increases mortality on those listed species”). The striped bass sport-fishing regulations reduce  
6 anglers’ take of striped bass in the Delta, and thereby artificially maintain the striped bass population in  
7 the Delta. SUF 2. Increasing striped bass increases striped bass predation on the Listed Salmon.  
8 SUF 4.

9 Thus, although Defendant may not be the only link in the chain of causation between CDFG’s  
10 action and Mr. Dillon’s injury, that chain is unbroken. *See, e.g., United States v. Students Challenging*  
11 *Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-90 (1973) (Supreme Court upheld  
12 plaintiffs’ standing to challenge an ICC rate increase on the theory that it would result, through a chain  
13 of causation, in the discarding of more refuse in national parks); *Nat’l Wildlife Fed’n v. FEMA*, 345  
14 F. Supp. 2d 1151, 1164 (W.D. Wash. 2004) (causation satisfied because “FEMA’s promulgation of  
15 minimum eligibility criteria and its sale of flood insurance both enable development in the floodplain  
16 that negatively impacts salmon.”).

17 In *Davis*, faced with a chain of events analogous to those in the instant case, the Ninth Circuit  
18 held that even though the “chain of causation [had] more than one link,” it was not hypothetical or  
19 tenuous. 307 F.3d at 849. The plaintiffs, bird enthusiasts, challenged “Proposition 4” under the ESA  
20 and the Migratory Bird Treaty Act. Proposition 4 banned the use of leghold traps to capture or kill  
21 wildlife in California. *Id.* at 842-843. Prior to the passage of Proposition 4, federal officials used  
22 leghold traps to protect bird species from predators. *Id.* at 844. The Ninth Circuit held that plaintiffs  
23 had standing to challenge Proposition 4 because the injury suffered was “fairly traceable” to the  
24 Proposition, because the traps were removed due to the Proposition’s passage, and their removal would  
25 increase the predator population, which would decrease the population of birds including birds protected  
26 by the ESA. *Id.* at 849.

27 Here, as in *Davis*, Defendant has promoted the population of a predator, striped bass, to the  
28 detriment of the federally protected Listed Salmon. As in *Davis*, the injury to the environmental

1 plaintiff, Mr. Dillon, is caused by the decline of the federally protected species. Thus, the injury  
2 suffered by Mr. Dillon is “fairly traceable” to the enforcement activities of the Defendant. *See also*  
3 *Palila*, 639 F.2d at 496-98 (State’s action of maintaining feral goats and sheep for sport hunting violated  
4 the ESA by negatively impacting the habitat of the endangered *palila*); *Loggerhead Turtle*, 148 F.3d at  
5 1253-54 (unlawful take of sea turtles, was “fairly traceable” to the county’s refusal to regulate artificial  
6 beach lighting on private property).

7 The fact that the striped bass sport-fishing regulations are not the sole cause of the decline of the  
8 Listed Salmon is irrelevant, because standing causation does not require that defendant’s action be the  
9 sole, or even a substantial, cause of a plaintiff’s injury; instead, the Constitution only requires that the  
10 defendant’s action be one cause of the plaintiff’s injury. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497,  
11 523-24 (2007); *Ocean Advocates*, 402 F.3d at 860 (while other factors may also increase the risk of  
12 injury, the link between the challenged activity and the heightened risk was not “tenuous or abstract”);  
13 *Loggerhead Turtle*, 148 F.3d at 1247 (“standing is not defeated merely because the alleged injury can be  
14 fairly traced to the actions of both parties and non-parties” (citing *Lujan*, 504 U.S. at 560)); *Natural Res.*  
15 *Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (“plaintiffs need not show that a particular  
16 defendant is the only cause of their injury”); *S. Carolina Wildlife Fed’n v. S. Carolina Dep’t of Transp.*,  
17 485 F. Supp. 2d 661, 670 (D.S.C. 2007) (“Plaintiffs do not have to prove that defendants’ actions are the  
18 only cause of their injuries or that they would have undisputed enjoyment of the environment in the  
19 absence of defendants’ conduct.”).

20 This Court denied Plaintiffs’ previous Motion for Summary Adjudication because the  
21 Declaration of Matthew Nobriga raised “serious questions about the plausibility of Plaintiffs’ causal  
22 theory by challenging Plaintiffs’ fundamental assertion that there is some, measurable link between  
23 increased striped bass abundance and Listed Species mortality.” Order Denying Pls.’ Mot. for Partial  
24 Summ. J. (Doc. 57) at 36:17-24. These questions, however, have been answered conclusively by the  
25 admissions of Marty Gingras and Matthew Nobriga. They admit that (1) increasing striped bass  
26 abundance increases striped bass predation on the Listed Salmon and (2) that reducing striped bass  
27 predation would benefit the populations of the Listed Salmon. *See* SUF 4, 7, 8-10. (*See also, e.g.,*  
28 *Rubin Decl.* ¶ 35, Exh. 29 [Gingras Depo.] at 485:10-13 (agreeing with Dr. Hanson’s conclusion that

1 reducing striped bass abundance “would reduce total juvenile salmon predation and mortality, with a  
 2 corresponding increase in juvenile salmon survival”); ¶ 32, Exh. 27 [Nobriga Depo.] at 259:24-260:6  
 3 (agreeing with same conclusion); ¶ 35, Exh. 29 [Gingras Depo.] at 501:9-11 (striped bass predation “is  
 4 proportional to striped bass abundance” ); ¶ 32, Exh. 27 [Nobriga Depo.] at 292:16-293:5 (fewer striped  
 5 bass would increase salmon); ¶ 12, Exh. 9 [Resp. to Pls.’ RFA] RFA Nos. 6-7 (admitting that “it is  
 6 probable [that] an increase in striped bass predation would result in an increase in striped bass  
 7 predation” on Listed Salmon). As explained above in § III, these admissions are binding on Defendant  
 8 and cannot be contradicted. Therefore, because Defendant’s enforcement of these regulations is a  
 9 “fairly traceable” cause of Mr. Dillon’s injury, the constitutional element of causation is satisfied.

10 **C. If the Striped Bass Sport-Fishing Regulations are Invalidated, Mr. Dillon’s Injury**  
 11 **would Likely be Redressed.**

12 The final prong of the constitutional standing analysis is redressability. To demonstrate  
 13 redressability, a plaintiff need only show that the requested relief is “likely” to redress his injury, “*not*  
 14 that a favorable decision will inevitably redress his injury.” *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th  
 15 Cir. 1994) (emphasis added and deleted from original); *see also Regents of Univ. of Cal. v. Bakke*, 438  
 16 U.S. 265, 281 n.14 (1978) (constitutional element of standing is satisfied if plaintiff demonstrates “any  
 17 injury to himself that is likely to be redressed by [a] favorable decision of his claim.”). Although  
 18 Plaintiffs have demonstrated above that they should prevail on the merits, they need not do so to  
 19 establish standing. *E.g., Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008) (“We  
 20 assume for the purposes of standing that [plaintiffs] view on the merits will prevail”); *Nat’l Wildlife*  
 21 *Fed’n*, 345 F. Supp. 2d at 1165-66 (plaintiffs need not demonstrate success on the merits); *DMJ Assocs.,*  
 22 *L.L.C. v. Capasso*, 288 F. Supp. 2d at 272.

23 Defendant admits – through its experts and documents – that elimination of the striped bass  
 24 regulations would benefit the Listed Salmon by reducing striped bass predation on the Listed Salmon, by  
 25 reducing the risk of the Listed Salmon’s extinction, and by increasing the population of the Listed  
 26 Salmon. SUF 8-10. For example, both CDFG’s designee Mr. Gingras and its expert Mr. Nobriga  
 27 repeatedly agreed with Dr. Hanson’s statement that a reduction in striped bass abundance “would reduce  
 28 total juvenile salmon predation and mortality, with a corresponding increase in juvenile salmon

1 survival.” (Rubin Decl. ¶ 29, Exh. 23 [Hanson Rebuttal Report] at 3; ¶ 35, Exh. 29 [Gingras Depo.] at  
2 485:10-13; ¶ 32, Exh. 27 [Nobriga Depo.] at 260:6, 292:16-293:5 (same conclusion but adding that “less  
3 striped bass would create some increase in salmon”). When asked whether reducing the striped bass  
4 population via deregulation would help the salmon recovery, Mr. Gingras twice testified: “I would say  
5 the odds are that it will.” (Rubin Decl. ¶ 35, Exhs. 29-30 [Gingras Depo.] at 403:7-12, 615:3-14.)  
6 Likewise, Mr. Gingras admitted that eliminating the striped bass sport-fishing regulations would reduce  
7 the striped bass population and reduce striped bass predation on Delta salmon. (*Id.* at 612:3-9, 504:7-  
8 505:7; *see also* ¶ 36, Exh. 38 [Draft Conservation Plan] at 111 (“it is reasonable to assume that predation  
9 on winter-run chinook salmon . . . would decrease roughly in proportion to whatever decline occurred in  
10 striped bass abundance due to regulation changes.”). Dr. Hanson concludes that “Reducing striped bass  
11 predation mortality on listed salmonids would substantially reduce the risk of their extinction and  
12 increase the probability of recovery of these species.” (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert  
13 Report] at 40.) He estimates the population level benefits of deregulation to the Listed Salmon to be  
14 approximately 14%-27%. (*Id.*; *see also, e.g.*, ¶ 35, Exhs. 29-30 [Gingras Depo.] at 507:7-8 (changing  
15 striped bass regulations would have a “beneficial effect” on Listed Salmon), 609:20-610:6 (eliminating  
16 striped bass regulations would contribute to recovery of Listed Salmon, assuming deregulation reduces  
17 striped bass abundance), 447:4-9 (agreeing with Dr. Hanson’s conclusion that reducing the striped bass  
18 population would contribute “to a reduction in the risk of extinction of winter-run salmon.”).) Further,  
19 the National Marine Fisheries Service recently acknowledged that predation of salmon by striped bass is  
20 a “very high” stressor (Rubin Decl. ¶ 38 Exh. 46 at Appendix A-1 and B-2 to B-3), and one of the four  
21 “important stressors” on the Delta’s Chinook salmon population. (*Id.* at ES-2.) To combat this cause of  
22 harm to the species and promote their recovery, the National Marine Fisheries Service recommended  
23 implementing “programs and measures designed to control non-native predatory fish,” expressly  
24 identifying the striped bass and “harvest management techniques.” (*Id.* at 47.) Likewise, a “Working  
25 Group” organized as part of the Bay Delta Conservation Planning effort and co-chaired by Defendant  
26 has proposed reducing the size limit and increasing the bag limit on non-native predatory species,  
27 including striped bass, to decrease their abundance and thereby contribute to the conservation of listed  
28 species, including the Listed Salmon. (Rubin Decl. ¶ 42, Exh. 50 [BDCP] at 1-2.)

1 Thus, if Defendant were enjoined from enforcing the striped bass sport-fishing regulations, it is  
2 likely that Mr. Dillon's injury would be redressed. In the alternative, Mr. Dillon's injury would also  
3 likely be redressed by enjoining the enforcement of the striped bass sport-fishing regulations until the  
4 Defendant consulted with and obtained a permit from NMFS pursuant to section 7 or section 10 of the  
5 ESA. The end result of consultation would be either a biological opinion and incidental take statement  
6 or an incidental take permit. In either case, Defendant would have to institute measures to minimize and  
7 mitigate the negative impact of the striped bass regulations on the Listed Salmon (16 U.S.C.  
8 §§ 1536(b)(3)(A), 1539(a)(2)(A)), thereby redressing Mr. Dillon's injury.

9 The fact that there are other forces that would continue to negatively impact the Listed Salmon  
10 does not preclude such a finding. *See Massachusetts v. EPA*, 549 U.S. 525 (for purposes of standing, a  
11 favorable decision need not relieve a plaintiff's every injury (quoting *Larson v. Valente*, 456 U.S. 228,  
12 244 n.15 (1982); *Sierra Club v. Franklin County Power of Ill., LLC*, 546 F.3d 918, 927-28 (7th Cir.  
13 2008) (plaintiff's injury would be redressed, although defendant would likely be allowed to continue  
14 some polluting); *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) ("even a small  
15 probability of injury is sufficient to create a case or controversy . . . provided of course that the relief  
16 sought would, if granted, reduce the probability."); *Blue Water Fishermen's Ass'n v. Nat'l Marine*  
17 *Fisheries Serv.*, 226 F. Supp. 2d 330, 342 (D. Mass. 2002) ("[n]othing in the ESA forecloses piecemeal  
18 or incremental pursuit of the goal of species protection."); *Natural Res. Def. Council v. Kempthorne*, No.  
19 1:05-cv-1207, 2007 U.S. Dist. LEXIS 91968 at \*42-43 (E.D. Cal. Dec. 14, 2007) (Wanger, J.) (although  
20 the Court could not determine "whether the operations of the CVP and SWP export facilities are the  
21 principal cause of the decline in the delta smelt or whether other factors beyond the control of the  
22 Projects are the principal cause . . . , the impact from Project operations is at least a concurrent cause  
23 which jeopardizes the existence of the Delta smelt and endangers its survival and its critical habitat,  
24 which necessitates remedial action.").

25 In an analogous situation, the Seventh Circuit held that the plaintiff was not required to show that  
26 a favorable decision would relieve her every injury. *Franklin County Power*, 546 F.3d at 918. There  
27 defendant obtained a Prevention of Significant Deterioration ("PSD") permit pursuant to the Clean Air  
28 Act ("CAA"), and began preliminary excavation work. *Id.* at 923-24. Shortly thereafter defendant

1 ceased all construction related activities for a period of almost two years. *Id.* at 924. When defendant  
2 finally re-started construction, plaintiff filed a CAA lawsuit. *Id.* at 922-23. Finding that plaintiff  
3 satisfied the constitutional elements of injury in fact and causation, the Seventh Circuit turned to the  
4 issue of redressability. *Id.* at 925-26. Defendants argued that the member's injury was not redressable  
5 because it was possible that a new NPDS permit would set the same emission standards as the 2001  
6 NPDS permit, and the member's "concerns might remain even if the plant polluted at lower emission  
7 levels." *Id.* at 927. The Seventh Circuit explained that plaintiff "need not show that a favorable  
8 decisions [would] relieve [the member's] every injury." *Id.* Instead, "[i]t is enough that her concerns  
9 [would] be addressed if more stringent emission standards are imposed than those required under the  
10 2001 permit, even though the plant [would] still emit some pollutants . . . ." *Id.* at 928. Accordingly, the  
11 Seventh Circuit found that "it [was] likely that a favorable decision" would redress the member's injury,  
12 and therefore plaintiff had standing. *Id.*

13 Like the plaintiff in *Franklin County Power*, although a favorable decision may not relieve Mr.  
14 Dillon's *every* injury, it would likely relieve every injury caused by Defendant's violation. Further, the  
15 experts on both sides agree, a favorable decision would likely benefit the Listed Salmon. Dr. Hanson  
16 puts it bluntly: "Allowing fishermen to reduce striped bass predation via deregulation is probably the  
17 most efficient and cost-effective method to contribute to recovery of Central Valley salmon and  
18 steelhead." (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 4-5.) Likewise, NMFS recommends  
19 reducing the abundance of striped bass and other non-native predators to "prevent extinction or to  
20 prevent the species from declining irreversibly." (Rubin Decl. ¶ 38, Exh. 46 [Draft Recovery Plan] at  
21 153, 157, 183). At a minimum, if Defendant was enjoined from enforcing the striped bass sport-fishing  
22 regulations, the predation on Listed Salmon caused by protecting the striped bass population would  
23 cease. *See Loggerhead Turtle*, 148 F.3d at 1253-54 (plaintiff's injury held redressable, because if the  
24 requested relief was granted, fewer protected sea turtles would be harmed). Here too, a favorable  
25 decision would likely benefit the Listed Salmon.

26 Accordingly, Mr. Dillon has standing under Article III of the United States Constitution to  
27 pursue this litigation. Pursuant to the parties' Stipulation and the Court's Order, because Mr. Dillon has  
28 standing so does the Coalition. Order re Plaintiffs' Standing (Doc. 106) at 2.

1 **VI. CONCLUSION**

2 Dr. Hanson, a preeminent fish biologist in the Delta, concluded:

3 Predation by striped bass is not the sole cause of the declines in listed fish,  
4 but it may be the largest cause of mortality to salmon and steelhead.  
5 NMFS now recommends a significant reduction of striped bass and other  
6 non-native predators to prevent extinction of the salmon and steelhead  
7 (NMFS 2009b). Reducing striped bass abundance through deregulation  
8 would substantially reduce predation mortality and benefit the populations  
9 of winter-run and spring-run Chinook salmon and steelhead. Allowing  
10 fishermen to reduce striped bass predation via deregulation is probably the  
11 most efficient and cost-effective method to contribute to recovery of  
12 Central Valley salmon and steelhead. Unless this is done, expensive  
13 management programs designed to improve their survival within the lower  
14 Delta are unlikely to save these listed species.

15 (Rubin Decl. ¶ 24, Exh. 18 [Hanson Expert Report] at 41.)

16 In a series of candid CDFG e-mails, Mr. Gingras criticized the promotion of striped bass  
17 abundance, and he warned: “With the status of the Delta smelt and a few other natives in the tank, and  
18 recent ‘back of the envelope’ calculations indicating striped bass predation could be a very significant  
19 factor, we probably should not take steps to increase the abundance of anadromous striped bass.”

20 (Rubin Decl. ¶ 36, Exh. 35 [Gingras Email to Manji et al.].) It is undisputed that CDFG’s continued  
21 enforcement of the striped bass regulations constitutes “steps” that maintain or increase striped bass  
22 abundance, and that result in a violation of section 9 of the ESA. (Rubin Decl. ¶ 39, Exh. 47  
23 [Independent Review of the CVPIA] at 47 (California Fish and Game Commission “programs that  
24 encourage population increases and thus fishing opportunities for exotic predatory species such as  
25 striped bass . . . conflict with CVPIA and ESA mandates to protect and rebuild depressed stocks of  
26 native salmonids”).)

27 For the reasons stated above, Plaintiffs’ request that the Court grant this Motion in its entirety,  
28 that the Court find that Defendant has violated the ESA with respect to the Listed Salmon, and that  
29 Plaintiffs Dee Dillon and the Coalition have standing to sue. In the alternative, should the Court find a



1 disputed issue of material fact with respect to any of these issues, Plaintiffs’ request that the Court  
2 summarily adjudicate the remaining issues.

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