

1 UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF CALIFORNIA

3 COALITION FOR A SUSTAINABLE
4 DELTA, et al.,

5 Plaintiffs,

6 v.

7 JOHN MCCAMMAN, in his official
8 capacity as the Director of the
9 California Department of Fish and
Game,

10 Defendant,

11 CENTRAL DELTA WATER AGENCY, et
12 al.,

13 Defendant-Intervenors,

14 CALIFORNIA SPORTFISHING PROTECTION
15 ALLIANCE, et al.,

16 Defendant-Intervenors.

1:08-cv-00397 OWW GSA

MEMORANDUM DECISION
GRANTING REQUEST FOR
APPROVAL OF CONSENT
DECREE (DOC. 230).

17 I. INTRODUCTION

18 On January 29, 2008, the Coalition for a Sustainable
19 Delta, Berrenda Mesa Water District, Lost Hills Water
20 District, Wheeler Ridge-Maricopa Water Storage District
21 and Dee Dillon ("Plaintiffs") filed suit against
22 Defendant John McCamman, in his Official Capacity as
23 Director of the California Department of Fish and Game
24 ("State Defendant" or "DFG"), alleging that State
25 Defendant's enforcement of California's striped bass
26 sport fishing regulations, Cal. Code Regs. tit. 14, §
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1 5.75, cause a striped bass population that is higher than
2 it otherwise would be in nature in the Sacramento-San
3 Joaquin Delta and associated rivers and tributaries,
4 which causes "take" of Sacramento River winter-run
5 Chinook salmon, Central Valley spring-run Chinook salmon,
6 Central Valley steelhead, and delta smelt (collectively,
7 "Listed Species"), in violation of section 9 of the
8 Endangered Species Act ("ESA"), 16 U.S.C. § 1538. State
9 Defendant disputes that DFG's enforcement of the striped
10 bass sport fishing regulations causes unlawful "take."
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12 On May 29, 2008 and July 24, 2008, respectively,
13 Central Delta Water Agency, South Delta Water Agency,
14 Honker Cut Marine, Inc., Rudy Mussi, and Robert Souza
15 (collectively, "Central Delta Parties"); and the
16 California Sportfishing Protection Alliance, California
17 Striped Bass Association, and the Northern California
18 Council of the Federation of Fly Fishers (collectively,
19 "CSPA") were granted permission to intervene as of right,
20 provided that they strictly limit their participation to
21 issues about which they can provide unique information
22 and/or arguments. Docs. 32 & 41. Specifically, the
23 Central Delta Parties argue that the striped bass sport
24 fishing regulations are necessary to achieve the doubling
25 goals for striped bass prescribed by the Central Valley
26 Project Improvement Act ("CVPIA").
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1 A July 21, 2010 Memorandum Decision denied
2 Plaintiffs' motion for summary judgment that State
3 Defendant's conduct violated ESA § 9 and that the Central
4 Delta Parties' CVPIA affirmative defense was invalid.
5 Doc. 168. That decision also rejected Plaintiffs' theory
6 that proof of reasonably certain threat of imminent harm
7 to a single member of any of the Listed Species was
8 sufficient to establish a Section 9 violation in this
9 case. *Id.* at 6-18.

11 Over a period of more than two months, Plaintiffs and
12 State Defendants (collectively, "Moving Parties") engaged
13 in arms-length settlement negotiations. Defendant-
14 Intervenors claim to have been excluded from the
15 negotiations until late in the process, after a tentative
16 agreement had already been reached. Defendant-
17 Intervenors declined to sign the settlement and made a
18 counter-offer that was not adopted by the Moving Parties.
19 The Moving Parties now move for the entry of a order
20 approving their Settlement Agreement under the standards
21 applicable to consent decrees. Doc. 230. Defendant-
22 Intervenors object to approval. Docs. 233 & 234. Moving
23 Parties filed a reply. Doc. 238. In response to the
24 Court's request, Defendant Intervenors submitted proposed
25 language concerning their participation in further
26 administrative proceedings before DFG and in related
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1 regulatory proceedings. Doc. 248. State Defendant
2 advocates the use of alternative language. Doc. 249.
3 Plaintiffs joined State Defendant's request. Doc. 250.
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5 II. SETTLEMENT AGREEMENT

6 The Moving Parties entered into a Settlement
7 Agreement on February 9, 2011 that provides for the stay
8 of this case subject to certain conditions to enable DFG
9 to consider a new rule. First, State Defendant, in
10 consultation with the National Marine Fisheries Service
11 ("NMFS" or "NOAA Fisheries") and the U.S. Fish and
12 Wildlife Service ("FWS"), is required to develop a
13 "Regulatory Proposal" based on the best available
14 scientific information, to be submitted to the California
15 Fish and Game Commission ("Commission") with a
16 recommendation that the Commission modify the striped
17 bass sport fishing regulation to, among other things,
18 modify the bag and size limits to "reduce striped bass
19 predation on the listed species." *Id.* at ¶ 2(a). The
20 Regulatory Proposal must also include an adaptive
21 management plan designed to determine the effect of any
22 changes in the regulations to striped bass abundance,
23 striped bass predation on the listed species,
24 mesopredator release, and abundance of the listed
25 species. *Id.* at ¶ 2(b).
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1 Within 30 days following approval of the Settlement
2 Agreement, State Defendant shall solicit input and
3 scientific information from Plaintiffs and Defendant-
4 Intervenors. *Id.* at ¶ 3. State Defendant shall then
5 circulate a draft Regulatory Proposal to Plaintiffs and
6 Intervenors within 30 days of the last input meeting.
7 *Id.* at ¶ 4. Plaintiffs and Intervenors will have 10 days
8 to provide written comments. *Id.* at ¶ 5. If Plaintiffs
9 recommend modifications to the Regulatory Proposal, State
10 Defendants then have 30 days to reach agreement on an
11 alternative proposal. *Id.* at ¶ 6. If NMFS, FWS, or
12 Plaintiffs object to the final Regulatory Proposal, the
13 stay will be lifted and the Court will set a new pretrial
14 and trial date. *Id.* at ¶ 7.

17 If State Defendants and Plaintiffs agree on the
18 Regulatory Proposal, State Defendants shall circulate a
19 draft staff report in support of the Regulatory Proposal
20 within fifteen (15) days of receipt of Plaintiffs'
21 written proposal. If Plaintiffs object to the content of
22 the report, the stay will be lifted, and the case shall
23 proceed to trial. *Id.* at ¶ 8.

24 If Plaintiffs do not object to the drat staff report,
25 State Defendant will recommend at the next public meeting
26 of the Fish and Game Commission that the Commission adopt
27 the Regulatory Proposal. *Id.*₅ at ¶ 9. A final staff
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1 report will accompany the recommendation. *Id.* The
2 Settlement Agreement provides that the final draft report
3 "shall not differ materially from the draft staff
4 report." *Id.* If Plaintiffs believe the final staff
5 report differs materially from the draft, Plaintiffs
6 shall have 10 days to object, and State Defendants shall
7 have 10 days to revise the report accordingly. *Id.* If
8 the Plaintiffs still believe the final report differs
9 materially from the draft report, the Moving Parties
10 shall jointly request a determination from the Court
11 whether the revisions constitute a material alternation.
12 *Id.* If the Court finds a material alteration and State
13 Defendants refuse to revise the report, Plaintiffs or
14 State Defendants shall notify the Court, and the Court
15 shall lift the stay. *Id.*

18 If there are no such objections and the Commission
19 takes final action on the Final Regulatory Proposal (by
20 approving, modifying and approving, or rejecting the
21 amended regulation), Plaintiffs shall promptly take all
22 necessary steps to dismiss their First Amended Complaint
23 with prejudice. *Id.*

25 If the Commission does not take final action within
26 twelve months and Plaintiffs believe State Defendant has
27 not acted in good faith, Plaintiffs may petition the
28 Court to lift the stay. *Id.* at ¶ 11. If the Commission

1 does not take final action within twenty-one months, the
2 parties will provide notice to the Court, after which the
3 Court shall lift the stay. State Defendant can seek an
4 extension upon a showing of good cause. *Id.* at ¶ 12.

5 The Court is not required to approve an extension.

6
7 Plaintiffs agree not to participate in or fund any
8 lawsuit against State Defendant based on the same
9 underlying facts and legal theories. *Id.* at ¶ 14.

10 The Settlement Agreement also contains the following
11 confidentiality provisions:

12 State Defendants, Intervenors, and Plaintiffs
13 agree that all documents, oral statements, and
14 other communications rendered as part of
15 settlement discussions (1) are confidential and
16 shall not be made publicly available prior to
17 the submission of the Final Regulatory Proposal
18 to the Commission except as otherwise required
19 by law and (2) are no longer confidential
20 following submission of the Final Regulatory
21 Proposal to the Commission except as otherwise
22 required by law. Failure to agree to the
23 confidentiality requirement set forth in this
24 paragraph shall preclude the party that declines
25 to agree with the confidentiality requirement
26 from participating in the meetings described in
27 paragraph 3, from receiving or commenting on the
28 draft Regulatory Proposal described in
paragraphs 4 or 5 or any modification of the
draft Regulatory Proposal, or receiving the
draft staff report described in paragraph 8.

24 *Id.* at ¶ 16 (emphasis added). As Defendant-Intervenors
25 refused to sign the Settlement Agreement, they will not
26 be included in any of the scoping meetings described in
27 paragraph 3, nor will they receive or be able to comment

1 upon the draft Regulatory Proposal and/or draft staff
2 report. The settlement agreement does not preclude
3 Defendant-Intervenors from otherwise participating in the
4 regulatory process as permitted by state law.

5 The Settlement Agreement provides that State
6 Defendant will set aside \$1,000,000.00 to support
7 research projects regarding predation on listed species
8 in the Delta. One or more research projects will be
9 selected by an "independent scientific review panel"
10 composed of: Marty Gingras, Charles Hanson, Dennis
11 Murphy, Pat Coulston, and a fifth member to be determined
12 jointly by Plaintiffs and the State Defendants. *Id.* at ¶
13 17.
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16 III. STANDARD OF DECISION

17 "The initial decision to approve or reject a
18 settlement proposal is committed to the sound discretion
19 of the trial judge." *S.E.C. v. Randolph*, 736 F.2d 525,
20 529 (9th Cir. 1984) (quoting *Officers for Justice v. Civil*
21 *Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). "This
22 discretion is not unbridled, however. Unless a consent
23 decree is unfair, inadequate, or unreasonable, it ought
24 to be approved." *Id.*; see also *Sierra Club, Inc. v.*
25 *Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355
26 (9th Cir. 1990) ("[A] district court should enter a
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1 proposed consent judgment if the court decides that it is
2 fair, reasonable and equitable and does not violate the
3 law or public policy."). The Moving Parties and
4 Defendant Intervenors also point to language from
5 *Officers for Justice*, which involved approval of a class
6 action settlement under Federal Rule of Civil Procedure
7 23:
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9 [A] court's intrusion upon what is otherwise a
10 private consensual agreement negotiated between
11 the parties to a lawsuit must be limited to the
12 extent necessary to reach a reasoned judgment
13 that the agreement is not the product of fraud
14 or overreaching by, or collusion between, the
15 negotiating parties, and that the settlement,
16 taken as a whole, is fair, reasonable and
17 adequate to all concerned. Therefore, the
18 settlement or fairness hearing is not to be
19 turned into a trial or rehearsal for trial on
20 the merits. Neither the trial court nor this
21 court is to reach any ultimate conclusions on
22 the contested issues of fact and law which
23 underlie the merits of the dispute, for it is
24 the very uncertainty of outcome in litigation
25 and avoidance of wasteful and expensive
26 litigation that induce consensual settlements.
27 The proposed settlement is not to be judged
28 against a hypothetical or speculative measure of
what might have been achieved by the
negotiators.

688 F.2d at 625 (emphasis added). Although Rule 23 is
inapplicable here, the Ninth Circuit has applied the
reasoning of *Officers for Justice* to non-class action
consent judgments. See *United States v. State of Or.*,
913 F.2d 576, 586 (9th Cir. 1990) (inquiring into whether
the agreement was the product of "fraud or overreaching
by, or collusion between, the negotiating parties," as

1 part of approval of Columbia River Fish Management Plan).
2 The burden is on the party objecting to a settlement.
3 *Id.* (acknowledging that other circuits impose upon the
4 objecting party "a heavy burden of demonstrating that the
5 decree is unreasonable").

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7 Moving Parties cite authority that a court should
8 afford deference to a government agency settling a matter
9 within its area of expertise. For example, the Ninth
10 Circuit held in *Randolph*, 736 F.2d at 529, that "courts
11 should pay deference to the judgment of the government
12 agency which has negotiated and submitted the proposed
13 judgment." Moving Parties admit that existing caselaw
14 refers only to agencies of the federal government, but
15 suggest, without citing any authority, that "the same
16 principle can be extended to [] State [agencies]." Doc.
17 230-1 at 6. This assertion is undermined by another of
18 Plaintiffs' cited cases, *United States v. Cannons Eng'g*
19 *Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). *Cannons*
20 concerned the approval of a consent decree in a CERCLA
21 case. The First Circuit acknowledged the general rule
22 that "it is the policy of the law to encourage
23 settlements." *Id.*

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26 That policy has particular force where, as here,
27 a government actor committed to the protection
28 of the public interest has pulled the laboring
oar in constructing the proposed settlement.
While the true measure of the deference due

1 depends on the persuasive power of the agency's
2 proposal and rationale, given whatever practical
3 considerations may impinge and the full panoply
4 of the attendant circumstances, [citation] the
district court must refrain from second-guessing
the Executive Branch.

5 *Id.* Deference to the settlement preferences of federal
6 Executive Branch agencies stems in part from a respect
7 for the balance of powers between the various branches of
8 the federal government. Plaintiffs have no authority to
9 support a rule that a federal court must afford deference
10 to state agencies. As Defendant Intervenors point out,
11 the settling state agency, DFG, is not charged with the
12 task of implementing either the ESA or the CVPIA.

14 More generally, "a consent decree must spring from
15 and serve to resolve a dispute within the court's
16 subject-matter jurisdiction." *Local No. 93, Intern.*
17 *Ass'n of Firefighters, AFL-CIO C.L.C. v. City of*
18 *Cleveland*, 478 U.S. 501, 525 (1986). "[C]onsistent with
19 this requirement, the consent decree must come within the
20 general scope of the case made by the pleadings, and must
21 further the objectives of the law upon which the
22 complaint was based." *Id.* (internal citations and
23 quotations omitted).

25 A court may adopt a Consent Decree over the
26 opposition of non-settling parties.

28 It has never been supposed that one party-
whether an original₁₁ party, a party that was

1 joined later, or an intervenor-could preclude
2 other parties from settling their own disputes
3 and thereby withdrawing from litigation. Thus,
4 while an intervenor is entitled to present
5 evidence and have its objections heard at the
hearings on whether to approve a consent decree,
it does not have power to block the decree
merely by withholding its consent

6 *Id.* at 528-529; see also *S. Cal. Edison v. Lynch*, 307
7 F.3d 794, 806-07 (9th Cir. 2002) ("An intervenor does not
8 have the right to prevent other parties from entering
9 into a settlement agreement.").

11 IV. DISCUSSION

12 A. The Consent Decree Does Not Require State Defendant 13 to Draft or Promulgate an Unjustified Regulatory 14 Proposal.

15 Defendant Intervenors argue that the Settlement
16 Agreement is not reasonable because it requires a
17 substantive result that is not supported by the best
18 available science. Specifically, Defendant Intervenors
19 point to Paragraph 2(a) which provides that "State
20 Defendant shall develop a proposal based upon the best
21 available scientific information to modify the striped
22 bass sport fishing regulation to reduce striped bass
23 predation on the listed species" in the form of a
24 "Regulatory Proposal" that is to consist of "changes to
25 title 14, section 5.75(b) and (c) (bag and size limit,
26 respectively) of the California Code of Regulations to
27 reduce striped bass predation on the listed species."
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1 Settlement Agreement ¶ 2(a) (emphasis added). Defendant
2 Intervenor's argue that this objective "can only be
3 accomplished by a reduction in striped bass numbers."
4 Doc. 233 at 22.

5
6 It is unnecessary to delve into the merits of the
7 case when considering approval of a consent decree. The
8 terms of the Settlement Agreement speak for themselves.
9 The Settlement Agreement calls for State Defendant to
10 develop the described Regulatory Proposal, but State
11 Defendant's failure to satisfy this condition precedent
12 only leaves Plaintiffs the option to proceed with this
13 lawsuit. Nothing in the Settlement Agreement requires
14 State Defendant to draft, let alone promulgate, such a
15 Regulatory Proposal if doing so would be inconsistent
16 with the best available science or if it otherwise
17 violates the law. Nothing in the Settlement Agreement
18 requires that the Regulatory Proposal reduce striped bass
19 predation on the listed species by reducing striped bass
20 numbers.
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23 B. The Settlement Agreement Does Not Undermine the
24 Federal Interest Embodied in the CVPIA.

25 The Central Delta Parties emphasize that nearly
26 twenty (20) years ago in the CVPIA, Pub. L. 102-575, 106
27 Stat. 4600, Title 34, 106 Stat. 4706-31 (1992), Congress
28 deemed striped bass populations in the Delta worthy of

1 protection and restoration to a specific level as yet
2 unattained. See CVPIA sections 3402(a) and 3406(b)(1);
3 (b)(1)(B); (b)(8); (9), (14), (18), (19), and (21);
4 (c)(1); (e)(1) and (5); (f); and (g)(4) and (7). The
5 July 16, 2009 Memorandum Decision reviewed the CVPIA's
6 treatment of striped bass:
7

8 The CVPIA contains numerous provisions calling
9 for protection and enhancement of striped bass
10 within the Sacramento-San Joaquin Delta. CVPIA
11 section 3403(a) defines the term "anadromous
12 fish" to include "striped bass," making
13 applicable section 3406(b)(1)'s maintenance and
14 restoration provisions. That section requires
15 the Secretary of Interior to "develop within
16 three years of enactment and implement a program
17 which makes all reasonable efforts to ensure
18 that, by the year 2002, natural production of
19 anadromous fish in Central Valley rivers and
20 streams will be sustainable, on a long-term
21 basis, at levels not less than twice the average
22 levels attained during the period of 1967-1991."
23 To this end, it is undisputed that FWS has
24 established a doubling goal for striped bass of
25 2,500,000 fish. McDaniel Decl., Doc. 66-4, at ¶3
26 & Ex. B (Final Restoration Plan for Anadromous
27 Fish Restoration Program, January 9, 2001) at 9-
28 10. It is also undisputed that this goal has not
been achieved. *Id.* at Ex. C (Anadromous Fish
Restoration Program Doubling Graphs for striped
bass).

21 Section 3406(b)(1)(B) provides that "the
22 Secretary is authorized and directed to modify
23 Central Valley Project operations to provide
24 flows of suitable quality, quantity, and timing
25 to protect all life stages of anadromous
26 fish...." Section 3406(b)(1)(D)(2) requires that
27 the Secretary "upon enactment of this title
28 dedicate and manage annually 800,000 acre-feet
of Central Valley Project yield for the primary
purpose of implementing the fish, wildlife, and
habitat restoration purposes and measures
authorized by this title...." This provision has
been interpreted to require that the Secretary
give primacy to its anadromous fish doubling
program in the allocation of the 800,000 acre-
foot CVP yield dedication. See *San Luis & Delta
Mendota Water Auth.*¹⁷ *U.S. Dept. of the*

1 Interior, --- F. Supp. 2d ---, 2009 WL 1362652
2 (E.D. Cal. 2009); *Bay Institute of San Francisco*
3 *v. United States*, 87 Fed. Appx. 637 (9th Cir.
4 Jan. 23, 2004). Because striped bass are
5 included in the statutory definition of
6 "anadromous fish," they are intended and
7 designated beneficiaries of these efforts. CVPIA
8 § 3403(a).

9 Section 3406(b)(14) is directed specifically to
10 striped bass, requiring the Secretary to
11 "develop and implement a program which provides
12 for modified operations and new or improved
13 control structures at the Delta Cross Channel
14 and Georgiana Slough during times when
15 significant numbers of striped bass eggs,
16 larvae, and juveniles approach the Sacramento
17 River intake to the Delta Cross Channel or
18 Georgiana Slough."

19 Certain CVPIA provisions require the Secretary
20 to coordinate with state agencies to protect
21 anadromous fish in general and striped bass in
22 particular. For example, Section 3406(b)(21)
23 requires that the Secretary "assist the State of
24 California in efforts to develop and implement
25 measures to avoid losses of juvenile anadromous
26 fish resulting from unscreened or inadequately
27 screened diversions on the Sacramento and San
28 Joaquin rivers, their tributaries, the
Sacramento-San Joaquin Delta, and the Suisun
Marsh." Similarly, section 3406(b)(18) requires
that the Secretary "if requested by the State of
California, assist in developing and
implementing management measures to restore the
striped bass fishery of the Bay-Delta estuary."
Such measures must be "coordinated with efforts
to protect and restore native fisheries." *Id.*

Doc. 85 at 19-22. That Decision also concluded that
whether application of the ESA to the sport-fishing
regulations would conflict with Congress' CVPIA
objectives was a highly factual inquiry not amenable to
summary judgment:

Can the numerous CVPIA provisions directing the
Secretary of the Interior, in consultation with
other federal agencies, to protect and enhance
the striped bass population, be harmonized with
application of section 9's take prohibition to

1 CDFG's enforcement of the striped bass sport-
2 fishing regulations and more general application
3 of the ESA? On Plaintiffs' motion for summary
4 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
7 support the nonmoving party's case." *Soremekun*,
8 509 F.3d at 984. Plaintiffs maintain, and have
9 presented evidence to support their claim, that
10 State Defendant's enforcement of the sport-
11 fishing regulations necessarily take Listed
12 Species, and that lawful application of the ESA
13 to State Defendant's enforcement activities will
14 require elimination of (or substantial
15 modification to) those sport-fishing
16 regulations, which are causing jeopardy to
17 Listed Species. The State rejoins that the
18 current sport-fishing regulations are critical
19 to the maintenance of current striped bass
20 abundance levels. The State's evidence suggests
21 that the continued enforcement of these
22 regulations, and/or the promulgation of more
23 stringent protections, may be necessary to
24 achieve the 2,500,000 striped bass population
25 goal promulgated by the Service.

14 This presents a material factual dispute over
15 the effects of CDFG's striped bass regulations
16 on the bass and Listed Species populations. The
17 express language and the legislative purpose of
18 the CVPIA do not evince an intent to abrogate
19 application of the ESA. Only after the facts are
20 developed will it be possible to determine if a
21 conflict in operation exists between
22 implementation of the ESA to the sport-fishing
23 regulations and achieving the CVPIA objectives
24 by application of those regulations. Plaintiffs'
25 motion for summary adjudication of Central
26 Delta's CVPIA affirmative defense is DENIED
27 WITHOUT PREJUDICE.

21 *Id.* at 24-26. This was reiterated in the July 21, 2010

22 Memorandum Decision re Plaintiffs' Motion for Summary

23 Judgment:

24
25 The significance of [the] evidence is in
26 dispute. As Central Delta points out "striped
27 bass and the salmonids co-existed in the Delta
28 for more than a century, and it has not been
shown that [a similar coexistence] cannot be
achieved." Doc. 125 at 14 (noting that FWS
adopted the Restoration Plan to restore both

1 striped bass and salmonids pursuant to the
2 direction of the CVPIA). Central Delta also
3 points out that, despite the opinions of the
4 review panel, Congress expressed its
5 unconditional intent to restore both striped
6 bass and salmonids. At the same time, there is
7 ample record evidence to support the proposition
8 that the sportfishing regulations are necessary
9 to achieve the CVPIA's goal of doubling the
10 striped bass population.

11 Doc. 168 at 89-90.

12 The Central Delta Parties maintain that the federal
13 interests embodied in the CVPIA are not protected by the
14 Settlement Agreement. Moving Parties rejoin that DFG is
15 not bound by the CVPIA, which governs the actions of the
16 United States Secretary of the Interior. CVPIA § 3406(a)
17 provides:

18 (b) Fish and Wildlife Restoration Activities.--
19 The Secretary, immediately upon the enactment of
20 this title, shall operate the Central Valley
21 Project to meet all obligations under state and
22 federal law, including but not limited to the
23 federal Endangered Species Act, 16 U.S.C. s
24 1531, et seq., and all decisions of the
25 California State Water Resources Control Board
26 establishing conditions on applicable licenses
27 and permits for the project. The Secretary, in
28 consultation with other State and Federal
agencies, Indian tribes, and affected interests,
is further authorized and directed to:

(1) Develop within three years of enactment
and implement a program which makes all
reasonable efforts to ensure that, by the
year 2002, natural production of anadromous
fish in Central Valley rivers and streams
will be sustainable, on a long-term basis,
at levels not less than twice the average
levels attained during the period of 1967-
1991;

This imposes burdens on the Secretary of the Interior,

1 not DFG, to develop a program to double anadromous fish
2 populations (which are defined to include striped bass)
3 by 2002. However, the CVPIA's requirement of striped
4 bass population doubling is relevant to whether approval
5 of this settlement agreement is in the public interest.
6 The CVPIA expresses Congress' intent to protect and
7 enhance the striped bass population. Nevertheless,
8 nothing in the Settlement Agreement requires State
9 Defendant to promulgate a regulation that derogates the
10 CVPIA's goals, nor does the Settlement Agreement preclude
11 the Central Delta Parties from raising the CVPIA in any
12 future challenge to a Regulatory Proposal. The federal
13 interest in the CVPIA is not per se harmed or advanced by
14 the Settlement Agreement, which has for its primary
15 purpose the protection of listed species.

18 C. The Settlement Agreement is Otherwise in the Public
19 Interest.

20 The Agreement serves the public interest by avoiding
21 protracted litigation and conserving resources. See
22 *Citizens for a Better Environment v. Gorsuch*, 718 F.2d
23 1126, 1117 (D.C. Cir. 1983) ("Not only the parties, but
24 the general public as well, benefit from the saving of
25 time and money that results from the voluntary settlement
26 of litigation.").

28 The Agreement requires State Defendant to address the

1 issue of predation in a manner that is consistent with
2 the purposes of the ESA and with the conservation and
3 protection of the Listed Species. See *United States v.*
4 *Salt River Project Agric. Improvement and Power Dist.*,
5 2008 WL 5332023, at *3 (D. Ariz. Dec. 22, 2008) (finding
6 Consent Decree served the public interest because it was
7 consistent with the purposes of the Clean Air Act). The
8 Settlement Agreement ensures that the combined expertise
9 and resources of the State Defendant, NOAA Fisheries, and
10 FWS, the state and federal agencies responsible for
11 protecting wildlife resources (including the Listed
12 Species) in the Delta and tributaries thereto, are
13 brought to bear on the issue of striped bass predation.
14 The Agreement also provides a means for funding and
15 researching predation impacts on one or more fish species
16 listed under the federal and/or California Endangered
17 Species Acts in the Delta and/or the anadromous waters of
18 the Sacramento and San Joaquin river watersheds.
19 Settlement Agreement at ¶¶ 2, 17.

20
21
22 If this examination results in a recommendation to
23 modify the striped bass sport fishing regulations,
24 Defendant Intervenors may raise their objections to the
25 regulation at that time. This will also permit a more
26 developed record for future judicial review.
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1 **D. The Makeup of the Science Panel.**

2 Paragraph 17 of the Settlement Agreement establishes
3 "Independent Scientific Review Panel," charged with the
4 task of selecting research proposals to receive funding
5 from the \$1,000,000 set aside by State Defendant.
6 Defendant Intervenors complain that the Panel's
7 membership is not "independent."
8

9 Proposed members include Marty Gingras, a DFG
10 employee and State Defendant Rule 30(b)(6) designee at
11 the center of the factual dispute in this case. For
12 example, Plaintiffs previously argued that certain
13 statements Mr. Gingras made at his deposition concerning
14 the effect of striped bass sport fishing regulations on
15 striped bass populations and the effect of striped bass
16 predation on the Listed Species should absolutely bind
17 State Defendant. Another DFG employee Pat Coulston is
18 assigned to the panel, along with Plaintiff's expert
19 Charles Hanson, and Dennis Murphy, who co-authored an
20 article on the Endangered Species Act with Plaintiffs'
21 attorney Paul Weiland. The four members are authorized
22 to pick the fifth Panel member. Moving Parties maintain
23 that these participants are both qualified and
24 knowledgeable and that Defendant Intervenors' suggestion
25 that they cannot exercise independence has no basis in
26 fact.
27
28

1 Defendant Intervenors suggested, as an alternative,
2 that a panel of National Academy of Sciences scientists
3 be used to select research projects. This is
4 impracticable, as NAS panels are typically impaneled at
5 the request of Congress, a federal agency, or both, with
6 the ultimate goal of producing a report, not of choosing
7 research projects for grant funding.
8

9 The law does not arrogate to Defendant Intervenors
10 the authority to choose the composition of Panel members.
11 The DFG and Plaintiffs are adversaries. They and the
12 Panel must comply with all applicable laws. The law does
13 not require more.
14

15 E. The Settlement Process Was Not Unfair.

16 Defendant Intervenors complain that they were
17 excluded from the Settlement Process until the Agreement
18 had been formulated.¹ Once the Agreement was drafted,
19 Defendant Intervenors were included in discussions. They
20 articulated five principles that should be implemented.
21

22 (1) The financial commitment by DFG should be
23 utilized to study all predation, inform DFG, and
24 be the basis of any regulatory proposal. The
25 study should be directed by an independent
26 panel. The intervenors suggested the National
27 Academy of Sciences.

28 (2) Any regulatory proposal should be

¹ Defendant Intervenors also complain that FWS, the agency charged with implementation of the CVPIA, was also excluded from the initial discussions. This complaint is baseless. The Settlement Agreement calls for State Defendant to consult with NMFS and FWS in developing their Regulatory Proposal, as is required by law.

1 consistent with and implement the CVPIA
2 provisions for the doubling of all anadromous
fish populations as defined therein.

3 3) Full review under the California
4 Environmental Quality Act, California Public
5 Resources Code section 21000, et seq. ("CEQA")
should be a part of the process, with the
inclusion of agreed alternatives.

6 4) All parties should be equal participants in
7 the process.

8 5) There should be reserved jurisdiction by the
9 Court. Some, but not all, of their concerns were
addressed.

10 Doc. 233 at 7; Declaration of Daniel A. McDaniel, Doc.
11 233-1 ¶ 6, Ex. A. Intervenors proposed revisions to the
12 Settlement Agreement, however only minor changes were
13 adopted.

14 The Moving Parties describe the Settlement process
15 very differently. They explain that a "phased approach"
16 was taken at the behest of Judge Seng, who recommended
17 that Plaintiffs negotiate with State Defendant, followed
18 by involvement of Defendant Intervenors if Plaintiffs and
19 State Defendants are able to reach agreement. Doc. 239
20 at 6. According to Moving Parties, this procedure "made
21 sense" because Defendant Intervenors would not waste
22 their time if Plaintiffs and State Defendants were unable
23 to reach agreement. *Id.*

24
25 Defendant Intervenors shall be provided notice and
26 the opportunity to participate in and provide input in
27 the development of the Regulatory Proposal consistent
28

1 with and subject to paragraphs 3, 4, 5, 8, and 16 of the
2 settlement agreement.² Defendant Intervenors shall
3 further be provided the opportunity to participate in and
4 provide input to the California Fish and Game Commission
5 during the regulatory process, including any proceedings
6 relating to the Commission's consideration of the
7
8 Regulatory Proposal, pursuant to the California
9 Administrative Procedure Act and Sections 205 and 207 of
10 the California Fish and Game Code. Nothing provided
11 herein shall be construed or implied to require that any
12 general or specific regulatory proposal be made.
13

14 **F. The Settlement Process Was Not Tainted by Collusion.**

15 The Settlement Agreement embodies a reasonable
16 compromise by all signatories. The issues in this case
17 were hotly disputed. While the Agreement offers some
18 relief to Plaintiffs in the form of a procedure to
19 develop a Regulatory Proposal, none is guaranteed.
20 Plaintiffs will receive no injunctive or declaratory
21 relief, nor will they obtain fees. The Agreement is not
22 the product of any collusion between Plaintiffs and the
23 State Defendant. Rather, it was the product of rigorous,
24

25
26 ² These opportunities to participate are conditioned upon Defendant-
27 Intervenors' consent to confidentiality terms set forth at paragraph
28 16 of the Settlement Agreement. Defendant Intervenors complain that
such restrictions will --- but they are a reasonable requirement to
foster open discussions and in any event are to be lifted upon the
issuance of a Regulatory Proposal²³

1 arms-length negotiations.

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3

V. CONCLUSION

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SO ORDERED

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Dated: April 5, 2011

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/s/ Oliver W. Wanger
United States District Judge

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