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2  
3 UNITED STATES DISTRICT COURT  
4 FOR THE EASTERN DISTRICT OF CALIFORNIA  
5

6 SAN JOAQUIN RIVER GROUP AUTHORITY,

1:11-cv-00725 OWW GSA

7 Plaintiff,

MEMORANDUM DECISION RE CROSS  
MOTIONS FOR SUMMARY JUDGMENT  
(DOCS. 58, 73, 77, 80)

8 v.

9 NATIONAL MARINE FISHERIES SERVICE,

10 Defendants,

11 CENTRAL DELTA WATER AGENCY, *et*  
12 *al.*,

13 Defendant-Intervenors,

14 PACIFIC COAST FEDERATION OF  
FISHERMEN'S ASSOCIATIONS,

15 Defendant-Intervenor.  
16

17 I. INTRODUCTION/BACKGROUND

18 This suit arises from the United States Pacific Fisheries  
19 Management Council's ("PFMC" or the "Council") April 13, 2011  
20 adoption of commercial troll and recreational fishing management  
21 measures for the waters south of Cape Falcon, Oregon, permitting  
22 commercial and recreational fishing for Sacramento River fall-run  
23 Chinook Salmon ("SRFC") for the 2011 fishing season ("2011 management  
24 measures"), and the National Marine Fisheries Service's ("NMFS") May  
25 4, 2011 approval of the PFMC's recommended 2011 management measures.  
26  
27 Doc. 1.  
28

1 Plaintiff, the San Joaquin River Group Authority ("SJRG")<sup>1</sup>  
2 moves for summary judgment on the following grounds:

3 (1) That NMFS violated the Administrative Procedure Act ("APA")  
4 and the Magnuson-Stevens Fishery Conservation and Management Act  
5 ("Magnuson-Stevens Act" or "MSA") because: (a) the 2011 management  
6 measures did not properly account for "known scientific uncertainty  
7 and bias in abundance estimates"; and (2) PFMC's decision to end the  
8 "overfishing concern" was not supported by the record. Doc. 59 at  
9 16-20.

10  
11 (2) That adoption of the 2011 management measures violated the  
12 National Environmental Policy Act ("NEPA") because the Environmental  
13 Assessment ("EA"): (a) failed to consider whether the 2011 management  
14 measures would violate laws or requirements imposed to protect the  
15 environment; and (b) failed to consider a reasonable range of  
16 alternatives. *Id.* at 20-23.

17  
18 (3) That Plaintiff has standing based on two theories of injury:  
19 (a) if the 2011 management measures result in less San Joaquin River  
20 fall-run Chinook ("SJRFC") escapement, SJRG member agencies could be  
21

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22 <sup>1</sup> The SJRG is a California Joint Powers Authority duly organized and existing in  
23 accordance with the provisions of Sections 6500 *et seq.* of the California  
24 Government Code. The SJRG is comprised of (a) the Merced Irrigation District  
25 ("Merced ID"), Modesto Irrigation District ("Modesto ID"), Oakdale Irrigation  
26 District ("OID"), South San Joaquin Irrigation District ("SSJID") and Turlock  
27 Irrigation District ("TID"), each of whom is a California irrigation district  
28 formed and existing pursuant to the provisions of the California Irrigation  
District Law (Water Code §§ 20500 *et seq.*); (b) the San Joaquin River Exchange  
Contractors Water Authority, a California Joint Powers Authority comprised of two  
mutual water companies, a California irrigation district and a California water  
district (*see* Water Code §§ 34000 *et seq.*); (c) the Friant Water Authority ("FWA"),  
a California Joint Powers Authority consisting of 22 public water agencies; and (d)  
the City and County of San Francisco. Complaint, Doc. 1, ¶ 5.

1 subject to future remedial action by the State Water Resources  
2 Control Board ("SWRCB") and others "in the form of draconian demands  
3 to bypass flows or release water"; and/or (b) that reduced SRFC or  
4 SJRFC escapement might lead to SRFC or SJRFC being listed as  
5 threatened or endangered under the ESA, which would then subject  
6 SJRGA member agencies to ESA regulatory activity. *Id.* at 23-25.

8 Federal Defendants oppose and cross move for judgment on all the  
9 above grounds, and additionally argue that the Doe Defendants should  
10 be dismissed as improper parties. Doc. 73-1. Defendant-Intervenor,  
11 Pacific Coast Federation of Fishermen's Associations ("PCFFA"),  
12 separately cross-moves for judgment on standing and mootness grounds.  
13 Doc. 80-1. Defendant-Intervenors, Central Delta Water Agency, South  
14 Delta Water Agency (collectively, "Delta Intervenors"), also cross-  
15 move on the issue of standing and separately argue that Plaintiff's  
16 claims are not ripe. Doc. 77-1.

18 Plaintiff filed separate oppositions/replies in response to each  
19 cross motion. Docs. 84, 87, 89. Federal Defendants and both sets of  
20 Defendant-Intervenors replied. Docs. 92, 93, 94.

21 All motions were submitted for decision September 28, 2011.

## 23 II. STANDARDS OF DECISION

### 24 A. Review Under the APA.

25 The MSA's judicial review provision specifically provides that a  
26 regulation promulgated or action taken under the MSA can only be set  
27 aside on a ground specified in APA § 706(2) (A), (B), (C), or (D). 16  
28

1 U.S.C. § 1855(f)(1)(B). Because NEPA contains no separate provision  
2 for judicial review, compliance with NEPA is also reviewed under the  
3 APA. *Nw. Res. Info. Ctr., Inc. v. NMFS*, 56 F.3d 1060, 1066 (9th Cir.  
4 1995). Here, Plaintiff alleges NMFS's action was "arbitrary,  
5 capricious, an abuse of discretion, or otherwise not in accordance  
6 with law." 5 U.S.C. § 706(2)(A).  
7

8 Under the APA's "arbitrary and capricious" standard, a court  
9 must defer to the agency on matters within the agency's expertise,  
10 unless the agency completely failed to address some factor,  
11 consideration of which was essential to making an informed decision.  
12 *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 798 (9th Cir. 2005) ("*NWF*  
13 *v. NMFS I*"). A court "may not substitute its judgment for that of  
14 the agency concerning the wisdom or prudence of the agency's action."  
15 *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir.  
16 2009):  
17

18 In conducting an APA review, the court must determine  
19 whether the agency's decision is "founded on a rational  
20 connection between the facts found and the choices made ...  
21 and whether [the agency] has committed a clear error of  
22 judgment." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir. 2001). "The  
[agency's] action ... need be only a reasonable, not the  
best or most reasonable, decision." *Nat'l Wildlife Fed. v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

23 *Id.*

24 Although deferential, judicial review under the APA is designed  
25 to "ensure that the agency considered all of the relevant factors and  
26 that its decision contained no clear error of judgment." *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir. 1987) (internal citation and  
27  
28

1 quotation omitted). "The deference accorded an agency's scientific  
2 or technical expertise is not unlimited." *Brower v. Evans*, 257 F.3d  
3 1058, 1067 (9th Cir. 2001).

4 [An agency's decision is] arbitrary and capricious if [it]  
5 has relied on factors which Congress has not intended it to  
6 consider, entirely failed to consider an important aspect  
7 of the problem, offered an explanation for its decision  
8 that runs counter to the evidence before the agency, or is  
9 so implausible that it could not be ascribed to a  
10 difference in view or the product of agency expertise.

11 *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*,  
12 463 U.S. 29, 43 (1983); see also *Citizens to Preserve Overton Park,*  
13 *Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (reviewing court may overturn  
14 an agency's action as arbitrary and capricious if the agency failed  
15 to consider relevant factors, failed to base its decision on those  
16 factors, and/or made a "clear error of judgment"), *overruled on other*  
17 *grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

18 More generally, "[u]nder the APA 'the agency must examine the  
19 relevant data and articulate a satisfactory explanation for its  
20 action including a rational connection between the facts found and  
21 the choice made.'" *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1048  
22 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).  
23 "The reviewing court should not attempt itself to make up for an  
24 agency's deficiencies: We may not supply a reasoned basis for the  
25 agency's action that the agency itself has not given." *Id.*

26 B. Summary Judgment.

27 Summary judgment is appropriate when the pleadings and the  
28 record demonstrate that "there is no genuine dispute as to any

1 material fact and the movant is entitled to judgment as a matter of  
2 law." Fed. R. Civ. P. 56(c). A court conducting APA judicial review  
3 may not resolve factual questions, but instead determines "whether or  
4 not as a matter of law the evidence in the administrative record  
5 permitted the agency to make the decision it did." *Sierra Club v.*  
6 *Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental*  
7 *Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)). "[I]n a case  
8 involving review of a final agency action under the [APA] ... the  
9 standard set forth in Rule 56(c) does not apply because of the  
10 limited role of a court in reviewing the administrative record." *Id.*  
11 at 89. In this context, summary judgment becomes the "mechanism for  
12 deciding, as a matter of law, whether the agency action is supported  
13 by the administrative record and otherwise consistent with the APA  
14 standard of review." *Id.* at 90.

17 Local Rule 260(e) directs that each motion shall be accompanied  
18 by a "Statement of Undisputed Facts" that shall enumerate each of the  
19 specific material facts on which the motion is based and cite the  
20 particular portions of any document relied upon to establish that  
21 fact. In APA cases, such statements are generally redundant because  
22 all relevant facts are contained in the agency's administrative  
23 record. Although no such request was received in this case, requests  
24 to dispense with the requirement of filing a statement of facts are  
25 routinely granted in this District.  
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1 III. BACKGROUND

2 A. Magnuson-Stevens Act.

3 The Magnuson-Stevens Act was enacted to "conserve and manage the  
4 fishery resources found off the coasts of the United States" and  
5 "promote domestic commercial and recreational fishing under sound  
6 conservation and management principles." 16 U.S.C. § 1801(b)(1),  
7 (3). The MSA recognizes that "[a] national program for the  
8 conservation and management of the fishery resources of the United  
9 States is necessary to prevent overfishing, to rebuild overfished  
10 stocks, to insure conservation, to facilitate long-term protection of  
11 essential fish habitats, and to realize the full potential of the  
12 Nation's fishery resources." *Id.* at § 1801(6).

14 The MSA establishes eight regional fishery management councils;  
15 the PFMC has authority over the Pacific Ocean fisheries off the  
16 coasts of California, Oregon, and Washington. 16 U.S.C. § 1852  
17 (a)(1)(F). The principle responsibility of each Council is to  
18 prepare and implement, in accordance with national standards,  
19 Fisheries Management Plans ("FMP") designed to "achieve and maintain,  
20 on a continuing basis, the optimum yield." from the fisheries under  
21 their authority. 16 U.S.C. §§ 1801(b)(4), 1851(a)(1). With regard  
22 to the yield from a fishery, the term "optimum," means the amount of  
23 fish which:  
24

25  
26 (A) will provide the greatest overall benefit to the  
27 Nation, particularly with respect to food production and  
28 recreational opportunities, and taking into account the  
protection of marine ecosystems;

1 (B) is prescribed on the basis of the maximum sustainable  
2 yield from the fishery, as reduced by any relevant social,  
3 economic, or ecological factor; and

4 (C) in the case of an overfished fishery, provides for  
5 rebuilding to a level consistent with producing the maximum  
6 sustainable yield in such fishery.

7 16 U.S.C. § 1802(33). Councils may also submit regulations deemed  
8 "necessary or appropriate" to implement an FMP or to modify existing  
9 regulations. 16 U.S.C. § 1853(c).

10 All FMPs must be consistent with ten national standards  
11 prescribed in the Act. 16 U.S.C. § 1851(a). Relevant here is  
12 National Standard One ("NS 1"), which states: "Conservation and  
13 management measures shall prevent overfishing while achieving, on a  
14 continuing basis, the optimum yield from each fishery for the United  
15 States fishing industry." *Id.* at § 1851(a)(1). The Act defines  
16 "overfishing" and "overfished" as the "rate or level of fishing  
17 mortality that jeopardizes the capacity of a fishery to produce the  
18 maximum sustainable yield [{"MSY"}] on a continuing basis." 16  
19 U.S.C. § 1802(34).<sup>2</sup> MSY is defined as the "largest long-term average  
20 catch or yield that can be taken from a stock or stock complex under  
21 prevailing ecological, environmental conditions and fishery  
22 technological characteristics (e.g., gear selectivity), and the  
23

24  
25 <sup>2</sup> The implementing regulations distinguish more clearly between "overfishing" and  
26 "overfished." "Overfishing (to overfish) occurs whenever a stock or stock complex  
27 is subjected to a level of fishing mortality or annual total catch that jeopardizes  
28 the capacity of a stock or stock complex to produce maximum sustainable yield on a  
sustainable yield on a continuing basis." 50 C.F.R. § 610.310(e)(2)(i)(E).



1 distribution of catch among fleets." 50 C.F.R. § 600.310(e)(i)(A).  
2 If NMFS determines a fishery is overfished, a rebuilding plan is  
3 required within two years. 16 U.S.C. § 1854(e). Fishing may  
4 continue during this period, although interim measures may be  
5 required. *See id.*  
6

7 B. The Salmon Fishery Management Process.

8 The Pacific Salmon FMP guides management of commercial and  
9 recreational salmon fisheries off the coasts of Washington, Oregon,  
10 and California. AR 298. Implementing the existing FMP, the Council  
11 annually recommends management measures to achieve conservation  
12 objectives for each stock, while simultaneously seeking to fulfill,  
13 to the extent practicable, harvest and allocation objectives that  
14 reflect the Council's social and economic considerations. AR 302.  
15 After a preseason planning process including public participation,  
16 the Council submits the annual management measures to NMFS for review  
17 and promulgation as a regulation. *See* 16 U.S.C. § 1855(d).  
18

19 Conservation objectives are fixed measures intended to provide  
20 the guidance during the annual preseason planning process to  
21 establish salmon fishing seasons that achieve optimum yield. AR 305.  
22 Many of the conservation objectives are expressed in terms of annual  
23 fishery escapement numbers, in other words, adults that return to  
24 freshwater to spawn, believed to be optimum for producing MSY over  
25 the long-term. AR 304.  
26

27 In the Salmon FMP, "California Central Valley Chinook salmon"  
28

1 include all fall-run, late-fall-run, winter-run, and spring-run stocks  
2 of the Sacramento and San Joaquin Rivers and their tributaries. AR 311.  
3 Of these, SRFC are the single largest contributor to ocean fisheries off  
4 California, a significant contributor off southern and central Oregon,  
5 and present north into British Columbia. *Id.* As the major contributing  
6 stock to ocean Chinook salmon fisheries off Oregon and California, SRFC  
7 serve as the basis for managing the Central Valley Chinook fishery. *Id.*  
8 The bulk of SRFC stocks are south of Point Arena, with considerable  
9 overlap with coastal and Klamath River fall Chinook between Point Arena  
10 and Horse Mountain. *Id.* The FMP sets the conservation objective for  
11 SRFC at 122,000-180,000 natural and hatchery adult spawners. *Id.*  
12 Plaintiff does not challenge the conservation objective, which is  
13 part of the FMP.  
14

15 The FMP also sets forth overfishing criteria, recognizing that  
16 salmon "abundance can fluctuate dramatically" and "it is not unusual  
17 for a healthy and relatively abundant salmon stock to produce  
18 occasional spawning escapements which, even with little or no fishing  
19 impacts, may be significantly below the long-term average associated"  
20 with maximum sustainable yield. AR 305. To address the MSA  
21 requirement to identify when a stock may be approaching an overfished  
22 condition or is overfished, the PFMC established two separate  
23 criteria based on a stock's failure to meet its conservation  
24 objective. The first measure, a "conservation alert," is forward-  
25 looking and reacts to potential stock declines that might lead to  
26 overfishing. AR 306. This criterion is triggered during the annual  
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1 preseason process if a stock is projected to fall short of its  
2 conservation objective. *Id.* The FMP sets forth the required actions  
3 associated with a "conservation alert," which include closing the  
4 fishery on that stock for that year. *Id.*

5  
6 The second criterion, an "overfishing concern," is based on past  
7 history and occurs if, in three consecutive years, the postseason  
8 estimates indicate a stock has fallen short of its conservation  
9 objective. AR 307. When an overfishing concern is triggered, the  
10 PFMC will complete an assessment of the stock within one year, that  
11 appraises actual level and source of fishing impacts on the stock;  
12 considers if excessive fishing has been inadvertently allowed by  
13 estimation errors or other factors; identifies any other pertinent  
14 factors leading to the overfishing concern; and assesses the overall  
15 significance of the present stock depression with regard to achieving  
16 MSY on a continuing basis. AR 307-08. Depending on its findings,  
17 the Council's Salmon Technical Team ("Technical Team" or "STT") will  
18 recommend any needed adjustments to annual management measures to  
19 assure the conservation objective is met, or recommend adjustments to  
20 the conservation objective which may more closely reflect the MSY or  
21 ensure rebuilding to that level. AR 308. Following its review of  
22 the Technical Team report, the Council will specify the actions that  
23 will comprise its immediate response for ensuring that the stock's  
24 conservation objective is met or a rebuilding plan is properly  
25 implemented and any inadvertent excessive fishing within Council  
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1 jurisdiction is ended. *Id.* The criteria for determining the end of  
2 an overfishing concern will be included as a part of any rebuilding  
3 plan adopted by the Council. *Id.*

4 The FMP is periodically amended; the last amendment was passed  
5 in 2007. *E.g.* AR 635. Plaintiff does not challenge any aspect of  
6 the FMP. During development of the 2011 fishing regulations, the  
7 Council engaged in a parallel process of developing a proposed  
8 Amendment 16. Among other things, the proposed amendment includes  
9 revisions designed to provide clearer criteria for making  
10 "overfishing," "overfished," "approaching overfished," and "rebuilt"  
11 determinations. AR 1051. Final Council action on the proposed  
12 amendment was not scheduled until June 2011. The Council made clear  
13 that 2011 salmon management would be governed by the terms of the  
14 current FMP at that time. AR 1574; *see also* AR 1300.

17 C. Management of the Pacific Salmon Fishery in Recent Years.

18 The SRFC experienced a sudden decline in 2007, with an  
19 escapement of 91,374 adults, despite the forecasted escapement of  
20 more than 265,000. AR 4487; AR 869-70. From 2007 until 2009, SRFC  
21 escapements were the lowest ever observed (87,940 spawners in 2007,  
22 64,456 in 2008, and 39,530 in 2009, respectively). 75 Fed. Reg.  
23 24,482, 24,484 (May 5, 2010); AR 870. The crash has generally been  
24 attributed to adverse ocean conditions. AR 1207, 1212. However,  
25 freshwater conditions and fishery management also played a role. AR  
26 869-70.  
27  
28

1 A NMFS workgroup responsible for evaluating the stock collapse  
2 found that the Central Valley Index ("CVI") forecasting method used  
3 to estimate the 2007 escapement was biased. See AR 870. For the  
4 2008 season, NMFS developed a new abundance index, the Sacramento  
5 Index ("SI"), to replace the CVI. AR 3834. The SI was utilized from  
6 the 2008 season onwards. AR 3856. The SI reflects the sum of (1)  
7 SRFC ocean fishery harvest south of Cape Falcon between September 1  
8 and August 31, (2) SRFC impacts from "non-retention ocean fisheries"  
9 when they occur, (3) the recreational harvest of SRFC in the  
10 Sacramento River Basin, and (4) SRFC adult escapement. AR 5007. The  
11 SI is forecast annually using a linear regression model. *Id.* Along  
12 with the estimated value, 95% prediction intervals are calculated.  
13 *See id.* There is only a 2.5% chance that actual abundance will be  
14 less than the low end of the prediction interval and a 2.5% chance  
15 that it will be greater than the top end. The Chinook salmon  
16 fisheries south of Cape Falcon were largely closed in 2008 and 2009  
17 in response to low preseason SI abundance forecasts for SRFC. 75  
18 Fed. Reg. 24,482 at 24,484.

21 For the 2010 season, the SI forecasted an abundance of 245,483  
22 adult SRFC, with the upper bound of the 95% prediction interval at  
23 532,657 and the lower bound at zero. AR 4796. In its March 2010  
24 guidance letter, NMFS informed the Council that, because SRFC had not  
25 met its conservation objective from 2007 to 2009, it had triggered an  
26 "overfishing concern" and would be reported to Congress as  
27

1 "overfished" and that the two-year deadline for a rebuilding plan was  
2 triggered. AR 1052. NMFS provided guidance that, until a rebuilding  
3 plan is implemented, a risk-averse management approach should be  
4 adopted, given the recent trend in SRFC adult escapement. *Id.* NMFS  
5 advised the Council to adopt a conservative approach to management of  
6 SRFC in 2010 by structuring potential fisheries to target escapement  
7 around the upper end of the SRFC conservation objective range. *Id.*  
8 The Council adopted measures designed to achieve a projected  
9 escapement level of 180,000 SRFC. AR 4953. Under the 2010  
10 management measures, California commercial fisheries were heavily  
11 constrained, with only eight days open south of Point Arena. AR  
12 4471. Escapement failed to meet the 180,000 SRFC objective; only  
13 125,353 hatchery and natural SRFC adults returned to the Sacramento  
14 River Basin. AR 4472.

17 D. Development and Adoption of the 2011 Management Measures.

18 The 2010 fishery showed that a total of 125,353 hatchery and  
19 natural area SRFC adults were estimated to have returned to the  
20 Sacramento River basin for spawning in 2010, just above the lower  
21 bound of the conservation objective. AR 4472. Using the SI, the  
22 forecasted SRFC adult abundance for 2011 was estimated to be 729,893  
23 adults. AR 5007. The upper bound of the 95% prediction interval was  
24 estimated to be 1,228,114, and the lower bound estimated to be  
25 231,671. AR 5007, 5033 (figures).

26 In the Preseason I report, the Technical Team noted a "concern"  
27  
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1 about the potential for the SI forecast to be biased high in years  
2 when the prior year's returns of two-year old fish (jacks) are  
3 weaker. AR 1569, 4994-95. Such was the case with the data used to  
4 make the 2009, 2010, and 2011 forecast, meaning that the potential  
5 for bias was present in 2011. AR 4995. The current model over-  
6 predicted escapement in two of the three years it has been used. AR  
7 4796, 5007. In 2009, the forecast escapement was 3.1 times actual  
8 escapement; in 2010 it was 1.6 times actual escapement. *Id.* Despite  
9 this, the Council's Scientific Statistical Committee ("SSC") endorsed  
10 the forecast as the best available science for use in 2011  
11 management. AR 1184.

13 The potential for bias in the SI was discussed at the Council's  
14 March 4-10, 2011 meeting, with the Council's scientific advisors  
15 noting the potential for upward bias and recommending that management  
16 measures be crafted accordingly. AR 1184. The Council's advisors  
17 discussed whether the bias could be quantified and/or corrected, but  
18 concluded that, although the bias could be explained, neither  
19 quantification nor correction were possible. AR 1184; 1570 (partial  
20 transcription of Council meeting). The Council requested additional  
21 information on the issue, which was provided later that day. AR  
22 1570-71; AR 808. The supplemental presentation compared prior SI  
23 predictions with the jack cohort strength for those years (i.e.,  
24 decreasing, similar, or increasing, as was the case in 2011). AR  
25 809. While this provided some evidence that the SI forecast could be  
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1 biased high under the condition of increasing jack escapement, the  
2 Council was advised that "the pattern does not suggest that a  
3 positive bias in the forecast in 2011 would be a foregone  
4 conclusion." *Id.* The Council was also advised that ocean fisheries  
5 would likely be constrained due to concern for other stocks as well  
6 as NMFS's guidance to target the upper end of the conservation  
7 objective, and that these constraints would act as an effective  
8 "buffer" to any potential bias in the SI forecast. AR 810. To  
9 illustrate this point, it was noted that if the 2011 SI forecast of  
10 729,893 was arbitrarily reduced by one half, and the stock  
11 experienced a plausible exploitation rate of 0.50, the projected  
12 escapement of SRFC would be approximately 182,000 adults, still  
13 exceeding the conservation objective. *Id.*

14  
15  
16 The 2010 SRFC overfishing concern was also on the Council's  
17 agenda for its March meeting. The FMP required the Council to  
18 consider the stock assessment on factors causing the overfishing  
19 concern, to identify criteria to end the concern, specify actions to  
20 ensure the stock's conservation objective was met, and consider any  
21 other actions arising from the stock assessment. AR 1195. The  
22 Council requested the Technical Team utilize the Lindley (2009)  
23 report as a starting point for the stock assessment. *Id.* Doing so,  
24 the Council's advisors updated the report with additional data and  
25 analyses in order to assess the three broods associated with the  
26 2007-2009 returns. *Id.* The assessment concurred with the Lindley  
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1 (2009) finding that ocean conditions were the proximate cause of the  
2 SRFC collapse, while also noting that problems in the freshwater  
3 environment effect survival of fish that migrate through the system.  
4 AR 1212.

5 The report also, alternatively employed the preliminary proposed  
6 alternatives from Amendment 16 to evaluate whether SRFC were  
7 "overfished" or had been subject to "overfishing." AR 1212-14.  
8 Under the Amendment 16 alternatives, SRFC would not have been  
9 declared overfished or subject to overfishing during the same time  
10 period. *Id.* The report also recommended criteria for ending the  
11 overfishing concern, utilizing the preliminary proposed Amendment 16  
12 criteria for finding a stock to be in "rebuilt" status: a three-year  
13 geometric mean escapement exceeding 122,000. AR 1214. Using this  
14 measure, the overfishing concern would be ended with an escapement of  
15 354,412 in 2011. *Id.* However, the Council recognized that since  
16 they were acting under the current FMP, not including Amendment 16,  
17 they should utilize the criteria set forth in the FMP to end an  
18 overfishing concern. AR Audiofile 3/6/11 AM2, 1:28:00-1:31:00. The  
19 Council unanimously decided to use the existing, "default" criteria,  
20 which is satisfied when a stock meets its conservation objective, as  
21 SRFC did after the 2010 season. *Id.*; *see also* AR 1591.

22 Three management alternatives were proposed for public review at  
23 the end of the March meeting. AR 1366-92, 1394-1422. The Council  
24 then issued the Preseason II report analyzing the three proposed  
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1 alternatives. For SRFC, the forecast of 729,893 adults was just  
2 slightly lower than the average SI for years 1983-2010. AR 5202. As  
3 in 2010, NMFS provided guidance that the management alternatives  
4 should target an escapement around the upper end of the conservation  
5 objective. AR 651-52. Predicted SRFC escapements under the three  
6 alternatives ranged from 368,700 to 376,800, AR 5235, 5215, 5223,  
7 more than double the upper end of the conservation objective, AR  
8 5203.

9  
10 At the April meeting, the Council took final action on the 2011  
11 management measures. AR 1606. It subsequently issued the Preseason  
12 III report summarizing the Council's analysis of the adopted  
13 measures. AR 5256. The adopted measures were predicted to result in  
14 an SRFC escapement of 377,000 adults, AR 5271, more than double the  
15 target recommended by NMFS (the 180,000 upper end of the conservation  
16 objective) and more than three times the lower end of the  
17 conservation objective (122,000), see AR 5263. The adopted measures  
18 allow for significantly more fishing opportunity than recent years.  
19 AR 5267, 5291-92 (figures).

20  
21  
22 E. Relevant NEPA Analysis

23 The three preseason reports also contained the relevant NEPA  
24 analysis. The Preseason I report contained the statement of purpose  
25 and need, a summary of the affected environment, and a description  
26 and analysis of the No-Action Alternative. AR 4993. The No-Action  
27 Alternative was assumed to repeat the previous year's management  
28

1 measures without alteration. AR 4996. This alternative would not  
2 take into account the current status of salmon stocks and would  
3 result in over- or under-harvest of some stocks. *Id.* Given the 2011  
4 forecast, a repeat of the 2010 regulations was expected to result in  
5 an escapement of 572,600 natural and hatchery adult SRFC, well above  
6 the upper end of the conservation objective (180,000). AR 5058. The  
7 Council concluded that the No-Action Alternative would not meet the  
8 purpose and need for the proposed action because it would result in  
9 unnecessarily conservative management measures for some stocks, while  
10 not satisfying the Endangered Species Act ("ESA") standards for  
11 others. AR 5060.

12  
13 The Preseason II report described and analyzed three alternative  
14 fishery management measures. AR 5191; 5198-99. The three  
15 Alternatives proposed various levels of fishing effort for various  
16 stocks and areas. While there were constraints south of Cape Falcon  
17 due to other stocks, a relatively high SRFC abundance forecast would  
18 allow greater commercial fishing opportunity compared to recent  
19 years. AR 5199. The recreational fishery alternatives all had a  
20 greater minimum size limit in some areas and were proposed to open  
21 April 2 and run until mid-September through mid-November, depending  
22 on the alternative. AR 5200. While the three alternatives were  
23 predicted to result in similar SRFC escapements, there were  
24 significant differences for other stocks and with respect to the  
25 socioeconomic impact on fishermen and associated fishing communities.  
26  
27  
28

1 See AR 5208, 5241-44. In addition to impacts on target stocks and  
2 socioeconomics, the Preseason II report evaluated the impact of the  
3 three alternatives on ESA-listed species, other non-target species,  
4 habitat, and ecosystem function. AR 5200-10. The report concluded  
5 that no significant environmental impacts will result from final  
6 regulations selected from any of the three alternatives. AR 5210.  
7

8 The Preseason III report, analyzing the Council's selected  
9 alternative, acted as the NEPA description of the preferred  
10 alternative. AR 5256. NMFS combined all three of these reports into  
11 a single EA with a preface guiding the reader to the relevant NEPA  
12 analysis in each, document. AR 30-31. In April 2011, NMFS issued a  
13 FONSI analyzing each of the CEQ criteria for evaluating the  
14 significance of the action. AR 23. In addressing the criterion on  
15 uncertainty, NMFS found that, while there is some inherent  
16 uncertainty involved in projecting stock abundance in a given year,  
17 "such uncertainty is addressed through precautionary management  
18 measures, and weak stock management which results in lower impacts on  
19 healthy stocks which are intermixed with weak stocks in the fishery."  
20 AR 26.  
21

22  
23 F. NMFS's Approval of the Regulations.

24 NMFS approved the Council's management measures on April 27,  
25 2011. AR 14. The decision memo provided additional information on  
26 several issues, including the uncertainty of the SRFC forecast.  
27 After noting that the expected SRFC escapement is dependent on other  
28

1 management constraints, the decision memo states:

2 The Council questioned the STT about their comments on  
3 forecast bias and whether the bias could be accounted for  
4 or otherwise quantified. The STT provided an analysis  
5 regarding the question of bias and other indicators related  
6 to forecast certainty. In the end, the Council and STT were  
7 satisfied that the anticipated escapement of 379,000, twice  
8 the upper end of the conservation objective, was sufficient  
9 to account for uncertainty and provide confidence that that  
10 the conservation objective escapement range would be met.

11 AR 20-21.

12 IV. ANALYSIS

13 A. Threshold/Jurisdictional Issues.

14 1. The Council and Doe Defendants.

15 The Complaint names the Council and Does 1-100 as defendants.  
16 Federal Defendants move to dismiss of the Council on the ground that  
17 it is not an "agency" within the meaning of the APA. *See, e.g., Gen.*  
18 *Category Scallop Fishermen v. U.S. Dept. of Commerce*, 635 F.3d 106,  
19 112 n.15 (3d Cir. 2011); *J.H. Miles & Co., Inc. v. Brown*, 910 F.  
20 Supp. 1138, 1157-59 (E.D. Va. 1995). The Doe Defendants have not  
21 been identified by name or capacity. Plaintiff does not object to  
22 the dismissal of these parties. PFMC and the Doe Defendants are all  
23 DISMISSED WITH PREJUDICE.

24 2. Standing.

25 a. General Legal Standard.

26 Standing is a judicially created doctrine that is an essential  
27 part of the case-or-controversy requirement of Article III. *Pritikin*  
28 *v. Dept. of Energy*, 254 F.3d 791, 796 (9th Cir. 2001) (citing *Lujan*  
*v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "To satisfy the

1 Article III case or controversy requirement, a litigant must have  
2 suffered some actual injury that can be redressed by a favorable  
3 judicial decision." *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67,  
4 70 (1983). "In essence the question of standing is whether the  
5 litigant is entitled to have the court decide the merits of the  
6 dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498  
7 (1975).  
8

9 To have standing, a plaintiff must show three elements.

10 First, the plaintiff must have suffered an "injury in  
11 fact"-an invasion of a legally protected interest which is  
12 (a) concrete and particularized and (b) actual or imminent,  
13 not conjectural or hypothetical. Second, there must be a  
14 causal connection between the injury and the conduct  
15 complained of-the injury has to be fairly traceable to the  
16 challenged action of the defendant, and not the result of  
17 the independent action of some third party not before the  
18 court. Third, it must be likely, as opposed to merely  
19 speculative, that the injury will be redressed by a  
20 favorable decision.

21 *Lujan*, 504 U.S. at 560-61 (internal citations and quotations  
22 omitted).

23 The Supreme Court has described a plaintiff's burden of proving  
24 standing at various stages of a case as follows:

25 Since [the standing elements] are not mere pleading  
26 requirements but rather an indispensable part of the  
27 plaintiff's case, each element must be supported in the  
28 same way as any other matter on which the plaintiff bears  
the burden of proof, i.e., with the manner and degree of  
evidence required at the successive stages of the  
litigation. At the pleading stage, general factual  
allegations of injury resulting from the defendant's  
conduct may suffice, for on a motion to dismiss we presume  
that general allegations embrace those specific facts that  
are necessary to support the claim. In response to a  
summary judgment motion, however, the plaintiff can no  
longer rest on such "mere allegations," but must "set  
forth" by affidavit or other evidence "specific facts,"  
Fed. Rule Civ. Proc. 56(e), which for purposes of the  
summary judgment motion will be taken to be true. And at

1 the final stage, those facts (if controverted) must be  
2 supported adequately by the evidence adduced at trial.

3 *Id.* at 561; *see also Churchill County v. Babbitt*, 150 F.3d 1072, 1077  
4 (9th Cir. 1998).

5 b. Injury-In-Fact and Causation.

6 Plaintiff first must establish that it has suffered an injury in  
7 fact, which *Lujan* defines as "an invasion of a legally protected  
8 interest which is (a) concrete and particularized; and (b) actual or  
9 imminent, not 'conjectural or hypothetical.'" 504 U.S. at 560  
10 (internal citations omitted). The second standing requirement,  
11 causation, requires that the injury be "fairly traceable" to the  
12 challenged action of the defendant, and not be "the result of the  
13 independent action of some third party not before the court." *Tyler*  
14 *v. Cuomo*, 236 F.3d 1124, 1132 (9th Cir. 2000). The causation element  
15 is lacking where an "injury caused by a third party is too tenuously  
16 connected to the acts of the defendant." *Citizens for Better*  
17 *Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 975 (9th Cir. 2003).  
18  
19

20 (1) Purported Threat of Additional Obligations to  
21 Protect SRFC.

22 SJRGA's members variously hold riparian and pre-1914 rights of  
23 appropriation, water rights permits and licenses issued by the SWRCB,  
24 and water service contracts with the U.S. Bureau of Reclamation.  
25 Nees Decl., Doc. 63, at ¶ 3; Sweigard Decl., Doc. 65, at ¶ 4;  
26 Jacobsma Decl., Doc. 66, at ¶ 5, Knell Decl., Doc. 62, at ¶ 6; Short  
27 Decl., Doc. 64, at ¶ 5. SJRGA member agencies own and/or operate the  
28

1 major non-CVP and non-SWP facilities on the San Joaquin, Stanislaus,  
2 Tuolumne, and Merced Rivers. Westcott Decl., Doc. 61, at ¶ 7. OID  
3 and SSJID hold water rights on the Stanislaus River that are senior  
4 to Reclamation's. Knell Decl., Doc. 62, at ¶ 7. Since 1988, New  
5 Melones has been operated under an agreement that recognizes and  
6 satisfies these senior rights. *Id.*

8 (a) Injury-In-Fact.

9 Plaintiff does not contend that its members' water rights have  
10 already suffered or presently suffer impairment as a result of the  
11 2011 management measures.<sup>3</sup> Rather, Plaintiff contends the 2011  
12 management measures "threaten" to burden its members' water rights by  
13 imposing additional obligations upon them to protect SRFC and, citing  
14 *Central Delta Water Agency v. U.S. Bureau of Reclamation*, 306 F.3d  
15 938, 947 (9th Cir. 2002), that such a "possibility of future,  
16 threatened injury" can be sufficient to confer standing. Doc. 59 at  
17 23.

18  
19 In *Central Delta*, two private owners of farmland adjacent to  
20 channels of the Delta sued Reclamation over the agency's planned  
21 operation of New Melones Reservoir, which were "highly likely" to  
22

23  
24 <sup>3</sup> Nor does Plaintiff contend that its members' water rights have diminished in  
25 economic value. Rather, SJRGA's argument is that they will at an unknown time in  
26 the future be required to put their water rights to instream fisheries uses, to the  
27 detriment of its members' interests. Therefore, Federal Defendants' citation to  
28 *Barnum Timber Co. v. EPA*, 633 F.3d 894, 898 (9th Cir 2011), which requires a  
plaintiff claiming reduction of property value to include "specific, concrete, and  
particularized" allegations of such diminution at the pleading stage, is not  
directly on point. Regardless, under *Lujan*, at the summary judgment stage,  
Plaintiff must provide concrete and particularized evidence of injury that is  
causally linked to the challenged action. 504 U.S. at 560-61.



1 cause the salinity of the water plaintiffs used to irrigate their  
2 crops to increase. *Id.* at 947. There was "little dispute" that  
3 changed salinity conditions in waterways adjacent to plaintiffs'  
4 farms would be "fairly traceable" to the Bureau's planned operation  
5 of New Melones. The Ninth Circuit concluded that the necessary  
6 showing for standing purposes is not that existing salinity standards  
7 "had already been exceeded, or that plaintiffs' crops had already  
8 been damaged by excessively saline water, but that plaintiffs face  
9 significant risk that the crops that they have planted will not  
10 survive as a result of the Bureau's decisions" regarding operations  
11 of New Melones. *Id.* at 948.

13 Applying this standard here, Plaintiff has to establish that it  
14 faces "significant risk" that the 2011 fishery management measures  
15 will burden its members' water rights. Plaintiff asserts that "if  
16 the 2011 management measures result in less SJRFC<sup>4</sup> escapement, SJRGA  
17 members could be subject to remedial action by the [State Water  
18 Resources Control Board ("SWRCB")] and others in the form of  
19 draconian demands to bypass flows or release stored water, regardless  
20 of whether they are responsible." Doc. 59 at 24. Such "draconian  
21 demands" would, in theory constitute "injury-in-fact," if Plaintiff  
22 could demonstrate that they would eventuate.

24 The Complaint alleges that "Section 3406(b)(1) of the Central  
25

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26  
27 <sup>4</sup> Plaintiff shifts between referencing SJRFC, rather than SRFC. Presumably this is  
28 because Plaintiff's members operate on the San Joaquin River, where only SJRFC  
reside. The 2011 management measures do not treat the SJRFC separately from the  
SRFC.

1 Valley Project Improvement Act ('CVPIA') (Public Law 102-575) directs  
2 the Secretary of the Interior to develop and implement a program that  
3 makes all reasonable efforts to at least double natural production of  
4 anadromous fish in California's Central Valley streams on a long-  
5 term, sustainable basis." Doc. 1 at ¶ 173. SRFC are such a species.  
6 More pertinent to Plaintiff, water quality standards imposed by the  
7 SWRCB also contain a "narrative salmon doubling objective," which  
8 requires that "[w]ater quality conditions shall be maintained,  
9 together with other measures in the watershed, sufficient to maintain  
10 a doubling of natural production of Chinook salmon from the average  
11 production of 1967-1991, consistent with the provisions of State and  
12 federal law." *SWRCB Cases*, 136 Cal. App. 4th 674, 703 (2006). To  
13 contribute to meeting this narrative salmon protection standard, the  
14 SWRCB's Bay-Delta Plan set flow objectives for both the Sacramento  
15 and San Joaquin Rivers. *See id.* at 775-76.

18 The SWRCB acknowledged in the 1995 Bay-Delta Plan that there was  
19 some "uncertainty" whether implementation of these flow objectives  
20 alone would achieve the narrative objective for salmon protection,  
21 but nothing obligates the Board to impose additional conditions on  
22 any particular schedule, if at all. *Id.* at. 776-77. "As part of the  
23 flow objectives in the 1995 Bay-Delta Plan, the [SWRCB] set minimum  
24 monthly average flow rates on the San Joaquin River at Vernalis...."  
25 *Id.* at 702. Currently, the Vernalis Adaptive Management Plan  
26 ("VAMP"), a voluntary arrangement allocating responsibility for  
27

1 meeting some but not all of the Vernalis flow objectives for a twelve  
2 year period to members of the SJRGA, who in exchange would receive \$3  
3 million per year from Reclamation and \$1 million per year from the  
4 California Department of Water Resources ("DWR"). *Id.* at 706-10.  
5 The SWRCB "candidly acknowledged" that VAMP might not provide  
6 protection for the Chinook "equivalent to that provided by the  
7 objectives." *Id.* at 709.

8  
9 The SWRCB has determined that additional flow is necessary and  
10 issued Draft San Joaquin River Fish and Wildlife Flow Objectives on  
11 April 1, 2011. Pltf's Request for Judicial Notice ("PRJN"), Ex. A,  
12 Doc. 60-1. Bureau of Reclamation comments on the Draft Flow  
13 Objectives suggest that their implementation would, in some years,  
14 require nearly the entire flow of the Stanislaus, Tuolumne, and  
15 Merced Rivers. PRJN, Ex. C, Doc. 60-3 at 26 (indicating that in  
16 critical years, implementing the doubling goal would require 97% of  
17 the flow of the Stanislaus, 76% of the Tuolumne, and 86% of the  
18 Merced). Plaintiff has not discussed the likelihood that flow  
19 objectives of this nature would actually be imposed. That they are  
20 discussed in the Bureau's comments indicates they have been  
21 considered, but this does not establish that Plaintiff faces  
22 "significant risk" that they would be adopted and implemented.<sup>5</sup> This  
23 is a failure by Plaintiff to prove the harm of which they complain is  
24  
25

---

26 <sup>5</sup> Delta Intervenors argue that in order to show that its member's water rights  
27 would be impaired by a decline in salmon abundance, SJRGA would "have to show that  
28 such water was available for [its members'] use and not otherwise required to be  
allocated for fishery, other in-stream uses, and downstream senior water rights."  
Doc. 77-1 at 8. This is yet another failure of proof by Plaintiff.

1 sufficiently imminent.

2  
3 (b) Causation.

4 Even if, *arguendo*, the Draft Flow Objectives were likely to  
5 impose additional burdens on Plaintiff's members in the near future,  
6 Plaintiff has entirely failed to demonstrate that any additional flow  
7 prescriptions would be tied to SRFC or SJRFC abundance. A "chain of  
8 causation [may have] more than one link, but [may not be]  
9 hypothetical or tenuous...." *Nat'l Audubon Soc'y v. Davis*, 307 F.3d  
10 835, 849 (9th Cir. 2002). It is Plaintiff's burden to establish by a  
11 preponderance of the evidence that its theory of causation is at  
12 least "plausib[le]." *Id.*; see also *Envtl. Def. Ctr. v. EPA*, 344 F.3d  
13 832, 867 (9th Cir. 2003) ("A plaintiff who shows that a causal  
14 relation is 'probable' has standing, even if the chain cannot be  
15 definitively established."). To successfully establish causation,  
16 Plaintiff must demonstrate the "plausibility" of at least two links  
17 in the causal chain: (1) that the 2011 management measures will  
18 decrease SRFC abundance; and (2) that any such decrease will result  
19 in harm in the form of additional burdens upon Plaintiff's members'  
20 water rights. Arguably, the 2011 management measures, which permit  
21 certain levels of SRFC harvest, will decrease SRFC escapement below  
22 levels that might exist under a different management scheme that  
23 permits less harvest. However, Plaintiff has not demonstrated any  
24 link between escapement in 2011 and additional flow burdens.

25  
26  
27 The SWRCB's April 1, 2011 "Notice of Preparation of  
28

1 Environmental Documentation" describes the Draft flow objectives in  
2 general terms. PRJN, Ex. A, Doc. 60-1. The Draft revises the  
3 "narrative" water quality objective to call for flows at various  
4 points on the San Joaquin River sufficient to:

5  
6 Maintain flow conditions from the San Joaquin River  
7 Watershed to the Delta at Vernalis, together with other  
8 reasonably controllable measures in the San Joaquin River  
9 Watershed sufficient to support and maintain the natural  
10 production of viable native San Joaquin River watershed  
11 fish populations migrating through the Delta.  
12 Specifically, flow conditions shall be maintained, together  
13 with other reasonably controllable measures in the San  
14 Joaquin River watershed, sufficient to support a doubling  
15 of natural production of Chinook salmon from the average  
16 production of 1967-1991, consistent with the provisions of  
17 State and federal law. Flow conditions that reasonably  
18 contribute toward maintaining viable native migratory San  
19 Joaquin River fish populations include, but may not be  
20 limited to, flows that mimic the natural hydrographic  
21 conditions to which native fish species are adapted,  
22 including the relative magnitude, duration, timing, and  
23 spatial extent of flows as they would naturally occur.  
24 Indicators of viability include abundance, spatial extent  
25 or distribution, genetic and life history diversity,  
26 migratory pathways, and productivity.

27 *Id.* at p. 10 of 21. This narrative specifically calls for flows that  
28 would "mimic the natural hydrograph," and does not demonstrate any  
intent to tie flows to annual escapement data.

Plaintiff cites the Notice of Preparation's Attachment 2, page  
1, for the proposition that "[w]hile the proposed objective is based  
on a percentage of unimpaired flow, the percentage of flow will be  
based on the percentage necessary to double the natural production of  
SJRFC." Doc. 84 at 6. On this page, the Board states that it has  
determined that "more flow of a more natural pattern is needed from

1 February through June from the San Joaquin River watershed to  
2 Vernalis to achieve the narrative San Joaquin River flow objective."  
3 PRJN, Ex. A, Doc. 60-1, at p. 10 of 21. The Board then describes how  
4 the numeric flow objectives could look, using a placeholder "X" in  
5 lieu of actual flow requirements:  
6

7 Thus, the State Water Board has determined that  
8 approximately X percent (e.g. 20-60 percent) of unimpaired  
9 flow is required from February through June from the  
10 Merced, Tuolumne, and Stanislaus Rivers on a X-day average  
11 (e.g. 14-day) to a maximum of X cubic-feet per second (cfs)  
12 (e.g. 20,000 cfs) at Vernalis, unless otherwise approved by  
13 the State Water Board as described below. This flow is in  
14 addition to flows in the San Joaquin River from sources  
15 other than the Merced, Tuolumne, and Stanislaus Rivers. In  
16 addition, the State Water Board has determined that base  
17 flows of X cfs (e.g. 1,000 cfs) on a X-day average (e.g.  
18 14-day) is required at Vernalis at all times during the  
19 February through June period. Water needed to achieve the  
20 base flows at Vernalis should be provided on a generally  
21 proportional basis from the Merced, Tuolumne, and  
22 Stanislaus Rivers. The actions necessary to meet the above  
23 requirements are described below.

24 *Id.* at p. 12 of 21. The actual flow parameters will be defined at a  
25 later date "based on subsequent analysis." *Id.* Nothing in this  
26 document defines the magnitude of proposed flow objectives, let alone  
27 indicates likelihood that these flow parameters will be tied to  
28 annual escapement figures.

29 Plaintiff cites the Bureau of Reclamation's February 8, 2011  
30 comments to the SWRCB on possible revisions to the Flow Objectives.  
31 The Bureau recommends that the SWRCB consider the following "specific  
32 goals that would contribute to meeting the overall salmonid doubling  
33 goal for the San Joaquin Basin":  
34

1 Biological Objectives for use as biological metrics:

- 2 • To achieve a survival rate of 0.50 for emigrating  
3 salmonid smolts in the Delta.  
4 • To achieve survival of emigrating salmonid smolts in  
5 each of the tributaries (Stanislaus, Tuolumne and  
6 Merced rivers) that result in an average juvenile  
7 production rate of 250 emigrating juveniles (measured  
8 near the mouth) per adult spawner in each San Joaquin  
9 River tributary.  
• No delay or blocking of adult salmonids during their  
upstream migration to the San Joaquin basin and its  
tributaries due to the effects of water operations  
(e.g. Stockton Deepwater Ship Channel dissolved oxygen  
and temperature issues).

10 Habitat and Flow conditions required to achieve biological  
11 objectives

- 12 • Provide adequate flows to connect the San Joaquin  
13 River and its tributaries to existing floodplains for  
14 three months during the February through June period  
15 to realize improved productivity of macro  
16 invertebrates, increased growth rates of juvenile  
17 salmonids, and provide refuge from predators.  
18 • Provide significantly high enough flows to activate  
19 geomorphic processes in the San Joaquin River and its  
20 tributaries to: mobilize fine sediments, deposit fines  
21 in riparian floodplain habitats, and activate natural  
22 creation of floodplain habitat.  
• Provide flow volumes that contribute to a suitable  
water temperature regime necessary to maximize  
survival and growth of incubating eggs, rearing, and  
migrating salmonids.  
• Provide flows to maximize quality (low siltation  
presence and low armoring of spawning habitat) and  
provide an appropriate quantity (with low rates of  
superimposition) of spawning habitat for adult  
salmonids.

23 PRJN, Ex. C, Doc. 60-3, at 15-16. The main focus of these goals is  
24 to improve the likelihood that the offspring of any migrating adult  
25 will survive to exit the Delta to the ocean.

26 The Bureau's comments indicate, as logic suggests, that there is  
27 some connection between harvest and the measures that will be needed  
28

1 to meet the doubling goal. The Bureau engaged in preliminary life-  
2 cycle modeling exercises to demonstrate to the SWRCB the kinds of  
3 analyses it should undertake when setting the Flow Objectives. These  
4 exercises considered harvest as one factor affecting the speed at  
5 which improvements in smolt survival would permit achievement of the  
6 doubling goal:  
7

8 In 2010, there were 62,176 juveniles estimated to have  
9 arrived at Mossdale. With that starting population and  
10 survival through the Delta of 0.50 (given that tributary  
11 survival equals 0.3, there are 2500 eggs per adult, egg to  
12 fry survival is 0.333, and 50% of the adults produced are  
13 harvested), it would take 9 generations (27 years assuming  
14 adults return in year 3) to reach an adult production level  
15 of greater than 78,000 (80,442). With a survival rate  
16 through the Delta of 0.20 or 0.05 given the same starting  
17 population as the previous example, doubling never occurs  
18 and instead populations go extinct in 18 and 4 generations  
19 (54 and 12 years) respectively, given that all other  
20 parameters remain the same.

21 Survival through the Delta has not been greater than 0.20  
22 since 2001 of coded wire tagged fish used in the VAMP  
23 studies (although survival was not measured in 2007 or 2009  
24 and is not yet available for 2010). This illustrates just  
25 how dire present conditions are for juvenile salmon  
26 migrating through the Delta. To have viable and increasing  
27 populations in the San Joaquin basin, this modeling would  
28 indicate that survival through the Delta must be greater  
than 0.20

21 *Id.* at 19. Although Reclamation's focus is on improving survival  
22 through the delta, these analyses suggest that long-term harvest  
23 trends may impact the number of years it will take for freshwater  
24 measures to double salmon.  
25

26 Although there is a connection between harvest rate and the  
27 speed at which managers may achieve the salmon doubling goal, this  
28



1 does not mean there is a connection between the harvest rate in 2011  
2 and the actual flow prescriptions that may be imposed, if and when  
3 the SWRCB adopts additional flow objectives. Plaintiff's assertion  
4 of such a connection is contradicted by the fact that all of the  
5 documents they cite to demonstrate standing predate the adoption of  
6 the 2011 management measures. The Bureau's Comments were transmitted  
7 to the SWRCB in February 2011. The 2011 management measures were not  
8 adopted until April 2011. There is no plausible connection between  
9 this year's management measures and even the most preliminary of  
10 projections for any future Flow Objectives. If anything, the  
11 Bureau's comments suggest the results achieved from revised flow  
12 objectives may be impacted by a long-term harvest rates. Notably,  
13 Plaintiff has challenged here only the 2011 management measures, the  
14 implementation of which will impact a single year's escapement.  
15 Plaintiff has not raised a programmatic challenge to the Pacific  
16 Salmon FMP or the regulations that guide how harvest is set over  
17 longer time horizons. (Whether NMFS even possesses discretion under  
18 the MSA to appreciably modify harvest rates is not discussed by any  
19 party.)

22 Plaintiff has completely failed to demonstrate that it faces any  
23 "significant risk" that additional burdens will be placed upon its  
24 members' water rights to protect SRFC or SJRFC, let alone that any  
25 such risk is causally linked to the 2011 management measures.  
26 Plaintiff has not established injury-in-fact or causation as to its  
27  
28

1 "additional flow obligations" theory of standing.

2  
3 (2) Threat of Listing of SRFC or SJRFC.

4 Alternatively, Plaintiff argues that the 2011 management  
5 measures may lead to the future listing of SJRFC as threatened or  
6 endangered. NMFS has already determined that listing of SRFC is  
7 unwarranted, because the species is "is not presently in danger of  
8 extinction, nor is it likely to become so in the foreseeable future."  
9 64 Fed. Reg. 50,394, 50,402 (Sept. 16, 1999). NMFS reaffirmed this  
10 decision five years later. See 69 Fed. Reg. 19,975, 19,997 (Apr. 15,  
11 2004).<sup>6</sup> Plaintiff does not refer to evidence suggesting a change of  
12 SRFC's or SJRFC's ESA status is likely. Whether the 2011 management  
13 measures could lead to the listing of SJRFC or SRFC is pure  
14 speculation. See *In re ESA Section 4 Deadline Litig.*, --- F.R.D. ---  
15 , 2011 WL 4005349 (D.D.C. 2011) (even where FWS was obligated under  
16 settlement agreements with other parties to issue listing  
17 determination on various game species by a date certain, hunter  
18 plaintiffs could not establish standing based on their theory that  
19 the species might eventually be listed, as the settlement agreements  
20 did not obligate FWS to reach any particular result and substantive  
21 outcome of listing determinations was not before the court).

22  
23  
24  
25  
26 \_\_\_\_\_  
27 <sup>6</sup> Plaintiff repeatedly argues that SRFC are listed under the ESA as a "species of  
28 concern." This designation, which identifies species "about which NMFS has some  
concerns regarding status and threats, but for which insufficient information is  
available to indicate a need to list the species under the ESA," imposes no legal  
obligations, nor indicates imminent listing. 69 Fed. Reg. at 19,975.

1 c. Redressability.

2 Plaintiff bears the burden of proving that it is "likely, as  
3 opposed to merely speculative, that the injury will be redressed by a  
4 favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt'l*  
5 *Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Where redress of a  
6 plaintiff's harms depends on independent decisions of governmental  
7 entities not a party to the pending lawsuit, standing does not exist.  
8 *See Lujan*, 504 U.S. at 568-71, (plaintiffs had no standing to  
9 challenge regulation interpreting ESA § 7(a)(2) as being limited in  
10 geographic scope to projects undertaken in the United States and the  
11 high seas; redressability was speculative because agencies funding  
12 projects overseas were not parties to the case and maintained the  
13 challenged regulation was not binding upon them, therefore requested  
14 relief (termination of funding until consultation) was not likely to  
15 result from successful lawsuit). "There is no redressability, and  
16 thus no standing, where ... any prospective benefits depend on an  
17 independent actor who retains' broad and legitimate discretion the  
18 courts cannot presume either to control or to predict.'" *Glanton ex*  
19 *rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123,  
20 1125 (9th Cir. 2006) (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605,  
21 615 (1989)). In *Glanton*, the "[p]laintiffs claim[ed] that, if their  
22 suit [was] successful" in proving that the defendant, a pharmacy  
23 benefit manager, charged their health plans too much for prescription  
24 drugs, "the plans' drug costs [would] decrease, and that the plans  
25  
26  
27  
28

1 might then reduce contributions or co-payments." *Id.* The Ninth  
2 Circuit found no standing, explaining that "nothing would force [the  
3 health plans] to" pass any savings down to the plaintiffs and that  
4 the plans "would be free" to keep the savings for themselves. *Id.*

5 This case cannot redress the harm Plaintiff's members would  
6 suffer as a result of the SWRCB imposing additional burdens to meet  
7 old or new flow objectives, because those flow objectives are not  
8 tied to SRFC or SJRFC escapement.

9 Redress is arguably not a bar for Plaintiff's listing theory of  
10 standing. If escapement in 2011 were likely to cause the listing of  
11 SRFC or SJRFC, modifying the 2011 management measures might make  
12 listing less likely. However, Plaintiff has not established this  
13 causal link. The "listing" standing theory is misplaced for other  
14 reasons.  
15 reasons.

16  
17 d. Relaxed Causation and Redressability Standards in  
18 Procedural Injury Cases.

19 Plaintiff's NEPA claims are arguably subject to relaxed  
20 causation and redressability standards:

21 A showing of procedural injury lessens a plaintiff's burden  
22 on the last two prongs of the Article III standing inquiry,  
23 causation and redressability. Plaintiffs alleging  
24 procedural injury must show only that they have a  
25 procedural right that, if exercised, could protect their  
26 concrete interests.

27 *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226  
28 (9th Cir. 2008) (internal citations and quotations omitted). The  
reach of this relaxed standard has limits, however, excusing a  
plaintiff only from the requirement to plead that the procedurally

1 invalid agency action will, in fact, be modified once the proper  
2 procedures are followed:

3           There is this much truth to the assertion that "procedural  
4 rights" are special: The person who has been accorded a  
5 procedural right to protect his concrete interests can  
6 assert that right without meeting all the normal standards  
7 for redressability and immediacy. Thus, under our case law,  
8 one living adjacent to the site for proposed construction  
9 of a federally licensed dam has standing to challenge the  
10 licensing agency's failure to prepare an environmental  
11 impact statement, even though he cannot establish with any  
12 certainty that the statement will cause the license to be  
13 withheld or altered, and even though the dam will not be  
14 completed for many years. (That is why we do not rely, in  
15 the present case, upon the Government's argument that, even  
16 if the other agencies were obliged to consult with the  
17 Secretary, they might not have followed his advice.)

18 *Lujan*, 504 U.S. at 573 n. 7 (1992).

19           Nothing in the procedural injury standing jurisprudence relaxes  
20 any other aspect of the standing analysis, e.g. that there must be a  
21 causal connection between the government action and the alleged harm.  
22 Plaintiff's tenuous procedural injury theory does not rescue its  
23 standing theories.

24 e.   Zone of Interest/ Prudential Standing.

25           In addition to the constitutional requirements of Article III,  
26 courts have developed a set of prudential considerations to limit  
27 standing in federal court to prevent a plaintiff "from adjudicating  
28 'abstract questions of wide public significance' which amount to  
'generalized grievances' pervasively shared and most appropriately  
addressed in the representative branches." *Valley Forge Christian  
College v. Am. United for Separation of Church and State, Inc.*, 454  
U.S. 464, 474-75 (1982) (quoting *Warth*, 422 U.S. at 499-500). To

1 that end, "the plaintiff's complaint must fall within the zone of  
2 interests to be protected or regulated by the statute or  
3 constitutional guarantee in question." *Valley Forge*, 454 U.S. at 475  
4 (quoting *Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S.  
5 150, 153 (1970)). In cases arising under the APA, this requirement  
6 is particularly important given the limitations of 5 U.S.C. § 702,  
7 which "grants standing to a person 'aggrieved by agency action within  
8 the meaning of a relevant statute.'" *Ass'n of Data Processing Serv.*  
9 *Orgs.*, 397 U.S. at 153-54 (citing 5 U.S.C. § 702). The zone-of-  
10 interests test is not, however, meant to be especially onerous;  
11 rather, it "is intended to 'exclude only those whose interests are so  
12 marginally related to or inconsistent with the purposes implicit in  
13 the statute that it cannot reasonably be assumed that Congress  
14 intended to permit the suit.'" *Nat'l Ass'n of Home Builders v.*  
15 *United States Army Corps of Eng'rs*, 417 F.3d 1272, 1287 (D.C. Cir.  
16 2005) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399  
17 (1987)),

18  
19  
20 Federal Defendants and PCFFA maintain that Plaintiff's injuries  
21 do not fall within the zone of interest of either the MSA or NEPA.  
22

23 (1) Prudential Standing Under the MSA.

24 The purpose of the MSA is to "create[] sustainable fisheries for  
25 the benefit of fishermen and fishing communities." *N. Carolina*  
26 *Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 84 (D.D.C.  
27 2007). Plaintiffs with economic fishing interests have been found to  
28

1 have prudential standing. *Id.* Plaintiff cites *Clarke*, 479 U.S. at  
2 400, for the general proposition that a plaintiff only need show that  
3 its interests share a "plausible relationship" to the policies  
4 underlying each statute. Plaintiff claims an indirect interest in  
5 seeing the fishery is managed "sustainably." It contends NMFS is  
6 managing the fishery improperly to the detriment of the fisheries'  
7 long-term viability. Although it is a close call, Plaintiff's  
8 interest in a sustainable fishery is "plausibly related" to the  
9 policies underlying the MSA. Regardless, Plaintiff's standing  
10 theories cannot survive on other grounds.  
11

12  
13 (2) Prudential Standing Under NEPA.

14 Defendants also maintain that Plaintiff lacks prudential  
15 standing under NEPA. PCFFA cites *Nevada Land Action Ass'n v. U.S.*  
16 *Forest Serv.*, 8 F.3d 713 (9th Cir. 1993), in which rancher plaintiffs  
17 challenged the Forest Service's issuance of a Land and Resource  
18 Management Plan ("LRMP"), asserting that the LRMP would result in  
19 drastically reduced grazing levels. *Id.* at 715. Among other claims,  
20 plaintiff challenged the Forest Service's compliance with NEPA. The  
21 Ninth Circuit found that plaintiffs lacked prudential standing to  
22 bring their NEPA claim, because "[t]he purpose of NEPA is to protect  
23 the environment, not the economic interests of those adversely  
24 affected by agency decisions ... Therefore a plaintiff who asserts  
25 purely economic injuries does not have standing to challenge an  
26 agency action under NEPA." *Id.* at 716. Plaintiffs specifically  
27  
28

1 argued that in addition to economic injury, the LRMP also affected  
2 the "human environment" by causing a "lifestyle loss." *Id.* The  
3 Ninth Circuit rejected this argument, reasoning that plaintiffs could  
4 not invoke NEPA to prevent a "lifestyle loss" when "the lifestyle in  
5 question is damaging to the environment," and where plaintiff's suit  
6 is "more likely to frustrate than to further" the objectives of NEPA.  
7 *Id.*

8  
9 Unlike *Nevada Land Action*, Plaintiff asserts that it has a  
10 direct interest in an environmental value, the sustainability of the  
11 SRFC fishery (and the arguably related abundance of SJRFC), "which  
12 occupy rivers and streams where SJRGA member agencies have rights to  
13 water...." Doc. 84 at 8. That Plaintiff and its members hold this  
14 interest for largely economic reasons, rather than purely aesthetic  
15 or environmental ones, does not transform that interest from a  
16 permissible environmental interest into an impermissible economic  
17 one. *See Lujan*, 504 U.S. at 582 ("[W]e have no license to demean the  
18 importance of the interest that particular individuals may have in  
19 observing any species or its habitat, whether those individuals are  
20 motivated by esthetic enjoyment, an interest in professional  
21 research, or an economic interest in preservation of the species").  
22 Protecting SRFC and/or SJRFC is a goal that is compatible with NEPA.  
23 The zone of interest test does not bar Plaintiff's standing to bring  
24 its NEPA claim. Regardless, Plaintiff's standing theories fail on  
25 other grounds.  
26  
27  
28



1  
2 Federal Defendants and Defendant-Intervenors' motions for  
3 summary judgment that Plaintiff lacks standing are GRANTED;  
4 Plaintiff's cross motion is DENIED. Plaintiff has not demonstrated  
5 it is likely that the challenged action will cause any harm to its  
6 member's water rights.  
7

8 3. Mootness.

9 An issue is moot "when the issues presented are no longer 'live'  
10 or the parties lack a legally cognizable interest in the outcome."  
11 *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). If the parties  
12 cannot obtain any effective relief, any opinion about the legality of  
13 a challenged action is advisory. *Id.* "Mootness has been described  
14 as the doctrine of standing set in a time frame: The requisite  
15 personal interest that must exist at the commencement of the  
16 litigation (standing) must continue throughout its existence  
17 (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43,  
18 68 n.22 (1997) (citation and quotation omitted). "[A]n actual  
19 controversy must be extant at all stages of review, not merely at the  
20 time the complaint is filed." *Id.* at 67.  
21  
22

23 PCFFA argues that Plaintiff's claims are moot because "[t]he  
24 season is quickly coming to a close." Doc. 80-1 at 9. Their  
25 argument continues:

26 All commercial fishing off the coast of California  
27 terminates on September 30, with the exception of a 12-day  
28 fishery off Point San Pedro in early October. AR 5275.  
All commercial fishing off the coast of Washington State

1 terminates on September 15, and fishing off the coast of  
2 Oregon terminates on August 31 excepting waters between  
3 Cape Falcon and Humbug Mountain, which reopen during the  
4 month of October. *Id.* The recreational fisheries south of  
5 Pigeon Point, California end on September 18; the other  
6 recreational fisheries off the coasts of Washington,  
7 California and California north of Pigeon Point close  
8 between September 5 and October 30. No commercial or  
9 recreational fishing is permitted after October 31. *Id.*

7 Thus, the majority of plaintiff's claims will be moot by  
8 the time this Court hears this matter on September 28, and  
9 the balance will become moot shortly thereafter. *Id.* Even  
10 as to any fishing seasons which have not yet closed as of  
11 the date of this Court's hearing on plaintiff's summary  
12 judgment motion, as a practical matter, given the heavy  
13 investment of the commercial and recreational fishing  
14 industries in reliance on the fishing seasons recommended  
15 by the PFMC last April and approved by NMFS on May 4, 2011,  
16 it is far too late in the season for plaintiff to secure  
17 any effective relief for its alleged grievances.

13 Doc. 80-1 at 9-10.

14 The fact that "the majority" of the fishing season will be over  
15 by the time these cross-motions are heard necessarily means that some  
16 aspects of the fishing season will continue past the hearing date. A  
17 rapid ruling from the court in Plaintiff's favor could be followed by  
18 the issuance of remedial injunctive relief. Imminent mootness is not  
19 the same as mootness.<sup>7</sup> PCFFA's motion for summary judgment that  
20 Plaintiff's claims are moot is DENIED WITHOUT PREJUDICE.

22 It is not necessary to evaluate Plaintiff's alternative argument  
23 that its claims are not moot because they are capable of repetition  
24

25  
26 <sup>7</sup> Notably, the MSA absolutely precludes preliminary injunctive relief. 16 U.S.C. §  
27 1855(f) (1) (A); *Turtle Island Rest. Network v. U.S. Dept. of Commerce*, 438 F.3d 937,  
28 943 (9th Cir. 2006). Plaintiff can only petition the court to assign the matter  
for hearing at the earliest possible date and expedite the matter in every possible  
way. 16 U.S.C. § 1855(f) (4). The parties did not seek further expedition of the  
hearing, although the Court was available.

1 yet evading review.

2  
3 4. Ripeness.

4 The Delta Intervenors assert that SJRGA's claims are not ripe,  
5 because Plaintiff fails to show any "actual damage to any of its  
6 members that has been caused by the management measures or a decline  
7 in salmon abundance, or that any injury is imminent." Doc. 77-1 at  
8 7. Delta Intervenors cite *American Council on Education v. FCC*, 451  
9 F.3d 226, 236 (D.C. Cir. 2006), which held that "a speculative fear  
10 about possible future agency action does not present a case or  
11 controversy ripe for judicial review." But, *American Council*  
12 concerned whether a challenge could be brought against a "possible  
13 future" action by the FCC. Here, the agency action complained of,  
14 the 2011 management measures, have already been adopted. Whether the  
15 harms claimed by Plaintiff are imminent goes to standing, not  
16 ripeness. Delta Intervenors' motion for summary judgment that  
17 Plaintiff's claims are unripe is DENIED.  
18

19  
20 B. Magnuson-Stevens Act Claims.

21 1. Assessment of SRFC's Status.

22 Although Plaintiff does not raise a relevant legal claim, the  
23 parties raise a debate over the health of the SRFC population.  
24 Plaintiff claims that SRFC have experienced a "consistent population  
25 decline" and a "recent and unprecedented population crash." Doc. 59 at  
26 17. Uncontradicted evidence shows that prior to 2007, SRFC failed to  
27 meet its conservation objective in only five of the prior 26 years,  
28

1 surpassing the high end of the conservation objective in 18 of those  
2 years. AR 4493. Federal Defendants concede that the population  
3 numbers in 2007, 2008, and 2009 were cause for concern, but emphasize  
4 that the population rebounded in 2010 and that this type of  
5 fluctuation is not unprecedented. For example, from 1990 through  
6 1992, SRFC also failed to exceed the low end of the conservation  
7 objective range three years in a row, yet rebounded in the following  
8 year and then experienced an 11-year period of record high  
9 escapements. AR 4487. Plaintiff rejoins that during the 2007-2009  
10 crash, abundance fell faster than at any time in the historical  
11 record and ranked among three of the four worst escapement years ever  
12 recorded, with 2008 and 2009 being the worst. AR 5014. Deference is  
13 owed to the agency's expert analysis of the status of the species.  
14 *PCFFA v. Sec'y of Commerce*, 494 F. Supp. 626, 634 (N.D. Cal. 1980).  
15 Plaintiff has pointed to no record evidence establishing that the  
16 agency's description of the SRFC's status was unreasonable or  
17 erroneous.  
18  
19

20 Plaintiff rejoins: "even meeting the conservation objective does  
21 not necessarily indicate whether Fall Chinook abundance is stable in  
22 a manner consistent with state and federal law, which seek to protect  
23 and restore natural stocks." Doc. 84 at 2. Plaintiff contends  
24 Federal Defendants ignored the detrimental effects of hatchery  
25 stocks, "whether natural stocks are declining and specifically  
26 whether natural SJRFC are declining," and that "simply looking at  
27  
28

1 whether the conservation objective was met is irrelevant." *Id.* at 3.  
2 These arguments, not included in Plaintiff's initial motion and  
3 raised for the first time in opposition/reply, fail to acknowledge  
4 that the challenge the conservation objective, which is not  
5 challenged, is 122,000 - 180,000 natural and hatchery adult spawners.  
6

7 Plaintiff again emphasizes that NMFS "identified Fall Chinook as  
8 a candidate for listing" to suggest the population is in trouble.  
9 Plaintiff also misleadingly suggests that "if it is now the position  
10 of the United States that Fall Chinook are doing fine, SJRGA looks  
11 forward to NMFS 'de-listing' Fall Chinook." Doc. 84 at 1. But,  
12 designation as a "species of concern" is not synonymous with being  
13 "listed," nor does Plaintiff cite any evidence demonstrating that the  
14 species is likely to be listed. To the contrary, NMFS has twice  
15 determined that listing is not warranted. 64 Fed. Reg. at 50,402; 69  
16 Fed. Reg. at 19,997. Neither the SRFC as a whole or the SJRFC are  
17 listed under the ESA. The MSA mandates that NMFS permit harvest  
18 (i.e., maintain optimum yield) for commercial stocks such as SRFC.  
19 16 U.S.C. §§ 1801(b)(4), 1851(a)(1). This is what NMFS has done.  
20  
21

22 2. Consistency with National Standard 1; Consideration of  
23 Scientific Uncertainty and Bias.

24 Plaintiff's first substantive claim is that the 2011 management  
25 measures are inconsistent with NS 1, which requires that conservation  
26 and management measures prevent overfishing while achieving, on a  
27 continuing basis, the optimum yield from each fishery. 16 U.S.C. §  
28 1851(a). The regulatory guidelines implementing NS 1 also require

1 that management actions become more conservative as biomass estimates  
2 decline and as scientific and management uncertainty increases. 50  
3 C.F.R. § 600.310(f)(1). Plaintiff contends that "despite upward  
4 bias, scientific uncertainty, a consistent population decline, a  
5 recent and unprecedented population crash, and a consistent history  
6 of over-predicting escapement, PFMC arbitrarily adopted management  
7 measures it knew would result in fewer fish." Doc. 59 at 17.

9 It is undisputed that the SSC, STT, and Preseason Report I all  
10 voiced concern as to scientific uncertainty and upward bias in the  
11 forecast. AR 1184, 1296, 1572, 3/6/11 am One 14:55. Plaintiff also  
12 contends that the model had a "history of over-predicting escapement;  
13 significantly over-predicting escapement two of the three times it  
14 had so far been used." Doc. 59 at 17 (citing AR 4998, 5007, 5014).  
15 Defendants do not deny that the SI model over-predicted escapement in  
16 those two years. However, the Council thoroughly considered the  
17 issues of scientific uncertainty and upward bias. At the March 4-10,  
18 2011 meeting, the Council's scientific advisors noted the potential  
19 for upward bias and recommended that management measures be  
20 formulated to address it. AR 1184. The Council's advisors  
21 considered whether the bias could be quantified and/or corrected, but  
22 concluded that neither quantification nor correction was possible.  
23 AR 1184; 1570 (partial transcription of Council meeting). The  
24 Council requested additional information on the issue, and a  
25 supplemental presentation provided some evidence that the SI forecast  
26  
27  
28

1 could be biased high under the condition of increasing jack  
2 escapement. The Council was advised that "the pattern does not  
3 suggest that a positive bias in the forecast in 2011 would be a  
4 foregone conclusion," AR 809, however, because ocean fisheries will  
5 likely be constrained due to concern for other stocks, and NMFS  
6 guidance was to target the upper end of the conservation objective,  
7 these constraints effectively act as a "buffer" to any potential bias  
8 in the SI forecast, AR 810. Plaintiff points to no record evidence  
9 or expert testimony suggesting this conclusion is clearly erroneous,  
10 nor to any facts the Council did not consider in its deliberations  
11 about recognizing, analyzing, and implementing measures to address  
12 upward bias in the fish population estimates.<sup>8</sup>

14  
15 Plaintiff cites transcripts from and documents presented during  
16 public hearings that led to adoption of the management measures to  
17 demonstrate that that biological and environmental factors indicated  
18 that actual abundance could be even lower in 2011 than in 2010, when  
19 escapement was only 152,857 fish. AR 1676; 3/6/11 am Two 1:09.  
20 These citations are to comments made by Plaintiff at the hearing  
21 highlighting (1) that "parental abundance" was lower for the 2011  
22 cohort than for the 2010 cohort and (2) that ocean conditions were  
23

---

24 <sup>8</sup> Plaintiff forecasts the potential consequences of an upward bias in the SI  
25 estimate. For example, if actual abundance turned out to be on the low end of the  
26 95% confidence interval predicted by the SI estimate (231,671), a harvest at a 50%  
27 exploitation rate would produce a post-season escapement of 115,835 (AR 1572,  
28 3/6/11 am Two 53:30), which would, according to Plaintiff, trigger a conservation  
alert and a fishery closure. See Doc. 59 at 18. This establishes that the  
potential consequences of an over-estimate are serious. The Council considered and  
adjusted for bias and uncertainty. Where the agency considers and reasonably  
explains the basis for its decision, the law does not require more.

1 less favorable in 2011 than in 2010. *Id.* The transcript indicates  
2 that, according to Plaintiff's presenter, these considerations could  
3 result abundance below 152,857, which is below the low end of the SI  
4 estimate's 95% confidence interval. Plaintiff's parental abundance  
5 theory is also explained in a written comment letter. AR 1621.  
6

7 Although it appears that the parental abundance figures, taken  
8 from the widely-accepted grand tab surveys, are accurate, Plaintiff  
9 cites no scientific authority for its contention that parental  
10 abundance is dispositive of overall abundance estimates. At oral  
11 argument, Plaintiff conceded that the SI index was the best available  
12 science and has made no attempt to undermine the Council's reliance  
13 upon it.  
14

15 In addition, Plaintiff's assertion that ocean conditions were  
16 worse appears to be based upon data from the Northwest Fisheries  
17 Science Center taken out of context. The letter, AR 1623, cites a  
18 Northwest Fisheries Science Center website<sup>9</sup>, which indicates the  
19 cited data concerns "indicators of the Northern California Current."  
20 The homepage for this entire section of the NFSC website<sup>10</sup> explains  
21 that the data on the entire website, of which the referenced website  
22 is a part, pertains to "growth and survival of juvenile salmon in the  
23 northern California Current off Oregon and Washington." (Emphasis  
24 added). It is undisputed that the bulk of SRFC stocks are south of  
25

26  
27 <sup>9</sup> See <http://www.nwfsc.noaa.gov/research/divisions/fed/oeip/g-forecast.cfm> (last  
visited Sept. 29, 2011).

28 <sup>10</sup> See <http://www.nwfsc.noaa.gov/research/divisions/fed/oeip/a-ecinhome.cfm> (last  
visited Sept. 29, 2011).



1 Point Arena, California. AR 311. Plaintiff's reliance on this data  
2 to demonstrate trends in SRFC abundance is unpersuasive and  
3 misplaced.

4 Plaintiff emphasizes a hypothetical example provided by Council  
5 advisors. The advisors noted that if the 2011 SI forecast of 729,893  
6 was "arbitrarily" reduced by one half, and the stock experienced a  
7 plausible exploitation rate of 50%, the projected escapement of SRFC  
8 would be approximately 182,000 adults, which still exceeds the  
9 conservation objective. AR 1572. This hypothetical situation was  
10 discussed for illustrative purposes. The use of the word "arbitrary"  
11 in the administrative record does not mean that the agency's decision  
12 was, in fact, arbitrary. Rather, this reflects an effort at  
13 transparency, by recognizing that the illustration "arbitrarily"  
14 chose the one-half reduction.  
15  
16

17 Even assuming, *arguendo*, Plaintiff has standing, its motion for  
18 summary judgment that Federal Defendants violated the MSA and APA by  
19 failing to adequately consider bias and uncertainty is DENIED;  
20 Federal Defendants' cross motion is GRANTED.  
21

22 3. PFMC's Decision to End the "Overfishing" Concern.

23 Plaintiff's opening brief argued that PFMC's decision to end the  
24 overfishing concern was arbitrary and capricious, because PFMC had  
25 "discretion to decide" what criteria to use to determine whether the  
26 overfishing concern should be terminated, but "blindly" close to  
27 apply the "default," existing criteria, rather than the criteria set  
28

1 forth in Amendment 16. Doc. 59. PFMC's decision was not "blind."  
2 Plaintiff admits that NMFS had not yet adopted the proposed Amendment  
3 16. Pltfs' Stmt. of Facts, Doc. 67, ¶¶ 224-226. PFMC determined it  
4 would be inappropriate to apply an unadopted standard. Regardless,  
5 although the PFMC recommended ending the overfishing concern, NMFS  
6 has not yet acted on that recommendation. See Fed. Def. Cross-Mot.,  
7 Doc. 73-1 at 22. Correspondingly, the stock is still reported and  
8 treated as "overfished." Plaintiff's challenge is without merit and  
9 is arguably unripe. Plaintiff did not address this issue in its  
10 opposition/reply brief.  
11

12 Even assuming, *arguendo*, Plaintiff has standing, its motion for  
13 summary judgment that Federal Defendants violated the MSA and APA by  
14 ending the overfishing concern is DENIED; Federal Defendants' cross  
15 motion is GRANTED.  
16

17 C. National Environmental Policy Act Claims.

18 1. Legal Framework.

19 NEPA requires all federal agencies to prepare an environmental  
20 impact statement ("EIS") to evaluate the potential environmental  
21 consequences of any proposed "major Federal action[] significantly  
22 affecting the quality of the human environment." 42 U.S.C. §  
23 4332(C). The preparation of an EIS serves a number of purposes:  
24

25 It ensures that the agency, in reaching its decision, will  
26 have available, and will carefully consider, detailed  
27 information concerning significant environmental impacts;  
28 it also guarantees that the relevant information will be  
made available to the larger audience that may also play a  
role in both the decisionmaking process and the  
implementation of that decision.

1  
2 Simply by focusing the agency's attention on the  
3 environmental consequences of a proposed project, NEPA  
4 ensures that important effects will not be overlooked or  
5 underestimated only to be discovered after resources have  
6 been committed or the die otherwise cast. Moreover, the  
7 strong precatory language of § 101 of the Act and the  
8 requirement that agencies prepare detailed impact  
9 statements inevitably bring pressure to bear on agencies to  
10 respond to the needs of environmental quality. 115 Cong.  
11 Rec. 40425 (1969) (remarks of Sen. Muskie).

12  
13 Publication of an EIS, both in draft and final form, also  
14 serves a larger informational role. It gives the public the  
15 assurance that the agency has indeed considered  
16 environmental concerns in its decisionmaking process, and,  
17 perhaps more significantly, provides a springboard for  
18 public comment.

19  
20 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)  
21 (internal citations and quotations omitted). "NEPA does not contain  
22 substantive requirements that dictate a particular result; instead,  
23 NEPA is aimed at ensuring agencies make informed decisions and  
24 contemplate the environmental impacts of their actions." *Ocean*  
25 *Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 971 (D. Hi. 2008)  
26 (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th  
27 Cir. 1998)). "NEPA emphasizes the importance of coherent and  
28 comprehensive up-front environmental analysis to ensure informed  
decision making to the end that the agency will not act on incomplete  
information, only to regret its decision after it is too late to  
correct." *Ctr. for Biological Diversity v. U.S. Forest Service*, 349  
F.3d 1157, 1166 (9th Cir. 2003) (internal citation and quotations  
omitted).

29  
30 Federal regulations implementing NEPA define major federal  
31 action:

1 Major Federal action includes actions with effects that may  
2 be major and which are potentially subject to Federal  
3 control and responsibility. Major reinforces but does not  
4 have a meaning independent of significantly ([40 C.F.R.] §  
5 1508.27). Actions include the circumstance where the  
6 responsible officials fail to act and that failure to act  
7 is reviewable by courts or administrative tribunals under  
8 the Administrative Procedure Act or other applicable law as  
9 agency action.

6 (a) Actions include new and continuing activities,  
7 including projects and programs entirely or partly  
8 financed, assisted, conducted, regulated, or approved by  
9 federal agencies; new or revised agency rules, regulations,  
10 plans, policies, or procedures; and legislative proposals  
11 (§§ 1506.8, 1508.17). Actions do not include funding  
12 assistance solely in the form of general revenue sharing  
13 funds, distributed under the State and Local Fiscal  
14 Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no  
15 Federal agency control over the subsequent use of such  
16 funds. Actions do not include bringing judicial or  
17 administrative civil or criminal enforcement actions.

12 (b) Federal actions tend to fall within one of the  
13 following categories:

14 (1) Adoption of official policy, such as rules,  
15 regulations, and interpretations adopted pursuant to  
16 the Administrative Procedure Act, 5 U.S.C. 551 et  
17 seq.; treaties and international conventions or  
18 agreements; formal documents establishing an agency's  
19 policies which will result in or substantially alter  
20 agency programs.

18 (2) Adoption of formal plans, such as official  
19 documents prepared or approved by federal agencies  
20 which guide or prescribe alternative uses of Federal  
21 resources, upon which future agency actions will be  
22 based.

21 (3) Adoption of programs, such as a group of concerted  
22 actions to implement a specific policy or plan;  
23 systematic and connected agency decisions allocating  
24 agency resources to implement a specific statutory  
25 program or executive directive.

24 (4) Approval of specific projects, such as  
25 construction or management activities located in a  
26 defined geographic area. Projects include actions  
27 approved by permit or other regulatory decision as  
28 well as federal and federally assisted activities.

27 40 C.F.R. § 1508.18.

1           When an agency takes major federal, the agency must prepare an  
2 EIS "where there are substantial questions about whether a project  
3 may cause significant degradation of the human environment." *Native*  
4 *Ecosystems*, 428 F.3d at 1239. An agency may choose to prepare an EA  
5 to determine whether an EIS is needed. 40 C.F.R. §§ 1501.4,  
6 1508.9(b). The EA must identify all reasonably foreseeable impacts,  
7 analyze their significance, and address alternatives. 40 C.F.R. §§  
8 1508.8, 1508.9, 1508.27. If, based on the EA, the agency concludes  
9 that the proposed actions will not significantly affect the  
10 environment, it may issue a Finding of No Significant Impact  
11 ("FONSI") and forego completion of an EIS. *See Bob Marshall Alliance*  
12 *v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988); 40 C.F.R. § 1501.4(e).  
13  
14

15           Whether an action may significantly affect the environment  
16 "requires consideration of context and intensity." *Ctr. for*  
17 *Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d  
18 1172, 1185 (9th Cir. 2008) (citing 40 C.F.R. § 1508.27). "Context  
19 delimits the scope of the agency's action, including the interests  
20 affected." *Id.* (quoting *Nat'l. Parks & Conservation Ass'n v. Babbitt*,  
21 241 F.3d 722, 731 (9th Cir. 2001)). Among other factors, an action's  
22 intensity depends on whether it threatens to violate Federal, State  
23 or local law, or requirements imposed to protect the environment. 40  
24 C.F.R. § 1508.27(b)(10).  
25

26 //

27 //

2. Do the 2011 Management Measures Threaten to Violate Federal, State, or Local Laws, or Other Requirements Imposed to Protect the Environment?

The EA for the 2011 management measures concluded that the measures would not significantly impact the quality of the human environment. AR 27. Plaintiff argues that that Preseason Report II, which includes the NEPA analysis for the 2011 management measures, did not even analyze whether the measures would violate any Federal, State, or local law or requirement imposed to protect the environment. See AR 5200-5210. Specifically, Plaintiff complains that PFMC ignored whether greater flow would be required to offset the impacts of greater harvest and/or of overfishing. Doc. 59 at 22. Plaintiff argues that "[b]y ignoring efforts to double natural production of Fall Chinook, NMFS and PFMC failed to take a 'hard look' at how ocean harvest following the recent, severe Fall Chinook population crash, would impact efforts to double the natural production of SJRFC." *Id.*<sup>11</sup>

This argument fails for a straightforward reason: Plaintiff has pointed to no enforceable standards that would be "violated" by the 2011 management measures. The SWRCB has implemented flow objectives to help achieve the state's narrative salmon doubling goal, but Plaintiff does not contend, as it cannot, that the 2011 management measures "violate" these flow objectives.

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<sup>11</sup> The Programmatic EIS for Pacific Salmon Fisheries Management off the Coasts of Southeast Alaska, Washington, Oregon, and California, and in the Columbia River Basin, acknowledges the existence of the CVPIA's doubling goal as a measure to "reverse trends in the decline of salmon," but does not discuss the interplay between ocean harvest and freshwater management. AR 2352.

1 Plaintiff does not address its "violation of law" theory in its  
2 opposition/reply.

3 Even assuming, *arguendo*, Plaintiff has standing, its motion for  
4 summary judgment that Federal Defendants violated NEPA and the APA  
5 for failing to consider whether the 2011 management measures  
6 "violated" any provision of state or federal law applicable to the  
7 salmon doubling goal is DENIED; Federal Defendant's cross motion is  
8 GRANTED.<sup>12</sup>

9  
10  
11 3. Range of Alternatives.

12 Plaintiff argues that the EA violated NEPA because it failed to  
13 analyze a reasonable range of alternatives to the 2011 management  
14 measures. NEPA mandates that federal agencies "study, develop, and  
15 describe appropriate alternatives to recommended courses of action in  
16 any proposal which involves unresolved conflicts concerning  
17 alternative uses of available resources." 42 U.S.C. § 4332(2)(E).  
18 This requirement applies whether an agency is preparing an EIS or an  
19 EA, and requires the agency to give full and meaningful consideration  
20

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21 <sup>12</sup> For the first time in reply, see Doc. 84 at 6, Plaintiff argues that NMFS failed  
22 to comply with NEPA's requirement that it consider "whether the action is related  
23 to other actions with individual insignificant but cumulatively significant  
24 impacts." 40 C.F.R. § 1508.27(b)(7). Plaintiff then cites a number of other  
25 "efforts in California to preserve and restore natural SJRFC," including VAMP,  
26 restoration programs implemented under CALFED and CVIPA, and NMFS's 2009 OCAP  
27 Salmonid Biological Opinion. This argument will not be considered, as it was  
28 raised for the first time in reply. Even if it were properly before the Court,  
Plaintiff entirely fails to explain how the cited NEPA regulatory provision is  
triggered by the existence of these "other efforts" to protect salmon. A  
cumulative impact is an "impact on the environment which results from the  
incremental impact of the action when added to other ... reasonably foreseeable  
future actions...." 40 C.F.R. § 1508.7. Plaintiff provides no evidence that the  
2011 management measures cause incremental impact when added to other reasonably  
foreseeable future actions.

1 to all reasonable alternatives. *N. Idaho Cmty. Action Network v.*  
2 *U.S. DOT*, 545 F.3d 1147, 1153 (9th Cir. 2008). However, "an agency's  
3 obligation to consider alternatives under an EA is a lesser one than  
4 under an EIS." *Id.* (citation omitted). In preparing an EIS, an  
5 agency is required to "[r]igorously explore and objectively evaluate  
6 all reasonable alternatives," see 40 C.F.R. § 1502.14(a); for an EA,  
7 an agency is only required to include "brief discussions of the need  
8 for the proposal, [and] of alternatives as required by section  
9 102(2)(E)...." 40 C.F.R. § 1508.9(b). The available reasonable  
10 alternatives are dictated by the underlying purpose of the proposed  
11 action. See *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123  
12 F.3d 1142, 1155 (9th Cir. 1997). The court "reviews an agency's  
13 range of alternatives under a 'rule of reason' standard that requires  
14 an agency to set forth only those alternatives necessary to permit a  
15 reasoned choice." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d  
16 1153, 1160 (9th Cir. 1998). In judging whether an agency considered  
17 appropriate and reasonable alternatives, a court should focus on the  
18 projects' stated purpose. *Native Ecosystems Council v. U.S. Forest*  
19 *Service*, 428 F.3d 1233, 1246 (9th Cir. 2005).

22 Under NEPA, an agency's consideration of alternatives is  
23 sufficient if it considers an appropriate range of  
24 alternatives, even if it does not consider every available  
25 alternative. An agency need not, therefore, discuss  
26 alternatives similar to alternatives actually considered,  
or alternatives which are infeasible, ineffective, or  
inconsistent with the basic policy objectives for the  
management of the area...

27 *N. Alaska Env'l Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir.  
28



1 2006) (internal citations and quotations omitted).

2 Here, Plaintiff claims that the four alternatives considered  
3 were "virtually identical, because, despite concerns raised regarding  
4 scientific uncertainty and upward bias in the forecast, all of the  
5 alternatives were based on a projected abundance of 729,893[, and]  
6 [n]one [was] premised on the possibility that projected SRFC  
7 escapement could be lower than 729,893, let alone as low as 231,671,  
8 the acknowledged lower bound of the 95 percent confidence interval."  
9 Doc. 59 at 23. Plaintiff argues that "given the recent population  
10 crash and concerns about upward bias and scientific uncertainty ...  
11 an alternative based on a lower abundance forecast and/or with more  
12 restrictive management measures would have been reasonable in order  
13 to inform decision-making and public participation as to the  
14 potential impacts of more conservative management measures, as well  
15 as evaluate different methods of achieving the goal of obtaining  
16 optimum yield on a continuing basis." *Id.*

17  
18  
19 The record establishes that NMFS considered scientific  
20 uncertainty and the potential for an upward bias and that the 2011  
21 management measures already appropriately accounted for these  
22 factors. Plaintiff offers no legal or scientific basis for requiring  
23 NMFS to construct alternatives utilizing abundance estimates outside  
24 the 95% confidence interval generated by the SI model, which NMFS  
25 reasonably found to be the best available science. Plaintiff  
26 provides no expert opinion that the science utilized does not meet  
27  
28

1 the required standard.

2 Plaintiff apparently challenges the fact that SRFC escapement  
3 estimates were similar among all the alternatives that were  
4 considered. The 2011 management measures and the alternatives  
5 evaluated in the EA constrain fishing by, among other things,  
6 controlling the timing of the fishing season, the methods and gear  
7 used by fishermen, and the imposition of size and catch limits. See  
8 *generally*, Preseason Report II, AR 5183-5249. Because the abundance  
9 of SRFC was predicted to be surplus to the conservation objective<sup>13</sup>,  
10 NMFS determined that other fish stocks, not SRFC, would constrain the  
11 fishing season this year. See AR 810. The alternatives explored  
12 various management measures that would create material differences in  
13 the impact to those other, constraining fish stocks. The purpose of  
14 the 2011 management measures is to "allow fisheries to harvest  
15 surplus production of healthy natural and hatchery salmon stocks," AR  
16 4993, and to implement the FMP, which is designed to achieve the  
17 optimum yield from the fishery. See 16 U.S.C. § 1802(33). Given  
18 that the purpose of the action is to permit harvest of salmon under  
19 the management scheme set forth in the MSA, NMFS did not need to  
20 include SRFC harvest alternatives that needlessly constrained SRFC  
21 harvest. Instead, the range of alternatives was structured to  
22 highlight alternative management approaches for the stocks that would  
23  
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26  
27 <sup>13</sup> The conservation objective is a goal set by previous regulation, not by the 2011  
28 management measures. Plaintiffs do not here challenge the conservation objective.  
They cannot reasonably object that the alternatives were structured to reflect the  
fact that SRFC was predicted to exceed the conservation objective.

1 constrain the fishery. This does not violate the "rule of reason,"  
2 as the additional alternatives demanded by Plaintiff were not  
3 necessary to permit a reasoned choice.

4 Assuming, *arguendo*, Plaintiff has standing, its motion for  
5 summary judgment that Federal Defendants violated NEPA and the APA by  
6 failing to identify a reasonable range of alternatives is DENIED;  
7 Federal Defendants' cross-motion is GRANTED.  
8

9  
10 V. CONCLUSION

11 This is a case where the agency "got it right" and followed the  
12 law. For the reasons set forth above:

13 (1) Defendant PFMC and the Doe Defendants are DISMISSED WITH  
14 PREJUDICE; and

15 (2) Federal Defendants', Delta Intervenors', and PCFFA's motions  
16 for summary judgment that Plaintiff lacks standing are GRANTED;  
17 Plaintiff's cross motion is DENIED.

18 (3) Assuming, *arguendo*, Plaintiff has standing:

19 (a) Plaintiff's motion for summary judgment that Federal  
20 Defendants violated the MSA and APA by failing to account for  
21 uncertainty and bias is DENIED; Federal Defendants' cross motion  
22 is GRANTED;

23 (b) Plaintiff's motion for summary judgment that Federal  
24 Defendants violated the MSA and APA by ending the overfishing  
25 concern is DENIED; Federal Defendants' cross motion is GRANTED;

26 (c) Plaintiff's motion for summary judgment that Federal  
27  
28

1 Defendants violated NEPA and the APA by failing consider whether  
2 the 2011 management measures would "violate" any federal, state  
3 or local laws or other requirements imposed to protect the  
4 environment is DENIED; Federal Defendants' cross motion is  
5 GRANTED; and  
6

7 (d) Plaintiff's motion for summary judgment that Federal  
8 Defendants violated NEPA and the APA by failing consider a  
9 reasonable range of alternatives in the EA for the 2011  
10 management measures is DENIED; Federal Defendants' cross motion  
11 is GRANTED.

12 A separate form of order adjudicating these dispositive motions  
13 shall be issued by the Court.  
14

15 SO ORDERED

16 Dated: September 30, 2011

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