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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
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8 COALITION FOR A SUSTAINABLE  
9 DELTA, *et al.*,

10 Plaintiffs,

11 v.

12 JOHN CARLSON, JR., in his  
13 official capacity as Executive  
14 Director of the California Fish  
and Game Commission, *et al.*,

15 Defendants,

16 CENTRAL DELTA WATER AGENCY, *et*  
17 *al.*,

18 Defendant-Intervenors,

19 CALIFORNIA SPORTFISHING  
20 PROTECTION ALLIANCE, *et al.*,

21 Defendant-Intervenors.  
22

1:08-CV-00397 OWW GSA

MEMORANDUM DECISION AND ORDER  
RE STATE DEFENDANTS' MOTION  
FOR JUDGMENT ON THE PLEADINGS  
(DOC. 24).

23 I. INTRODUCTION

24 Plaintiffs in this case are a coalition of agricultural  
25 water users in the San Joaquin Valley that contract for State  
26 Water Project ("SWP") water deliveries from the Delta; an  
27 umbrella organization, the Coalition for a Sustainable Delta,  
28 purporting to represent these water users (collectively the  
"Coalition"); and one individual, Dee Dillon, who uses and enjoys

1 the Delta for recreational and aesthetic purposes. On January  
2 29, 2008, Plaintiffs filed a lawsuit pursuant to 16 U.S.C. §  
3 1540(g)(3)(A), the citizen suit provision of the Endangered  
4 Species Act ("ESA"), seeking declaratory and injunctive relief,  
5 against John Carlson, Jr., in his official capacity as Executive  
6 Director the California Fish and Game Commission (the  
7 "Commission"); Richard Rogers, Cindy Gustafson, Jim Kellogg, and  
8 Michael Sutton, in their official capacities as Members of the  
9 Commission; and John McCamman, in his official capacity as  
10 Interim Director of the California Department of Fish and Game  
11 ("CDFG"). (See Doc. 1.)<sup>1</sup>

12 Before the court for decision is State Defendants' motion  
13 for judgment on the pleadings. (Doc. 24, filed May 5, 2008.)  
14 State defendants argue that: (1) neither the Coalition nor Dee  
15 Dillon have standing to sue; (2) the individual defendants named  
16 in their official capacities as Members of the Commission are  
17 absolutely immune from suit by virtue of the legislative immunity  
18 doctrine; and (3) the Eleventh Amendment otherwise bars suit  
19 against the Commission's Members and Executive Director.

## 20 II. BACKGROUND

21 The crux of the Coalition's Complaint is that the  
22 Commission's promulgation and CDFG's maintenance and enforcement  
23 of striped bass fishing regulations cause the unlawful "take" of  
24 four species of ESA "listed" fish, including the Sacramento River  
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26 <sup>1</sup> The Commission and CDFG were originally named as  
27 defendants, but were dismissed by stipulation of the parties,  
28 (Doc. 12), leaving only officials of these two agencies as  
defendants.

1 winter-run Chinook salmon ("winter-run"), the Central Valley  
2 spring-run Chinook salmon ("spring-run"), the Central Valley  
3 steelhead ("steelhead"), and the Delta smelt (collectively,  
4 "Listed Species"). Through the adoption and enforcement of the  
5 striped bass fishing regulations, which include bag and size  
6 limitations, the Complaint alleges that the Commission and CDFG  
7 have allowed and encouraged the population of the non-native  
8 striped bass to thrive in the Delta. According to the Complaint,  
9 the striped bass prey upon and consume the Listed Species, and  
10 this is one of several causes of the population declines of the  
11 Listed Species.

12 III. STANDARD OF REVIEW

13 A Rule 12(c) motion challenges the legal sufficiency of the  
14 opposing party's pleadings after the pleadings are closed.  
15 Judgment on the pleadings is appropriate when, even if all  
16 material facts in the pleading under attack are true, the moving  
17 party is entitled to judgment as a matter of law. *Honey v.*  
18 *Distelrath*, 195 F.3d 531 (9th Cir. 1999). The court must assume  
19 the truthfulness of the material facts alleged in the complaint.  
20 All inferences reasonably drawn from these facts must be  
21 construed in favor of the responding party. *Westlands Water*  
22 *Dist. v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993).

23 As with a motion to dismiss pursuant to Rule 12(b)(6), if  
24 matters outside of the pleadings are presented to and not  
25 excluded by the court on a motion for judgment on the pleadings,  
26 the motion shall be treated as one for summary judgment. Fed. R.  
27 Civ. P. 12(c). Nevertheless, a court may take judicial notice of  
28 matters of public record, including "records and reports of

1 administrative bodies" without converting the motion to one for  
2 summary judgment. See *Mack v. South Bay Beer Distribs., Inc.*,  
3 798 F.2d 1279, 1282 (9th Cir. 1986) (applying Rule 12(b)(6)).

4 IV. DISCUSSION

5 A. Standing.

6 1. General Legal Standard.

7 Standing is a judicially created doctrine that is an  
8 essential part of the case-or-controversy requirement of Article  
9 III. *Pritikin v. Dept. of Energy*, 254 F.3d 791, 796 (9th Cir.  
10 2001). "To satisfy the Article III case or controversy  
11 requirement, a litigant must have suffered some actual injury  
12 that can be redressed by a favorable judicial decision." *Iron*  
13 *Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1984). "In  
14 essence the question of standing is whether the litigant is  
15 entitled to have the court decide the merits of the dispute or of  
16 particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

17 The doctrine of standing "requires careful judicial  
18 examination of a complaint's allegations to ascertain whether the  
19 particular plaintiff is entitled to an adjudication of the  
20 particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752  
21 (1984). The court is powerless to create its own jurisdiction by  
22 embellishing otherwise deficient allegations of standing.  
23 *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990); *Schmier v.*  
24 *U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th  
25 Cir. 2002).

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

27 First, the plaintiff must have suffered an "injury in  
28 fact"--an invasion of a legally protected interest  
which is (a) concrete and particularized and (b) actual

1 or imminent, not conjectural or hypothetical. Second,  
2 there must be a causal connection between the injury  
3 and the conduct complained of-- the injury has to be  
4 fairly traceable to the challenged action of the  
5 defendant, and not the result of the independent action  
6 of some third party not before the court. Third, it  
7 must be likely, as opposed to merely speculative, that  
8 the injury will be redressed by a favorable decision.

9 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)

10 (internal citations and quotations omitted).

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

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

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

2. Standing of the Coalition.

a. Injury in Fact.

State defendants do not challenge the Coalition's ability to  
satisfy the injury in fact element. (Doc. 39 at 2-3, filed July  
7, 2008.) Nevertheless, the district court has a *sua sponte* duty  
to address the requirements of standing. *Bernhardt v. County of  
Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002). Here, the

1 Complaint alleges that:

2 Plaintiff Coalition for a Sustainable Delta  
3 ("Coalition") is comprised of agricultural water users  
4 in the San Joaquin Valley. Coalition members depend on  
5 State Water Project ("SWP") deliveries from the Delta  
6 to the San Joaquin Valley for their water supply. The  
7 continued operation of the SWP is, in turn, dependent  
8 on the overall health of the Delta and its ecosystem,  
9 which includes the maintenance of viable populations of  
10 species living in the Delta and protected by the ESA,  
11 such as the Sacramento River winter-run chinook salmon,  
12 Central Valley spring-run chinook salmon, Central  
13 Valley steelhead, and delta smelt. In 2007, a federal  
14 district court ruled that deliveries of SWP water to  
15 parties with water contracts, such as the Coalition  
16 members, must be reduced substantially to protect the  
17 delta smelt. *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS  
18 48261 (E.D. Cal. 2007). Recently, the California  
19 Department of Water Resources reported that in an  
20 average water year, the court's order in *NRDC v.*  
21 *Kempthorne* would reduce water exports from the Delta by  
22 22 to 30 percent. Department of Water Resources  
23 Advisory, DWR Releases Water Delivery Impact Estimates  
24 Following [the] Wanger Decision (Dec. 24, 2007).  
25 Violations of the ESA by defendants, including the take  
26 of the Federally-Protected species, contribute to a  
27 decline in the health of the Delta ecosystem.  
28 Furthermore, such violations contribute to declines of  
the populations of species in the Delta protected by  
the ESA. The illegal and unmitigated take of the  
Federally-Protected species, including the delta smelt,  
by defendants injures the Coalition because it reduces  
the population of the Federally-Protected species  
thereby worsening the baseline status of the species,  
which must be taken into account by FWS and NMFS when  
they determine whether proposed SWP exports from the  
Delta comply with the ESA. Therefore, defendants' ESA  
violations threaten deliveries of SWP water to members  
of the Coalition. In sum, because the CFGC and CDFG  
have contributed to the decline of the delta smelt  
population by violating the ESA, they have contributed  
to the reduction in SWP water deliveries to members of  
the Coalition. Reduced deliveries of SWP water have an  
economic impact on members of the Coalition. Thus,  
Coalition members have been, and will continue to be,  
harmed by defendants' violations of the ESA.

25 (Doc. 1 (Compl.) at ¶40.) The complaint also alleges that each  
26 of the Coalitions' members, Belridge Water Storage District  
27 ("BWS"), Berrenda Mesa Water District ("BMWD"), Lost Hills Water  
28 District ("LHWD"), and Wheeler-Ridge Maricopa Water Storage

1 District ("WRMWS"), all of which are California Water Storage  
2 Districts, "depend[] on SWP deliveries from the Delta to the San  
3 Joaquin Valley for their water supply," and are injured as  
4 described above in the paragraph concerning the Coalition as a  
5 whole. (*Id.* ¶ 41-44.)

6 These allegations are sufficient to satisfy the injury in  
7 fact requirement, as the Coalition and its members are arguably  
8 injured by reduced water deliveries caused, in part, by actions  
9 undertaken to protect the Listed Species. See *Bennet v. Spear*,  
10 520 U.S. 154, 168 (9th Cir. 1997) (injury in fact test satisfied  
11 where petitioner alleged that agency action reduced the amount of  
12 water available and, as a result, adversely affected plaintiffs'  
13 water supply).

14 b. Causal Connection.

15 Constitutional standing requires a showing of "a causal  
16 connection between the injury and the conduct complained of."  
17 *Lujan*, 504 U.S. at 560-561. More specifically, "the injury has  
18 to be fairly traceable to the challenged action of the defendant,  
19 and not the result of the independent action of some third party  
20 not before the court." *Id.* (internal quotations omitted).

21 "When the suit is one challenging the legality of government  
22 action or inaction, [and] plaintiff is himself an object of the  
23 action (or forgone action) at issue... there is ordinarily little  
24 question that the action or inaction has caused him injury, and  
25 that a judgment preventing or requiring the action will redress  
26 it." *Id.* at 561-62. This is not the case here, as Plaintiffs  
27 are not in any way the object of the challenged striped bass  
28 regulations.

1 Where, in contrast, "plaintiff's asserted injury arises from  
2 the government's allegedly unlawful regulation (or lack of  
3 regulation) of *someone else*, much more is needed."

4 In that circumstance, causation and redressability  
5 ordinarily hinge on the response of the regulated (or  
6 regulable) third party to the government action or  
7 inaction—and perhaps on the response of others as well.  
8 The existence of one or more of the essential elements  
9 of standing "depends on the unfettered choices made by  
10 independent actors not before the courts and whose  
11 exercise of broad and legitimate discretion the courts  
12 cannot presume either to control or to predict,"  
13 (Citations omitted.) and it becomes the burden of the  
14 plaintiff to adduce facts showing that those choices  
15 have been or will be made in such manner as to produce  
16 causation and permit redressability of injury.

17 *Id.* at 562 (emphasis in original).

18 Nevertheless, a "chain of causation [may have] more than one  
19 link," so as long as the connection between the injury and cause  
20 is not "hypothetical or tenuous." *Nat'l Audubon Soc. v. Davis*,  
21 307 F.3d 835, 849 (9th Cir. 2002). In *Davis*, the Ninth Circuit  
22 found that the Audubon Society, an organization dedicated to  
23 protection and observation of birds, had standing to challenge a  
24 regulation that forbade the use of a certain type of game trap  
25 because "[r]emoval of the traps leads to a larger population of  
26 predators, which in turn decreases the number of birds and other  
27 protected wildlife." *Id.* The Ninth Circuit reasoned: "This  
28 chain of causation has more than one link, but it is not  
hypothetical or tenuous; nor do appellants challenge its  
plausibility." *Id.*

Similarly, in *Ocean Advocates v. U.S. Army Corps of  
Engineers*, 402 F.3d 846 (9th Cir. 2005), the Ninth Circuit found  
that an environmental organization had standing to challenge the  
issuance by the Corps of Engineers of a permit to construct an



1 extension to an existing oil refinery dock. It was undisputed  
2 that the extension would be built if permitted; that its  
3 construction would increase traffic to the dock over time; and  
4 that, when considered alone or in tandem with other industrial  
5 projects in the area, the increased traffic would contribute to  
6 the risk of an oil spill. *Id.* at 860. While acknowledging that  
7 "other factors may also cause additional tanker traffic and  
8 increase the attendant risk of an oil spill," the Ninth Circuit  
9 found there was a sufficient causal connection between the  
10 issuance of the permit and plaintiffs' injuries, reasoning that  
11 the link between the new platform and increased traffic was not  
12 tenuous or abstract. *Id.* "The causal connection put forward for  
13 standing purposes cannot be too speculative, or rely on  
14 conjecture about the behavior of other parties, but need not be  
15 so airtight at this stage of litigation as to demonstrate that  
16 the plaintiffs would succeed on the merits." *Id.*; see also  
17 *Loggerhead Turtle v. County Council of Volusia County, Florida*,  
18 148 F.3d 1231, 1249 (9th Cir. 1998) (environmental organization  
19 showed sufficient causal connection to challenge county's  
20 decision to exempt certain municipalities within its boundaries  
21 from artificial beachfront lighting regulations designed to  
22 protect sea turtles; the fact that the municipalities had  
23 supplemental authority to enact more onerous lighting standards  
24 did not sever the "fairly traceable" connection between the  
25 county's regulatory actions and the alleged harm).

26 State Defendants argue that the Ninth circuit applies a  
27 strict "but for" test when evaluating causation in cases  
28 involving independent action by third parties, citing *Idaho*

1 *Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). In  
2 *that case*, the Ninth Circuit examined whether an environmental  
3 organization had standing to challenge whether an agency's  
4 decision to recommend against designating a certain area as  
5 wilderness. 956 F.2d at 1518. The Ninth Circuit held that, in  
6 contrast to cases in which the injury was not "fairly traceable"  
7 to the challenged action or resulted from the "independent action  
8 of some third party not before the court," the injury to the  
9 plaintiff would not have occurred "but for" the agency's decision  
10 to recommend against wilderness designation. *Id.* However, the  
11 Ninth Circuit did not indicate that a "but for" causal connection  
12 was necessary to achieve standing, only that it was sufficient.  
13 Subsequent case law, including *Ocean Advocates*, 402 F.3d 846, and  
14 *Loggerhead Turtle*, 148 F.3d at 1249, make no mention of a "but  
15 for" test.

16 Nor does another case relied upon by State Defendants,  
17 *Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir.  
18 2002), in which county employees challenged a union's improper  
19 notice of a fee deduction from their paychecks under a labor  
20 agreement. Among other things, plaintiffs sought to invalidate  
21 an employer indemnification clause within the agreement. *Id.*  
22 Notwithstanding the stipulated fact that the employer would not  
23 have entered into the agreement without the indemnification  
24 clause, the Ninth Circuit held that the plaintiffs lacked  
25 standing to contest the clause because the "causal relationship"  
26 between the clause and the plaintiffs' claimed injury was "too  
27 remote." *Id.* According to the Ninth Circuit, the plaintiffs'  
28 lacked standing because their alleged "injury was not caused by

1 the employer's entry into the collective bargaining agreement; it  
2 was caused by the unions' inadequate notice of the expenditures  
3 on which the agency fees were based." *Id.* This case merely  
4 supports the proposition that where a causal connection is too  
5 tenuous, standing does not exist.

6 Plaintiffs cite *Massachusetts v. EPA*, 127 S. Ct. 1438  
7 (2007), for the proposition that an injury should be considered  
8 "fairly traceable" even though it merely contributed to the  
9 alleged injury. In *Massachusetts v. EPA*, numerous environmental  
10 organizations, states, and local governments challenged a  
11 decision by the EPA not to adopt a rule regulating greenhouse gas  
12 emissions from new motor vehicles. Massachusetts argued that it  
13 was injured by EPA's decision, because the decision resulted in  
14 greater quantities of greenhouse gases being emitted into the  
15 atmosphere, thereby exacerbating the problem of climate change  
16 and contributing to the possibility that rising sea levels would  
17 permanently or temporarily inundate parts of Massachusetts. *Id.*  
18 at 1455-56. In challenging this chain of causation, the EPA  
19 asserted that "its decision not to regulate greenhouse gas  
20 emissions from new motor vehicles contribute[d] so  
21 insignificantly to [the alleged] injuries that the agency [could  
22 not] be haled into federal court to answer for them." *Id.* at  
23 1457. While the Supreme Court conceded that any decrease  
24 resulting from an EPA issued regulation would more than likely be  
25 offset by increases in greenhouse gas emissions from developing  
26 nations, it held that Massachusetts' injury was fairly traceable  
27 to the EPA's decision. *Id.*

28 However, *Massachusetts v. EPA* was premised on "the special

1 position and interest of Massachusetts." The Court reasoned:  
2 "[i]t is of considerable relevance that the party seeking review  
3 here is a sovereign State and not, as it was in *Lujan*, a private  
4 individual." *Id.* at 1453-1454. Massachusetts, the Court said,  
5 has an "independent interest in all the earth and air within its  
6 domain." *Id.* at 1454. The Court noted that, although a  
7 sovereign state, upon joining the Union, Massachusetts  
8 relinquished some of its sovereign prerogatives and thus "cannot  
9 invade Rhode Island to force reductions in greenhouse gas  
10 emissions, it cannot negotiate an emissions treaty with China or  
11 India, and in some circumstances the exercise of its police  
12 powers to reduce in-state motor-vehicle emissions might well be  
13 pre-empted." *Id.*

14 These sovereign prerogatives are now lodged in the  
15 Federal Government, and Congress has ordered EPA to  
16 protect Massachusetts (among others) by prescribing  
17 standards applicable to the "emission of any air  
18 pollutant from any class or classes of new motor  
19 vehicle engines, which in [the Administrator's]  
20 judgment cause, or contribute to, air pollution which  
21 may reasonably be anticipated to endanger public health  
22 or welfare." 42 U.S.C. § 7521(a)(1). Congress has  
23 moreover recognized a concomitant procedural right to  
24 challenge the rejection of its rulemaking petition as  
25 arbitrary and capricious. § 7601(b)(1). Given that  
26 procedural right and Massachusetts' stake in protecting  
27 its quasi-sovereign interests, the Commonwealth is  
28 entitled to special solicitude in our standing  
analysis.

*Id.* at 1454-1455 (emphasis added). Because standing in  
*Massachusetts v. EPA* was premised on this "special position and  
interest," it is of limited relevance to this case, brought by  
private citizens.

Here, the Coalition and its members assert that they are  
being harmed because the striped bass regulations protect striped

1 bass, which prey upon listed species, which predation, in turn,  
2 affects the "baseline" condition of those species. This less  
3 robust baseline, according to the Complaint, "must be taken into  
4 account by FWS and NMFS when they determine whether proposed SWP  
5 exports from the Delta comply with the ESA. Therefore,  
6 defendants' ESA violations threaten deliveries of SWP water to  
7 members of the Coalition." (Doc. 1 at ¶40.) "In sum," the  
8 Complaint alleges, "because the [the Commission] and CDFG have  
9 contributed to the decline of the delta smelt population by  
10 violating the ESA, they have contributed to the reduction in SWP  
11 water deliveries to members of the Coalition. Reduced deliveries  
12 of SWP water have an economic impact on members of the  
13 Coalition." (*Id.*)

14 Although "this chain of causation has more than one link, [  
15 it is not hypothetical or tenuous," *Davis*, 307 F.3d at 849, nor  
16 do state defendants "challenge its plausibility." *Id.* Instead,  
17 State Defendants make several arguments in the context of the  
18 causation element, e.g., that the invalidation of the striped  
19 bass regulations would have no direct effect on the *Kempthorne*  
20 interim remedies order nor would it necessarily alter future  
21 biological opinions (Doc. 25 at 9), that are more relevant to the  
22 issue of redressibility and are addressed below.

23 The Coalition's economic injuries are fairly traceable to  
24 the enforcement of the striped bass regulations.

25 c. Redressibility.

26 Constitutional standing also requires a showing that it is  
27 "likely, as opposed to merely speculative, that the injury will  
28 be redressed by a favorable decision." *Lujan*, 504 U.S. at 561

1 (internal citations and quotations omitted). "Relief that does  
2 not remedy the injury suffered cannot bootstrap a plaintiff into  
3 federal court; that is the very essence of the redressability  
4 requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S.  
5 83, 107 (1998). Where the "redress[]" of injury "depends on the  
6 unfettered choices made by independent actors not before the  
7 courts," a court should "have much less confidence in concluding  
8 that relief is likely to follow from a favorable decision."  
9 *Asarco, Inc. v. Kadish*, 490 U.S. 605, 614-615 (1989).

10 The Ninth Circuit has explored the issue of redressibility  
11 in many cases. In *Glanton v. AdvancePCS, Inc.*, 465 F.3d 1123,  
12 1225 (9th Cir. 2006), plaintiffs were company employees who  
13 participated in company-sponsored prescription drug plans. The  
14 plaintiffs contended that the drug benefits management company  
15 that administered the plans on behalf of their employers had  
16 overcharged their employers for drugs, forcing the employees to  
17 pay higher co-payments or contributions to their employers than  
18 appropriate. *Id.* The Ninth Circuit dismissed plaintiffs' claims  
19 for lack of standing because there was no reason to believe that  
20 the employing companies would actually have reduced employee  
21 co-payments or contributions, even if the plaintiffs had  
22 prevailed in their action against the drug benefits management  
23 company:

24 There is no redressability, and thus no standing, where  
25 (as is the case here) any prospective benefits depend  
26 on an independent actor who retains broad and  
legitimate discretion the courts cannot presume either  
to control or to predict.

27 *Id.* at 1125.

28 In *Nuclear Information & Research Service v. Nuclear*

1 *Regulatory Commission* ("NRC"), 457 F.3d 941, 955 (9th Cir. 2006),  
2 plaintiffs challenged the NRC's decision to revise regulations  
3 governing the exemption standards for the transportation of  
4 radioactive material, claiming that NRC failed to comply with its  
5 obligations under the National Environmental Policy Act (NEPA).  
6 NRC argued that plaintiffs failed the redressability prong of  
7 *Lujan* because radioactive material is subject not only to the NRC  
8 rules, but also to the related rules of another agency, the  
9 Department of Transportation ("DOT"). *Id.* at 955. NRC argued  
10 that because the DOT rules were not properly before the Ninth  
11 Circuit, plaintiffs injury would not be redressed by having the  
12 NRC rules invalidated. *Id.* Plaintiffs countered that they need  
13 only show that if NRC is required to conduct an appropriate  
14 environmental analysis, such analysis could result in a different  
15 exemption rule or no exemption, and noted that because NRC's  
16 environmental analysis was the basis for both NRC and DOT's  
17 rulemakings, setting aside NRC's NEPA investigation would remedy  
18 NRC's substantive challenge to the DOT rule. The Ninth Circuit  
19 sided with the agency:

20 Redressability depends on whether the court has the  
21 ability to remedy the alleged harm. *Hall*, 266 F.3d at  
22 975. In most NEPA cases, a petitioner "who asserts  
23 inadequacy of a government agency's environmental  
24 studies ... need not show that further analysis by the  
25 government would result in a different conclusion. It  
26 suffices that ... the [agency's] decision could be  
27 influenced by the environmental considerations that  
28 [the relevant statute] requires an agency to study."  
*Id.* at 977 (emphasis added) (citation omitted).  
However, this is not the usual NEPA case. The parties  
agreed at oral argument that NRC licensees are required  
to follow DOT's regulations for the transportation of  
nuclear material. 10 C.F.R. § 71.5(a) ("Each licensee  
who transports licensed material outside the site of  
usage, as specified in the NRC license, or where  
transport is on public highways, or who delivers

1 licensed material to a carrier for transport, shall  
2 comply with the applicable requirements of the DOT  
3 regulations in 49 CFR parts 107, 171 through 180, and  
4 390 through 397, appropriate to the mode of  
5 transport.""). Thus, even if we were to set aside the  
6 current NRC rule and remand to NRC with instructions  
7 that it prepare an EIS, nothing requires DOT to revisit  
8 its identical exemption standards, which govern the  
9 universe of NRC licensees. See Lujan, 504 U.S. at 568,  
10 112 S.Ct. 2130 (holding there was no redressability  
11 because the Secretary could be ordered to revise his  
12 regulation "[b]ut this would not remedy respondents'  
13 alleged injury unless the funding agencies were bound  
14 by the Secretary's regulation, which is very much an  
15 open question"). As NRC pointed out at oral argument,  
16 the DOT rule would control even if the NRC rule was  
17 wiped off the books. And the DOT regulation is not  
18 before us. We cannot see how an order remanding to NRC  
19 would remedy the asserted injury from the IAEA  
20 exemption standards because DOT would be under no  
21 obligation to reconsider its own, identical rule.

22 *Id.* (emphasis added).

23 Here, for the injury allegedly suffered by the Coalition and  
24 its members to be redressed, those water deliveries that have  
25 been reduced as a result of actions taken to protect the Delta  
26 smelt would need to be restored, at least in part. The  
27 *Kempthorne* interim remedies expired on June 20, 2008, and the new  
28 Delta smelt BiOp is due out in September 2008. It is total  
speculation to predict that the district court will be requested  
to modify or impose any interim operational restrictions on the  
CVP or SWP. In the ongoing litigation over the winter-run and  
spring-run Chinook Salmon and Central Valley steelhead, the  
interim remedies phase of the case has not been reached and no  
operational changes have been ordered. If any interim remedies  
were to be imposed, a revised BiOp for those species is due to be  
issued March 2, 2009.

Similarly, even assuming, *arguendo*, that Plaintiffs are  
entirely successful in this lawsuit and that the striped bass



1 regulations are invalidated as a result, it is speculative to  
2 assume that the FWS and/or NMFS would materially alter their  
3 conclusions regarding the status of the Listed Species and the  
4 measures required to prevent jeopardy and adverse modification to  
5 their habitat. Although the district court may be asked to  
6 review the agencies' revised biological opinions, the agencies  
7 are "independent actor[s] [that] retain[] broad and legitimate  
8 discretion the courts cannot presume either to control or to  
9 predict." *Glanton*, 465 F.3d at 1225. This case is similar to  
10 *Glanton*, in that there is no way to know whether the agencies  
11 would provide more water to the Coalition and its members if even  
12 if Plaintiffs prevail. This is especially so because there are  
13 multiple causes affecting the species unrelated to the striped  
14 bass.

15 The Coalition argues that "if the Court invalidates  
16 Defendants' striped bass regulations, the Coalition and Water  
17 Districts' injury would be redressed, as the Defendants' would no  
18 longer be contributing to the reduction in water deliveries via  
19 the adoption and enforcement of striped bass sport fishing  
20 regulations." (Doc. 36 at 16 (emphasis added).) In support of  
21 this assertion, the Coalition again cites *Massachusetts v. EPA*,  
22 127 S. Ct. at 1458, in which the Supreme Court explained that  
23 "[w]hile it may be true that regulating motor-vehicle emissions  
24 will not by itself reverse global warming, it by no means follows  
25 that we lack jurisdiction to decide whether EPA has a duty to  
26 take steps to slow or reduce it." The Supreme Court also found  
27 that the fact that developing countries were "poised to increase  
28 greenhouse gas emissions substantially over the next century" was

1 not dispositive on the issue. *Id.* Instead, the Court held that  
2 the injury could be redressed because the risk of harm "would be  
3 reduced to some extent if petitioners received the relief they  
4 [sought]." *Id.*

5 Plaintiffs argue that, as in *Massachusetts v. EPA*, "even  
6 though the remedy sought would not right the entire wrong, the  
7 relief sought would reduce the injury - Defendants would no  
8 longer be contributing to the reduction in water deliveries.  
9 Therefore, the injury can be redressed." (Doc. 36 at 17.)

10 However, because this holding was premised on the special role of  
11 Massachusetts as a sovereign, it is of questionable applicability  
12 to the present case.

13 Plaintiffs also cite *Ocean Advocates*, 402 F.3d 846, the oil  
14 platform extension project case, where the claimants requested an  
15 injunction to restrict tanker traffic to the existing platform  
16 and to require the agency to complete appropriate NEPA analyses  
17 before permitting the project. The Ninth Circuit reasoned that  
18 the injunction would "alleviate [plaintiff's] concern about  
19 increased traffic" and that a plaintiff "who asserts inadequacy  
20 of a government agency's environmental studies under NEPA need  
21 not show that further analysis by the government would result in  
22 a different conclusion. It suffices that, as NEPA contemplates,  
23 the [agency's] decision could be influenced by the environmental  
24 considerations that NEPA requires an agency to study." *Id.* at  
25 860. Unlike *Ocean Advocates*, Plaintiffs do not seek injunctive  
26 relief that would redress their injury (nor could they, as  
27 injunctive relief in this case would be confined to the present  
28 parties, and the CVP operator is not a party). This is not a

1 NEPA case, nor is a procedural statute challenged, in which  
2 correction of the procedural violations effectively redresses the  
3 harm.

4 Here, the Coalition lacks standing to sue because, even if  
5 it were to prevail in this case, its injury would not necessarily  
6 be redressed. If the regulations were invalidated, even if the  
7 striped bass population were reduced to a level that measurably  
8 protected salmonid species on which they prey, there are other  
9 predators (the pikeminnow) and other causes: operation of the  
10 Projects, toxics, in-Delta diverters, alien invasive species, all  
11 of which contribute to the species' jeopardy. The present Delta  
12 smelt and salmonids jeopardy findings are based on drought  
13 conditions and Project operations, as primary causes. The extent  
14 to which all other cooperative causes will continue to operate is  
15 unknown. There remains total uncertainty whether reduction in  
16 the threat of some predators will have more than minimal effect  
17 on the protected species. The State Defendants motion for  
18 judgment on the pleadings that the Coalition lacks standing is  
19 GRANTED, WITH LEAVE TO AMEND.

20 d. Associational Standing.

21 The Coalition also must satisfy the requirements of  
22 associational standing. "[A]n association has standing to bring  
23 suit on behalf of its members when":

24 (a) its members would otherwise have standing to sue in  
25 their own right;

26 (b) the interests it seeks to protect are germane to  
the organization's purpose; and

27 (c) neither the claim asserted nor the relief requested  
28 requires the participation of individual members in the  
lawsuit.

1  
2 *United Food & Commercial Workers v. Brown Group*, 517 U.S. 544,  
3 553 (1996). As the members of the Coalition do not satisfy the  
4 redressibility requirement, the Coalition does not have standing  
5 to bring suit on their behalf.

6 3. Standing of Dee Dillon.

7 a. Injury in Fact.

8 Dee Dillon is the only individual plaintiff in this case.  
9 His claims of injury are unrelated to reductions in water  
10 deliveries. According to the Complaint:

11 In the last six years, Mr. Dillon and his family have  
12 visited the Delta approximately 200 times. Mr. Dillon  
13 and his family engage in recreational boating,  
14 swimming, fishing, and wildlife viewing in the Delta.  
15 Mr. Dillon is deeply concerned about the health of the  
16 Delta ecosystem as he has personally witnessed its  
17 decline over the last six years. Mr. Dillon has  
18 engaged in boating for most of his adult life, in both  
19 the ocean and in inland waters, and it is his view that  
20 the Delta provides a freshwater boating and recreating  
21 experience that is different than any other in the  
22 western United States. Mr. Dillon is concerned about  
23 the continued survival of species in the Delta,  
24 including the Sacramento River winter-run chinook  
25 salmon, Central Valley spring-run chinook salmon,  
26 Central Valley steelhead and the delta smelt. Mr.  
27 Dillon derives aesthetic, recreational, and  
28 conservation benefits from the overall health of the  
Delta ecosystem, including the fish species that live  
in the Delta.

(Doc. 1 at ¶ 45.)

State Defendants argue that these allegations are  
insufficient because they do not contain "concrete allegations  
that the defendant's allegedly unlawful actions have actually  
altered the plaintiff's enjoyment of the environment." (Doc. 25  
at 12.) *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 182-183  
(2000), upheld a claim of standing in a Clean Water Act case

1 where plaintiffs established that the alleged discharge of  
2 pollution actually stopped the plaintiffs from fishing in and  
3 otherwise recreating on the water body in question. *Id.* at 182.

4 State Defendants argue that in environmental injury cases,  
5 the Ninth Circuit requires a plaintiff to show that defendant's  
6 conduct has "curtailed," "limited," or "deterred" a plaintiff's  
7 actions, citing *Nuclear Information*, 457 F.3d at 953, and  
8 *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d  
9 1141, 1150 (9th Cir. 2000). State Defendants read these cases  
10 too narrowly. In *Nuclear Information*, the Ninth Circuit started  
11 with the principle set forth in *Citizens for Better Forestry v.*  
12 *U.S. Dept. of Agriculture*, 341 F.3d 961, 971 (9th Cir. 2003),  
13 that provides "environmental plaintiffs must allege that they  
14 will suffer harm by virtue of their geographic proximity to and  
15 use of areas that will be affected by the [agency's] policy."  
16 The *Nuclear Information* court then examined the record for any  
17 evidence of a "geographic nexus" between the plaintiffs and the  
18 area where the alleged impact will occur:

19 To show a "geographic nexus," petitioners claiming a  
20 violation of NEPA must allege that they will suffer  
21 harm as a result of their proximity to the area where  
22 the alleged environmental impact will occur. We have  
23 defined the geographic nexus requirement broadly to  
24 permit challenges to actions with wide-reaching  
25 geographic effects where the petitioners properly  
26 allege, and support with affidavits, that they use the  
27 impacted area, even if the impacted area is vast. See  
28 *Citizens for Better Forestry*, 341 F.3d at 971 (holding  
that "Citizens need not assert that any specific injury  
will occur in any specific national forest that their  
members visit," where they "properly alleged, and  
supported with numerous affidavits" their members' use  
and enjoyment of a "vast range of national  
forests")....

None of declarations submitted by members of NIRS,  
Committee to Bridge the Gap, Public Citizen, or Redwood

1 Alliance explain in any way how their health may be  
2 affected by this regulation. They have not alleged with  
3 any specificity what geographic areas are most likely  
4 to be affected, other than to assert that the  
5 regulations impact highways nationwide. Nor have they  
6 alleged that they will be exposed to increases in  
7 radiation or that they will curtail their use of public  
8 highways as a result of the regulation.

9 *Id.* at 952. Hence, only in the context of searching for any  
10 evidence of a "geographic nexus" did the Ninth Circuit ask  
11 whether plaintiffs would "curtail" their use of the area in  
12 question.

13 In *Ecological Rights Foundation*, 230 F.3d at 1149-50, the  
14 Ninth Circuit reviewed the status of the law regarding injury in  
15 fact:

16 Under *Laidlaw*...an individual can establish "injury in  
17 fact" by showing a connection to the area of concern  
18 sufficient to make credible the contention that the  
19 person's future life will be less enjoyable-that he or  
20 she really has or will suffer in his or her degree of  
21 aesthetic or recreational satisfaction-if the area in  
22 question remains or becomes environmentally degraded.  
23 Factors of residential contiguity and frequency of use  
24 may certainly be relevant to that determination, but  
25 are not to be evaluated in a one-size-fits-all,  
26 mechanistic manner.

27 Daily geographical proximity, for instance, may make  
28 actual past recreational use less important in  
substantiating an "injury in fact," because a person  
who lives quite nearby is likely to notice and care  
about the physical beauty of an area he passes often.  
*See Laidlaw*, 120 S.Ct. at 704 (FOE member alleged  
injury in fact because "he lived a half-mile from  
*Laidlaw's* facility;...he occasionally drove over the  
North Tyger River, and...it looked and smelled  
polluted"); *Friends of the Earth v. Consolidated Rail  
Corp.*, 768 F.2d 57, 61 (2d Cir.1985) (affiant who  
passed the Hudson River regularly and found its  
pollution "offensive to his aesthetic values" stated  
injury in fact). On the other hand, a person who uses  
an area for recreational purposes does not have to show  
that he or she lives particularly nearby to establish  
an injury-in-fact due to possible or feared  
environmental degradation. Repeated recreational use  
itself, accompanied by a credible allegation of desired  
future use, can be sufficient, even if relatively

1 infrequent, to demonstrate that environmental  
2 degradation of the area is injurious to that person.  
3 *Id.* at 705 (finding that an individual who has canoed  
4 in the river and would do so again, closer to the  
5 discharge point, were it not for the discharges has  
6 made a sufficient "injury-in-fact" showing). An  
7 individual who visits Yosemite National Park once a  
8 year to hike or rock climb and regards that visit as  
9 the highlight of his year is not precluded from  
10 litigating to protect the environmental quality of  
11 Yosemite Valley simply because he cannot visit more  
12 often.

13 This flexible approach is the only one consistent with  
14 the nature of the aesthetic and recreational interests  
15 that typically provide the basis for standing in  
16 environmental cases. As the Supreme Court has  
17 explained, "[a]esthetic and environmental well-being,  
18 like economic well-being, are important ingredients of  
19 the quality of life in our society." *Sierra Club*, 405  
20 U.S. at 734. Yet, aesthetic perceptions are  
21 necessarily personal and subjective, and different  
22 individuals who use the same area for recreational  
23 purposes may participate in widely varying activities,  
24 according to different schedules. Laidlaw confirms that  
25 the constitutional law of standing so recognizes, and  
26 does not prescribe any particular formula for  
27 establishing a sufficiently "concrete and  
28 particularized," *Defenders of Wildlife*, 504 U.S. at  
29 560, aesthetic or recreational injury-in-fact.

30 Evaluating the record in this case in accord with  
31 Laidlaw, there is no doubt that both plaintiff  
32 organizations have come forward with sufficient factual  
33 averments to survive summary judgment on the standing  
34 issue. Both Hinderyckx, a member of Mateel, and  
35 Evenson, a member of ERF, stated longstanding  
36 recreational and aesthetic interests in Yager Creek,  
37 the specific place at issue in this case. Both have  
38 used the creek for recreational activities several  
39 times in the past, and both have alleged that Pacific  
40 Lumber's conduct has impaired their enjoyment of those  
41 activities. Hinderyckx, like the affiants in Laidlaw,  
42 testified that he is deterred from fully enjoying Yager  
43 Creek because of his concerns about pollutants  
44 discharged from Pacific Lumber's facilities adjacent to  
45 the creek; although he likes to fish, he refrains from  
46 fishing in the creek because of concerns about  
47 pollution, and he is less likely to swim at some places  
48 along the creek than he used to be. And both Hinderyckx  
49 and Evenson, like the affiants in Laidlaw, expressed an  
50 interest in participating in recreational activities in  
51 and around Yager Creek in the future, and in continuing  
52 to enjoy the beauty of the area.

1 *Id.* (emphasis added). State Defendants emphasize that the  
2 plaintiffs in *Ecological Rights Foundation* and *Laidlaw* both  
3 claimed to be deterred from using the resource in question as a  
4 result of the agency action in question. But, nothing in this  
5 jurisprudence suggests that "deterrence" from or "curtailment" of  
6 use of a resource is a necessary requirement.

7 Nevertheless, these cases do stand for the proposition that  
8 even injuries to aesthetic or recreational enjoyment of an area  
9 must be "concrete and particularized." Here, Mr. Dillon merely  
10 expresses "concern[] about the continued survival of species in  
11 the Delta, including the Sacramento River winter-run Chinook  
12 salmon, Central Valley spring-run Chinook salmon, Central Valley  
13 steelhead and the delta smelt..." because he "derives aesthetic,  
14 recreational, and conservation benefits from the overall health  
15 of the Delta ecosystem, including the fish species that live in  
16 the Delta." The allegation that "Defendants' violations of the  
17 ESA harm Mr. Dillon's aesthetic, recreational, and conservation  
18 interests in the Delta" are conclusory and do not explain in a  
19 "concrete and particularized" manner how the striped-bass  
20 regulations impact and interfere with his aesthetic and  
21 recreational interests.<sup>2</sup> Such allegations need not be detailed  
22 at the pleadings stage, but they must be reasonably inferred from  
23 factual allegations in the complaint. Here, the Complaint  
24 contains only conclusory allegations of injury which do not  
25 explain how Mr. Dillon is actually injured by the striped bass

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26  
27 <sup>2</sup> If Mr. Dillon were, for example, an avid recreational  
28 salmon angler, whose enjoyment of fishing was impaired by the  
striped-bass regulations.



1 regulations.

2 b. Causation.

3 State Defendants argue that Mr. Dillon cannot satisfy the  
4 causation requirement, because he fails to allege any causal  
5 connection between the State Defendants' enforcement of the  
6 striped bass regulations and the "decline" of the "Delta  
7 ecosystem" allegedly "witnessed" by Mr. Dillon. The reasons why  
8 the Coalition's standing allegations satisfy the causation  
9 requirement are equally applicable here. The causal chain is  
10 long, but is not "hypothetical or tenuous."

11 c. Redressibility.

12 State Defendants contend that the complaint does not contain  
13 any claim that the invalidation of the striped bass regulations  
14 will halt or materially reverse this claimed "decline" in the  
15 "Delta ecosystem." Moreover, the State Defendants maintain that  
16 even if the striped bass regulations are invalidated by this  
17 litigation, the Complaint does not explain how reversal of those  
18 regulations would redress Mr. Dillon's claimed injury as other  
19 causes have been held responsible for decline of the species, all  
20 of which will be invalidated by a favorable outcome in this case.

21 In support of this argument, State Defendants cite *Nuclear*  
22 *Info.*, 457 F.3d at 953-955, in which the Ninth Circuit held that  
23 causation and redressibility were not shown:

24 [Plaintiffs] fail[ed] to show that its members'  
25 concrete interest is threatened by the challenged  
26 regulation, rather than by "unregulated transportation  
27 of radioactive material" in the abstract. The  
28 declarations simply express undifferentiated  
"concerns"-the same concerns about nuclear hazards  
shared by the public at large-and speculate that  
unregulated transportation of radioactive material in  
general- not this regulation in particular-may present

1            unspecified threats to their health.

2    *Id* at 954. According to the State Defendants, this language  
3    establishes the proposition that Plaintiffs must allege that the  
4    regulation being challenged is "in particular" responsible for  
5    the plaintiffs' claimed injury. *Id.* at 954. Just such an  
6    allegation is reasonably inferred from the complaint. There is  
7    no requirement that he use particular words, let alone the words  
8    "in particular."

9  
10          State Defendants' motion for judgment on the pleadings that  
11    Dee Dillon lacks standing is GRANTED, because he has not  
12    satisfied the injury in fact requirement. Mr. Dillon is GRANTED  
13    LEAVE TO AMEND his complaint.

14          B.    Legislative Immunity of Commission Members.

15          State Defendants also move to dismiss the claims against  
16    Defendants Rogers, Gustafson, Kellogg, and Sutton, who are  
17    Officers or Members of the Commission, on the grounds that they  
18    are immune from suit under the doctrine of legislative immunity.  
19    The doctrine of legislative immunity provides officials with  
20    absolute immunity when they perform legislative or quasi-  
21    legislative functions. *Supreme Court of Va. v. Consumers Union*  
22    *of United States, Inc.*, 446 U.S. 719, 731-34 (1980). This  
23    "privilege of legislators to be free from arrest or civil process  
24    for what they do or say in legislative proceedings has taproots  
25    in the Parliamentary struggles of the Sixteenth and Seventeenth  
26    Centuries." *Id.* The immunity is absolute. *Eastland v. U.S.*  
27    *Servicemen's Fund*, 421 U.S. 491, 501-503 (1975); *Spallone v.*  
28    *United States*, 493 U.S. 265, 278 (1990). The immunity prohibits

1 claims for damages and declaratory and injunctive relief.  
2 *Spallone*, 493 U.S. at 278; *Supreme Court of Va.*, 446 U.S. at 732.  
3 The doctrine has no application when an official is acting in an  
4 administrative or executive capacity. *Tenney v. Brandhove*, 341  
5 U.S. 367, 379 (1951).

6 Individuals who are not members of legislative bodies may  
7 nonetheless claim the immunity where they have been delegated  
8 legislative powers. In *Lake County Estates v. Tahoe Regional*  
9 *Planning Agency*, 440 U.S. 391, 394, n.4 and 405 (1979), the  
10 Supreme Court held that members of the Tahoe Regional Planning  
11 Agency could assert legislative immunity in an action challenging  
12 the agency's adoption of a land use ordinance, where the  
13 ordinance's adoption was based upon delegated powers from the  
14 California and Nevada legislatures. Similarly, *Supreme Court of*  
15 *Virginia*, 446 U.S. at 733-734, held that the Virginia Supreme  
16 Court could claim legislative immunity in a challenge to certain  
17 state bar rules, where the Virginia court was "merely exercising  
18 a delegated power to make rules." In affirming the immunity, the  
19 U.S. Supreme Court held that "the Virginia Court is exercising  
20 the State's entire legislative power with respect to regulating  
21 the Bar, and its members are the State's legislators for the  
22 purpose of issuing the Bar Code." *Id.*

23 In *Bogan v. Scott-Harris*, 523 U.S. 44, 49-54 (1998), the  
24 Ninth Circuit analyzed whether a vote for an ordinance  
25 eliminating a city official's office was entitled to  
26 "legislative" immunity. Among other things, the Ninth Circuit  
27 reasoned that the ordinance "in substance, bore all the hallmarks  
28 of traditional legislation:"

1 It reflected a discretionary, policymaking decision  
2 implicating the city's budgetary priorities and its  
3 services to constituents; it involved the termination  
4 of a position, which, unlike the hiring or firing of a  
5 particular employee, may have prospective implications  
6 that reach well beyond the particular occupant of the  
7 office; and, in eliminating respondent's office, it  
8 governed in a field where legislators traditionally  
9 have power to act...

6 *Id.* at 55.

7 Here, the legal authority to promulgate the contested  
8 striped bass regulations is based upon specific authority  
9 delegated to the Commission by the California Legislature.  
10 Section 200 of the California Fish and Game Code states, in part,  
11 that "[t]here is delegated to the Commission the power to  
12 regulate the taking or possession of...fish...to the extent and  
13 in the manner prescribed in this article." Section 202 provides  
14 that "[t]he commission shall exercise its powers under this  
15 article by regulations made and promulgated pursuant to this  
16 article." Cal. Fish and Game Code, § 202. Section 205 expressly  
17 grants the Commission the authority to "[e]stablish, change or  
18 abolish bag limits, possession limits, and size limits" for fish  
19 species. Cal. Fish and Game Code, § 205. Based upon this  
20 delegated authority, the Commission has adopted regulations  
21 setting bag limits and size limits for striped bass. Cal. Code  
22 Regs., tit. 14, § 5.75.

23 Plaintiffs assert that "on its face," Cal. Fish & Game Code  
24 Section 200 "appears to delegate to the Commissioners both  
25 legislative and executive functions," citing the American  
26 Heritage Dictionary of the English Language 1471 (Joseph P.  
27 Pickett *et al.*, eds., 4th ed. 2000), for its definition of  
28 "regulate" as "to control or direct according to rule, principle,

1 or law." Plaintiffs argue that the word "regulate" should be  
2 read broadly at this stage of the litigation to encompass both  
3 legislative and executive (i.e., enforcement) powers.

4 However, the language of the Complaint characterizes the  
5 Commission's role with respect to striped bass in  
6 quasi-legislative terms. The complaint describes the Commission  
7 as having "regulatory authority" to adopt striped bass  
8 regulations; as having adopted such regulations; and as having  
9 approved a "striped bass policy." (Complaint at ¶¶ 30 and 33.)  
10 The complaint contains no allegations that the Commission or the  
11 individual Commission members have taken any steps to enforce or  
12 otherwise implement the striped bass regulations. Section 200's  
13 language, "giving permission to "regulate the taking or  
14 possession of...fish" is amplified by section 202, which  
15 specifies that "[t]he commission shall exercise its powers under  
16 this article by regulations made and promulgated pursuant to this  
17 article." (Emphasis added). Section 202 mentions nothing about  
18 enforcement.

19 The Commission's rule-making by regulations, as alleged in  
20 the complaint, have "all the hallmarks of traditional  
21 legislation." *Bogan*, 523 U.S. at 55. The Commission's adoption  
22 or amendment of a striped bass regulation or policy is a  
23 "discretionary, policymaking decision," distinctively legislative  
24 in character. *Id.* As the Ninth Circuit has observed,  
25 "statewide...policymaking for the community at large" constitutes  
26 the "quintessential legislative acts." *Chappell v. Robins*, 73  
27 F.3d 918, 921 (9th Cir. 1996); see also *Yakus v. United States*,  
28 321 U.S. 414, 424 (1944) ("The essentials of the legislative

1 function are the determination of the legislative policy and its  
2 formulation and promulgation as a defined and binding rule of  
3 conduct." ).

4 State Defendants' motion for judgment on the pleadings that  
5 the doctrine of legislative immunity bars Plaintiffs' claims  
6 against the Commission Members and the Commissions' Executive  
7 Director is GRANTED. State Defendants do not dispute that the  
8 doctrine of legislative immunity does not extend to or bar the  
9 claims against John McCamman, named in his official capacity as  
10 Interim Director of CDFG, because CDFG is responsible for  
11 enforcing, rather than promulgating, the striped bass  
12 regulations.

13 Initially, Plaintiffs requested the opportunity to propound  
14 limited discovery to ascertain the responsibilities of the  
15 Commission before the Court rules on the issue of legislative  
16 immunity. At oral argument, Plaintiffs conceded that they can  
17 ascertain such information via a public records requests prior to  
18 determining whether it is appropriate to re-name these defendants  
19 in an amended complaint. Federal Rule of Civil Procedure 11  
20 provides that an attorney has a duty to research in good faith  
21 the facts and law before filing a complaint.

22  
23 C. Eleventh Amendment Immunity of Commission Members.

24 The doctrine of state sovereign immunity prohibits suits in  
25 federal court against the State or entities of the State. *Puerto*  
26 *Rico Authority v. Metcalf & Eddy*, 506 U.S. 139, 144 (1993). In  
27 *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court enunciated  
28 the "state officials" exception to the Eleventh Amendment bar

1 against suits directed at the states in federal court:

2 [I]ndividuals, who, as officers of the State, are  
3 clothed with some duty in regard to the enforcement of  
4 the laws of the State, and who threaten and are about  
5 to commence proceedings, either of a civil or criminal  
6 nature, to enforce against parties affected an  
7 unconstitutional act, violating the Federal  
8 Constitution, may be enjoined by a Federal court of  
9 equity from such action.

10 *Id.* at 155-156. In asserting this exception, a plaintiff must  
11 show that:

12 In making an officer of the State a party defendant in  
13 a suit to enjoin the enforcement of an act alleged to  
14 be unconstitutional it is plain that such officer must  
15 have some connection with the enforcement of the act,  
16 or else it is merely making him a party as a  
17 representative of the State, and thereby attempting to  
18 make the State a party.

19 *Id.* at 157. The *Ex parte Young* exception applies to both federal  
20 constitutional violations and federal statutory violations.

21 *Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030, 1034  
22 (9th Cir. 1985).

23 The Ninth Circuit has repeatedly applied this "enforcement  
24 connection" requirement under *Ex Parte Young* to bar actions  
25 against state officials where the plaintiffs have not alleged or  
26 established that the individuals are "clothed with some duty in

27 regard to the enforcement of the laws of the State..." *Id.* at  
28 156 (emphasis added). In *Davis*, 307 F.3d at 847, the Ninth

Circuit affirmed the dismissal of the Governor of California and  
the California Resources Secretary, given the absence of any  
showing that either had "direct authority and practical ability  
to enforce the challenged statute." *Id.* at 846 and 847.

Similarly, in *Yakima Indian Nation v. Locke*, 176 F.3d 467,  
469-470 (9th Cir. 1999), the Ninth Circuit affirmed the dismissal

1 of the Governor of Washington as a defendant in an action  
2 challenging the state's lottery because "[n]owhere in [the  
3 relevant] statutes is there any indication that the governor has  
4 the responsibility of operating the state lottery or determining  
5 where the tickets would be sold." *Id.* at 470.

6 Although Plaintiffs have generally alleged a violation of  
7 federal statutory law, the Complaint does not contain any  
8 specific allegations that the individual Commission members or  
9 the Commission's Executive Director, John Carlson, Jr., are  
10 "clothed with some duty in regard to the enforcement of the laws  
11 of the State" or have any "connection with the enforcement" of  
12 state law. *Ex Parte Young*, 209 U.S. 156-57.

13 A review of California Fish and Game Code provisions cited  
14 by State Defendants reveals no indication that Commission Members  
15 or Executive Director have any enforcement duties as to the  
16 striped bass regulations. Cal. Fish and Game Code, §§ 200, 202,  
17 205, 702-704, and 850-851.

18 Plaintiffs' only response is to point out that "Defendants  
19 fail to cite any authority to support the proposition that such  
20 allegations are necessary at the pleading stage." But, the  
21 Commission's enforcement authority is a question of law that may  
22 be resolved at the pleadings stage. Should Plaintiffs discover  
23 new legal authority regarding the Commission's role, they may so  
24 allege in an amended complaint.

25 State Defendants' motion for judgment on the pleadings that  
26 the Eleventh Amendment bars Plaintiffs' claims against the  
27 Commission Members and Executive Director is GRANTED. State  
28 Defendants do not dispute that the Eleventh Amendment does not



1 bar the claims against John McCamman, named in his official  
2 capacity as Interim Director of CDFG, because CDFG is responsible  
3 for enforcing the striped bass regulations.

4 Again, Plaintiffs requested the opportunity to propound  
5 limited discovery to ascertain the responsibilities of the  
6 Commission before the Court rules on this issue. At oral  
7 argument, Plaintiffs conceded that they can ascertain such  
8 information via a public records requests prior to determining  
9 whether it is appropriate to re-name these defendants in an  
10 amended complaint.

11  
12 V. CONCLUSION

13 For the reasons set forth above, the State Defendants'  
14 motion for judgment on the pleadings is GRANTED. Neither the  
15 Coalition or Dee Dillon have alleged facts sufficient for  
16 standing and the claims against the Commission and its individual  
17 Members and Executive director are barred by both legislative and  
18 immunity and the Eleventh Amendment. Plaintiffs are GRANTED  
19 LEAVE TO AMEND, if they can do so within the requirements of Rule  
20 11, within thirty (30) days.

21 IT IS SO ORDERED.

22 Dated: July 23, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE