

1 DONALD B. MOONEY (SBN153721)
LAW OFFICES OF DONALD B. MOONEY
2 129 C Street, Suite 2
Davis, California 95616
3 Telephone: (530) 758-2377
4 Facsimile: (530) 758-7169
Attorney for
5 Petitioner Owens Valley
Committee
6

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SACRAMENTO
10

11 OWENS VALLEY COMMITTEE)	BY FAX
)	
12 Petitioners)	Case No. _____
)	
13 v.)	VERIFIED PETITION FOR
)	<u>WRIT OF MANDATE</u>
14 CALIFORNIA DEPARTMENT OF FISH)	
AND GAME; and, DOES 1 through 20)	
)	
15 Respondents)	
)	
16 _____)	

17
18 Petitioners OWENS VALLEY COMMITTEE (“Petitioner”) alleges:

- 19 1. By this action, Petitioner challenges Respondent California Department of Fish
20 and Game’s (“DFG”) January 11, 2010 certification of the Environmental Impact
21 Report/Environmental Impact Statement (“EIR”), State Clearinghouse #2008082025, for its
22 Hatchery and Stocking Program, required findings under the California Environmental Quality
23 Act (“CEQA”), Public Resources Code, section 21000 *et seq.*, and its approval of the
24 continued operation of its Hatchery and Stocking Program (“Project”).
- 25 2. Petitioners seek a determination from this Court that DFG’s approval of the
26 Project is invalid and void and that the EIR prepared for the Project fails to satisfy the
27 requirements of CEQA, and the CEQA Guidelines, Title 14, California Code of Regulations,
28 section 15000 *et seq.*

PARTIES

1
2 3. Petitioner Owens Valley Committee (“OVC”) is a California nonprofit corporation.
3 The specific purposes for which the OVC is organized are to monitor and oversee water
4 management activities in the Owens Valley, to educate the public on local environmental issues,
5 and to exercise the rights and obligations as a signatory to a 1997 Memorandum of
6 Understanding (“MOU”) regarding the Lower Owens River Project. The MOU was executed to
7 settle disputes related to preparation of an inadequate environmental impact report on the City of
8 Los Angeles Department of Water and Power’s augmented ground-water pumping project,
9 initiated in the early 1970’s in the Owens Valley. The Owens Valley Committee participated as
10 *amicus curiae* in *County of Inyo v. City of Los Angeles*, and it is a party to the MOU. OVC and
11 its members actively monitor ground-water pumping in the Owens Valley. OVC’s members
12 have a particular interest in the protection of the environment of the Owens Valley, and are
13 increasingly concerned about worsening environmental and land use conditions that
14 detrimentally affect their well-being and that of other residents and visitors of the Owens Valley.
15 OVC’s members live, work, travel and enjoy recreational activities in the Owens Valley. OVC
16 is composed of persons whose economic, personal, aesthetic, and property interests will be
17 severely injured if continued operation of the Project is not set aside pending full compliance
18 with CEQA and all other environmental laws. OVC brings this petition on behalf of all others
19 similarly situated who are too numerous to be named and brought before this court as petitioners.
20 As a group composed of residents and property owners within the Owens Valley, OVC is within
21 the class of persons beneficially interested in, and aggrieved by, the acts of Respondent as
22 alleged below. Petitioner and its members have a direct and substantial beneficial interest in
23 ensuring that Respondent complies with laws relating to environmental protection. Petitioner
24 and its members are adversely affected by Respondent’s failure to comply with CEQA in
25 approving the EIR and the Project. OVC participated in the administrative processes herein, and
26 exhausted its remedies. Accordingly, the OVC has standing to sue.

27 4. Respondent DFG is a political subdivision of the State of California. DFG is the
28 principal state agency with responsibility to manage and conserve the State’s biological

1 resources. As the lead agency for the Project, DFG is responsible for preparation of an
2 environmental document that describes the Project and its impacts, and, if necessary evaluates
3 mitigation measures and/or alternatives to lessen or avoid any significant environmental impacts.
4 As the lead agency, DFG is responsible for implementing and complying with the provisions of
5 CEQA and the CEQA Guidelines with respect to the Project.

6 5. Petitioner is unaware of the true names and capacities of Respondents identified as
7 Does 1-20. Petitioner is informed and believes, and on that basis alleges, that Respondents Does
8 1-20, inclusive, are individuals, entities or agencies with material interests affected by the Project
9 with respect to the Project or by DFG's actions with respect to the Project. When the true
10 identities and capacities of these Respondents have been determined, Petitioner will, with leave
11 of Court if necessary, amend this Petition to insert such identities and capacities.

12 **BACKGROUND FACTS**

13 6. California has been operating fish hatcheries in the state for more than 100 years.
14 Presently, DFG operates twenty-four hatchery facilities across the state. These facilities
15 release millions of fish into state waters every year, including trout, salmon, and steelhead at
16 various stages of development.

17 7. Among the 24 hatchery facilities are the Black Rock Rearing Ponds ("Black
18 Rock") and the Fish Springs Hatchery ("Fish Springs"). Both facilities are located in the
19 Owens Valley area of California.

20 8. To provide water to Black Rock, it diverts surface water from a small creek that is
21 later discharged to the Los Angeles Aqueduct. Black Rock also extracts water from local
22 groundwater wells. Fish Springs also extracts water from local groundwater wells. The wells
23 supplying both facilities were once fed by groundwater springs, which have dried up.

24 9. When CEQA was enacted in 1970, DFG continued to operate its fish hatcheries
25 and did not perform a CEQA analysis of the environmental impacts of its hatchery operations.

26 10. In fact, DFG did not prepare a CEQA analysis for its hatchery operations until
27 after it was sued in *Pacific Rivers Council, et al., v. California Department of Fish and Game*,
28 Sacramento County Superior Court, Case No. 06 CS 01451.

1 26. CEQA requires the preparation of an EIR in order to identify the significant
2 environmental effects of a project, so that measures to mitigate or avoid those effects, or
3 alternatives that avoid those effects, can be devised. (Pub. Resources Code §§ 21002.1(a),
4 21060.) Compliance with the procedural requirements of CEQA sets the stage for development
5 of mitigation measures and alternatives. Without a proper procedural foundation, a local agency
6 cannot comply with CEQA’s mandate that public agencies should not approve projects as
7 proposed if there are feasible alternatives or feasible mitigation measures available which would
8 substantially lessen the significant environmental effects of such projects. (Pub. Resources Code
9 § 21002.)

10 27. An EIR must provide public agencies and the public in general with detailed
11 information about the effect a project is likely to have on the environment, to list ways in which
12 the significant effects of a project might be minimized, and to indicate alternatives to such a
13 project. (Pub. Resources Code § 21061.) California Code of Regulations, title 14 (CEQA
14 Guidelines), section 15126.2, requires that the Final EIR identify the significant environmental
15 impacts of the project, including direct and indirect impacts. CEQA Guidelines section 15126.4
16 requires that the Final EIR describe all feasible measures that can minimize significant adverse
17 impacts of the project. CEQA does not allow an agency to defer analysis of impacts and
18 mitigation measures. (CEQA Guidelines § 15126.4(a)(I)(B).)

19 28. CEQA's fundamental goals are to foster informed decision-making and to fully
20 inform the public about the project and its impacts. (CEQA Guidelines § 15003.) In order for
21 an EIR to meet these goals and fully inform decision-makers, it must establish an appropriate
22 environmental baseline by which to determine whether the impacts of the project will be
23 significant.

24 29. Respondents committed a prejudicial abuse of discretion and failed to proceed in
25 a manner required by law by relying on an EIR that fails to meet the requirements of CEQA for
26 disclosure, analysis, and mitigation of significant project impacts. As discussed below, the
27 deficiencies in the Final EIR include an inadequate environmental baseline, an inadequate
28

1 analysis regarding the Project's environmental impacts, and an inadequate alternatives
2 analysis. The EIR also has procedural deficiencies.

3 **A. Environmental Baseline:**

4 30. The EIR uses an inadequate and impermissible baseline by which to determine
5 whether DFG's hatchery program has significant environmental effects. The EIR establishes
6 the environmental baseline as existing statewide hatchery operations between 2004-2008.
7 Because it uses a 2004-2008 baseline, the EIR determines that only impacts above and beyond
8 the impacts during the 2004-2008 period will be significant. This baseline is inadequate
9 because it allows DFG to ignore as insignificant all the impacts caused by the Project prior to
10 2004, disregarding decades of impacts without any CEQA analysis.

11 31. The 2004-2008 baseline is inappropriate because the effects of the hatchery
12 program have never been analyzed under CEQA. DFG's use of the 2004-2008 baseline
13 precludes a meaningful analysis of the preproject and postproject environmental conditions.

14 32. DFG's hatchery program has had significant environmental impacts as outlined in
15 the EIR. According to the EIR, groundwater pumping to supply the Black Rock and Fish
16 Springs facilities has caused and is causing significant environmental effects, including
17 permanently reduced surface water flows, eliminating rare alkali meadow habitat, local water
18 table depressions, and eliminating marsh habitat, small ponds and wetlands. When the Black
19 Rock and Fish Springs facilities were established there were thousands of acre-feet per year
20 flowing from the springs that fed the hatcheries. Now pumping for the hatcheries and other
21 uses exceed springs flows and have dried up the springs. However, by using the 2004-2008
22 baseline, DFG concludes that these impacts are insignificant because they occurred prior to the
23 2004-2008 baseline period.

24 33. DFG's EIR analyzing its hatchery operations is not the typical CEQA scenario
25 where an agency performs its environmental review prior to proceeding with its project. The
26 EIR itself recognizes that this is not the typical CEQA scenario. Here, DFG did not prepare a
27 CEQA document prior to implementing the Project. The Project has been ongoing for decades
28

1 and has caused significant environmental impacts, but has only complied with CEQA recently
2 as a result of a lawsuit compelling it to do so.

3 34. The EIR must provide sufficient information for informed decision-making and
4 apprise all interested parties of the true environmental consequences of the Project. The EIR's
5 environmental baseline is inadequate because it fails to provide sufficiently detailed
6 information regarding the environmental impacts of the DFG's hatchery operations across the
7 state, including at the Black Rock and Fish Springs facilities. The EIR must use an
8 environmentally-meaningful baseline that compares the environmental conditions existing
9 prior to the hatcheries pumping groundwater for Black Rock and Fish Springs facilities.

10 35. DFG's use of the 2004-2008 baseline is a prejudicial error and a violation of
11 CEQA because it does not provide detailed information regarding the environmental impacts
12 of the Project and precludes informed decisionmaking and informed public participation.

13 **B. Impact Analyses**

14 36. The EIR fails to provide an adequate analysis of the Project's impacts, and fails to
15 provide sufficient detail regarding the foreseeable impacts that will arise from continued
16 groundwater pumping to supply the Black Rock and Fish Springs facilities.

17 37. The EIR fails to comply with the requirements of CEQA in that it fails to
18 adequately disclose, analyze and/or mitigate the Project's environmental impacts as required
19 by law, and its conclusions regarding the Project's environmental impacts are not supported by
20 substantial evidence. As a result, the Project will result in significant environmental impacts
21 that the EIR failed to address or mitigate.

22 i. The EIR recognizes that the hatchery program has caused significant
23 environmental impacts, including permanently reduced surface water flows, eliminating rare
24 alkali meadow habitat, causing local water table depressions, and eliminating springs, marsh
25 habitat, small ponds and wetlands. Though the EIR acknowledges that groundwater pumping
26 in the Owens Valley to supply water to the Black Rock and Fish Springs facilities increased
27 significantly in the 1973-2008 period and has caused significant environmental impacts, it
28 dismisses this impact as insignificant because such pumping did not increase in the 2004-2008

1 baseline period as compared to the 1973-2004 period. DFG has dismissed a detailed analysis
2 of groundwater impacts of the Black Rock and Fish Springs facilities and whether ongoing
3 operations will continue to drawdown groundwater table only because they occurred prior to
4 the 2004-2008 baseline and will not result in “incremental environmental impacts” above those
5 which had already occurred prior to 2004. Because it does not consider such impacts
6 significant, the EIR omits any mitigation for these impacts. The Draft EIR proposed limiting
7 groundwater pumping to supply Black Rock and Fish Springs facilities to 8,000 acre-feet
8 annually, but this mitigation was omitted from the Final EIR.¹

9 ii. Even using 2004-2008 as the environmental baseline, the Project will
10 cause significant environmental effects that were not analyzed or mitigated in the EIR. For
11 example the groundwater wells supplying the Black Rock and Fish Springs facilities have
12 created a cone of depression that causes groundwater in the area to flow toward the hatchery
13 facilities’ wells. Groundwater tables in the sub-basins used to supply the Black Rock and Fish
14 Springs facilities have not stabilized and continue to drop. Continued operation of the Black
15 Rock and Fish Springs facilities will continue to lower the groundwater table and have
16 groundwater impacts that are not analyzed or mitigated in the EIR. In fact, the wells that
17 supply the Black Rock and Fish Springs facilities are exempt from applicable groundwater
18 management regimes allowing them to continue drawing down the groundwater table. The
19 EIR does not include mitigation for these impacts. These significant unmitigated
20 environmental effects are not addressed in the EIR.

21 iii. In analyzing the effects of the project on Owens Valley groundwater
22 basins, the EIR compares the facilities’ extractions to the total storage capacity of the basins.
23 This comparison does not take into account the many sub-basins in the area and fails to provide
24 sufficient information to determine the impacts of the groundwater pumping because it does
25 not evaluate how much water the basin currently contains or the recharge levels. Without such
26 information, it is impossible to determine the Project’s past, present, and probable future
27 environmental impacts on the groundwater basins it pumps water from to supply the Black
28 Rock and Fish Springs facilities.

1 **C. Alternative Analysis**

2 38. The EIR fails to provide a selection and discussion of alternatives that fosters
3 informed decision-making and informed public participation. The alternatives analysis in the
4 EIR does not meet the requirement of a reasonable range of alternatives that lessen the
5 Project’s significant environmental impacts, and does not focus on alternatives that either
6 eliminate adverse impacts or reduce them to insignificance, even if they would to some degree
7 impede the Project’s objectives, as required by CEQA. Instead of analyzing alternatives to the
8 entire statewide hatchery program, the EIR should have analyzed alternatives for each region
9 where a hatchery is located.

10 39. The EIR failed to include feasible alternatives to the Project that were presented
11 to DFG. Such alternatives included a groundwater monitoring plan that allows for reducing
12 groundwater pumping for the Fish Springs and Black Rock facilities as needed to allow
13 groundwater levels and the groundwater dependent alkali meadows to be restored. This
14 alternative would mitigate the significant environmental effects caused by groundwater
15 pumping to supply the Black Rock and Fish Springs facilities that has occurred since the
16 1970’s and continues to occur. Another alternative included limiting groundwater extractions
17 to 8,000 acre-feet annually.¹ This alternative was included in the Draft DIR/EIS, but omitted
18 from the Final EIR.

19 **D. Procedural Requirements and Agency Findings**

20 40. Prior to approving the Project, the Respondent failed to adequately consider some
21 of the public comments submitted during the environmental review process.

22 41. The responses to comments in the Final EIR fail to meet the requirements of
23 CEQA in that they neither adequately dispose of all the issues raised, nor provide specific
24 rationale for rejecting suggested Project changes, mitigation measures, or alternatives. CEQA
25 requires that the lead agency evaluate and respond to all environmental comments on the Draft
26 EIR that it receives during the public review period. The response(s) must describe the
27 disposition of the issue(s) raised and must specifically explain reasons for rejecting suggestions
28

1 and for proceeding without incorporating the suggestions. The Final EIR's responses to
2 comments fail to meet this standard.

3 42. Where mitigation measures and alternatives to a project are not adopted, the
4 CEQA findings must identify specific economic, legal, social and technological and other
5 considerations that make infeasible the adoption of mitigation measures or alternatives. All
6 CEQA findings must be supported by substantial evidence in the record and must disclose the
7 analytical route by which approval of the project is justified. Here, the EIR admits significant
8 environmental impacts have occurred in groundwater basins of the Owens Valley but declares
9 them to be insignificant and not requiring mitigation because they have been occurring since
10 the 1970's before the 2004-2008 baseline. The Draft EIR proposed limiting groundwater
11 pumping to supply Black Rock and Fish Springs facilities to 8,000 acre-feet annually, but this
12 mitigation was omitted from the Final EIR, without explanation.¹ The findings regarding the
13 significance of the impacts, mitigation measures for the impacts, and alternatives to avoid or
14 mitigate the impacts relied upon by Respondent's approval of the Project are not supported by
15 substantial evidence in the record, and the links between evidence and conclusions are not
16 satisfactorily provided.

17 43. Respondent violated CEQA in that the findings they adopted in support of the
18 approval of the continued operation of the hatchery program and certification of the EIR are
19 legally inadequate and not supported by substantial evidence. Inadequate findings include, but
20 are not limited to, findings regarding the environmental baseline, Project-specific impacts,
21 mitigation measures, and alternatives.

22 44. Respondent's findings violate the requirements of the CEQA Guidelines. The
23 Findings fail to identify the changes or alterations that are required to avoid or substantially
24 lessen the project's significant environmental effects (CEQA Guidelines § 15091(a)(1); the
25 Findings are not supported by substantial evidence (CEQA Guidelines, § 15091(b)); and the
26 Findings fail to adopt a mitigation monitoring program (CEQA Guidelines, § 15091(d)).

27 45. Respondent violated CEQA where it relied on the mitigation measures set forth in
28 another CEQA document to mitigate the Black Rock and Fish Springs facilities' impacts, but

1 does not specifically incorporate such document into its EIR to make the mitigation measures
2 binding.

3 46. Based upon each of the foregoing reasons, the EIR is legally defective under
4 CEQA. DFG prejudicially abused its discretion in violation of CEQA in approving the Project.
5 As such, the Court should issue a writ of mandate directing DFG to set aside its certification of
6 the EIR and approval of the Project.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Petitioner prays for judgment as follows:

9 1. That this Court issue a peremptory writ of mandate ordering Respondent to:

10 (a) vacate and set aside its certification of the EIR on the grounds that it
11 violates the California Environmental Quality Act, Public Resources Code section 21000 *et*
12 *seq.*

13 (b) withdraw the Notice of Determination for the Project;

14 (c) prepare, circulate and consider a new legally adequate EIR for the Project;

15 (d) suspend all groundwater extractions that contribute to overdraft of the
16 groundwater basins serving the Black Rock and Fish Springs facilities and/or that could result
17 in any change or alteration to the physical environment until Respondent has taken such
18 actions as may be necessary to bring their determination, findings or decision regarding the
19 Project into compliance with CEQA;

20 2. For Petitioner's costs associated with this action;

21 3. For an award of reasonable attorneys' fees pursuant to Code of Civil Procedure
22 section 1021.5; and

23 4. For such other and further relief as the Court may deem just and proper.

24 Dated: February 9, 2010

Respectfully submitted,

25 LAW OFFICES OF DONALD B. MOONEY

26 By _____

27 Donald B. Mooney
Attorneys for Petitioner
28 Owens Valley Committee

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Draft EIR proposed limiting groundwater pumping to supply Black Rock facilities to 8,000
acre feet per year. No reduction was proposed at the Fish Springs hatchery. This error was
discovered after documents were filed with the Court and will be corrected later in the legal
process.

VERIFICATION

I am the attorney for petitioner for Owens Valley Committee, a California nonprofit corporation, not located in Yolo County, State of California, where I have my office. For that reason, I make this verification for an on their behalf pursuant to the California Code of Civil Procedure section 446. I have read the foregoing document entitled VERIFIED PETITION FOR WRIT OF MANDATE and know the contents thereof. I am informed and believe and on that ground allege that the matters therein stated are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 9th day of February, 2010, at Davis, California.

Donald B. Mooney