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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF AMADOR

FOOTHILL CONSERVANCY, a non-profit corporation, FRIENDS OF THE RIVER, a non-profit corporation, and CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, a non-profit corporation

Petitioners

vs.

EAST BY MUNICIPAL UTILITY DISTRICT, EAST BAY MUNICIPAL UTILITY DISTRICT BOARD OF DIRECTORS, and DOES 1 through 10, inclusive

Respondents

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Case No. \_\_\_\_\_

VERIFIED

PETITION FOR WRIT OF MANDATE

[Action Includes Claims under California  
Environmental Quality Act (CEQA)]

## I. INTRODUCTION

1. Petitioners Foothill Conservancy, Friends of the River and California Sportfishing Protection Alliance (hereafter “Petitioner”) challenge Respondents East Bay Municipal Utility District’s (“EBMUD”) and the EBMUD Board of Directors’ approval on October 13, 2009 of the EBMUD’s Water Supply Management Program 2040 (“Project”) and certification of a program environmental impact report (“PEIR”) pursuant to the California Environmental Quality Act (“CEQA”), Pub. Res. Code § 21000 *et seq.*
2. Petitioners challenge this Project on the grounds that it failed to consider or analyze the significant environmental impacts that will occur due to the expansion and enlargement of Pardee Dam and Reservoir and Lower Bear Reservoir located in Amador and Calaveras Counties. The Project will inundate over a mile of the existing natural Mokelumne River, both a national landmark and a river segment recommended for national wild and scenic designation. The expansion will inundate with reservoir waters world class white-water rafting as well as existing recreational facilities constructed by the federal government and relied on for decades by local foothill communities. The larger reservoir and storage will eliminate important local cultural resources, such as the Middle Bar bridge. Yet with little to no analysis, the PEIR for the Project found that each of these impacts were less than significant.
3. The PEIR fails as an adequate informational document under CEQA. It fails to describe the existing environmental setting or provide an accurate project description that discloses the effect of the Pardee expansion on the local environment. The PEIR does not communicate the significance of the impacts that will occur to the public, nor does it contain any analysis of whether it could be feasible to avoid these impacts through the adoption of other measures ultimately not considered as part of the PEIR Project. As a result, EBMUD’s approval is uninformed and not supported by the analysis and findings that would be required under CEQA

before EBMUD would be allowed to shift the harm of its future water supply program onto a crashing Delta ecosystem and onto Sierra foothill counties that have neither electoral nor legislative remedies at their disposal to ensure that the resources enjoyed by their local communities are protected.

4. Petitioners request this Court to set aside Respondent EBMUD's approval of the 2040 Water Supply Management Plan as contrary to CEQA and to require Respondents to comply with the law prior to making any subsequent approval of the 2040 Water Supply Management Plan.

## **II. PARTIES**

5. Petitioner, FOOTHILL CONSERVANCY, is a 501-C-3 nonprofit organization with members who live and work in the Mokelumne River watershed. For two decades, the Foothill Conservancy has worked to restore, protect, and sustain the natural and human environment in and around Amador and Calaveras counties. The Foothill Conservancy's vision for this area includes protected scenic quality, conserved forest lands, restored natural diversity of native plants and animals, free-flowing rivers, coordinated land use planning, and balanced economic development that is ecologically and socially sustainable. The FOOTHILL CONSERVANCY and its members have repeatedly submitted public comments and participated in public workshops and hearings throughout development of the 2040 WSMP and PEIR.

6. Petitioner FRIENDS OF THE RIVER is a statewide river conservation organization founded in 1973, incorporated under the non-profit laws of the State of California, with its principal place of business in Sacramento, California. With more than 5,000 members, Friends of the River's mission is to preserve, protect and restore California's rivers, streams, watersheds, aquatic ecosystems, and associated fish and wildlife and their habitat. Friends of the River has been involved in the conservation and protection of the Mokelumne River for more than 20 years. Friends of the River encouraged the Forest Service and Bureau of Land Management to recommend Wild & Scenic River protection for the river. Friends of the River helped negotiate

a settlement agreement that established improved flows in the Mokelumne River for fish, wildlife, and recreation in the federal license for the Mokelumne Hydropower Project. Friends of the River was involved in the successful effort to open up the Middle Bar segment of the Mokelumne River to public access and recreation. Friends of the River testified at public meetings and submitted written comments in opposition to the proposed enlargement of the Pardee Reservoir on the Mokelumne River in EBMUD's Water Supply Management Plan 2040. Many Friends of the River members float, swim, fish, and recreate on the Mokelumne River.

7. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (CSPA) is a non-profit public benefit conservation and research organization corporation established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality, wildlife and fishery resources and their aquatic ecosystems and associated riparian habitats. To further these goals, CSPA actively seeks federal and state agency implementation of environmental regulations and statutes and routinely participates in administrative, legislative and judicial proceedings. Where necessary, CSPA directly initiates enforcement actions on behalf of itself and its members. CSPA has approximately 2,000 members who live, recreate and work in and around waters of the State of California, including waterways throughout the Sierra Nevada, Central Valley and the Sacramento-San Joaquin River Delta Estuary. CSPA has been involved in Mokelumne River proceedings for more than twenty years, including submittals and testimony leading up to the adoption of EBMUD's 2040 Plan.

8. Petitioners bring this action on behalf of themselves and their members, whose interests will be adversely affected by the proposed 2040 Project. Petitioners' members are engaged in the study, protection, enhancement, conservation and preservation of the natural and human environment in and around Amador and Calaveras Counties and in the Delta. Petitioners' members live and recreate in the Sierra Nevada foothills, including the area around Pardee and

Lower Bear Reservoir and the Mokelumne River. Petitioners' members rely on the Mokelumne River and its watershed as a place of residence, business, recreation and spiritual renewal. Petitioners' members wish to ensure the future environmental quality of the foothill regions, and to pass it on to newcomers and future generations. Petitioners' members are beneficially interested in the recreational, environmental, spiritual and aesthetic resources that will be adversely affected by the Project. Petitioners' members as public citizens also have a beneficial interest that agencies conduct careful and responsible planning in accordance with CEQA's informational requirements.

9. Respondent, EAST BAY MUNICIPAL UTILITY DISTRICT BOARD OF DIRECTORS (hereinafter, "the Board") is the governing body of respondent, EAST BAY MUNICIPAL UTILITY DISTRICT("District"), a municipal utility district created under the laws of the State of California to provide utility services to parts of Alameda and Contra Costa counties. (Pub. Utilities Code, sec. 11501, et. seq.). Respondents were and at all times relevant to this action the governmental entities responsible for reviewing and approving the Project challenged in this action.

10. The true names and capacities of Respondent Does 1-10 are not presently known to Petitioners. Petitioners may amend this Petition to add the true names and capacities of said Does at such time as they are discovered.

### **III. JURISDICTION AND VENUE**

11. Jurisdiction of this Court is invoked pursuant to Code of Civil Procedure §§ 1084 *et. seq.* and Public Resources Code § 21168.

12. This court is the proper venue pursuant to Code of Civil Procedure § 393(b), which states that the county in which the cause, or some part of the cause, arose, is the proper county for the trial. A cause arises in the county where the effects of the administrative action are felt, not where the agency signs the challenged order or takes the challenged action. *California State Parks*

*Foundation v. Superior Court* (2007) 150 Cal. App.4th 826, 834. Here, the impacts of the Project due to the proposed expansion of Pardee and Lower Bear reservoirs will be felt primarily by local communities in Amador County. This court is also the proper venue under Code of Civil Procedure § 394 due to one of Respondents' business offices being located in Amador County.

#### **IV. EXHAUSTION OF REMEDIES**

13. Petitioners have performed any and all conditions precedent to filing this instant action and have exhausted any and all available administrative remedies to the extent required by law. Petitioners provided scoping comments, further comments on the draft PEIR, and further comments on the Final PEIR and at the October 13, 2009 EBMUD Board hearing on the final approval.

14. On November 16, 2009, Petitioners' attorney faxed to EBMUD a Notice of Commencement of Action required by Public Resources Code § 21167.5. (*See Exhibit 1, attached hereto.*)

15. Petitioners' attorney has served a copy of this Petition on the Attorney General's office to give notice of Petitioners' intent to bring this proceeding as private attorney generals under Code of Civil Procedure section 1021.5. (*See Exhibit 2, attached hereto.*)

16. Petitioners have no other adequate remedy in the course of law unless this Court grants the requested writ of mandate to require the EBMUD to set aside its approval of the Project. In the absence of such remedies, EBMUD's approval will remain in effect in violation of CEQA.

#### **V. FACTUAL BACKGROUND**

##### **A. DESCRIPTION OF ENVIRONMENTAL SETTING**

17. The area in controversy begins at the crest of the Sierra Nevada Mountains in the Mokelumne Wilderness, between Carson Pass to the north and Ebbetts Pass to the south. The snows that melt on the granite and forest covered landscapes at the headwaters of the North Fork Mokelumne River watershed are gathered into both river tributaries, and into the Blue Lakes

Reservoirs complex at the top of PG&E's FERC 137 hydroelectric project. Further downstream, in the Amador Ranger District of the Eldorado National Forest, the river passes through another FERC 137 project element, the Salt Springs Reservoir and Powerhouse. North of the Salt Springs Reservoir, on a tributary to the Mokelumne River, are the Upper and Lower Bear River Reservoirs, that serve as permanent homes to fish and wildlife, and as vacation spots for mountain recreation enthusiasts. Through a series of tunnels, some water is diverted and conveyed to the Tiger Creek Powerhouse, the West Point Powerhouse, and to the terminus of FERC Project 137 at the Electra powerhouse. In addition, some water is conveyed to treatment facilities for use in Amador County. The river flows are delicately balanced to meet the needs of people, fish and wildlife through implementation of the FERC 137 settlement agreement.

18. This stretch of the Mokelumne runs through lands owned by the Bureau of Land Management ("BLM"), and is known for its scenic beauty, recreational values, and cultural resources. This area shelters extensive finds of Native American and Gold Rush era artifacts. Still today, Miwok elders come to this area to teach their children the ancient arts of tending and gathering black willow shoots for basket weaving, of gathering medicinal herbs, and of speaking their native language.

19. From the Electra Powerhouse to the Highway 49 Bridge, is the Electra Run, where whitewater boaters "put in" and ride the rapids. They then proceed down the Middle Bar Run, from the Highway 49 Bridge to the Middle Bar Bridge and "take out." The Historic Middle Bar Bridge joins the one-lane Middle Bar Road in Amador County to the one-lane Gwin Mine Road in Calaveras County. Downstream from the Middle Bar Bridge are EBMUD facilities, Pardee Reservoir, and later Camanche Reservoir. From there the River flows into the valley through Lodi, into the San Joaquin River, and on into the Delta, where decades of increasing freshwater diversions and other factors have led to the significant loss of fisheries and potential collapse of the aquatic ecosystem.

20. To protect the recreational, scenic, and cultural resources of the Mokelumne River, the United States Forest Service and BLM have determined that approximately 37 miles of segments of the Mokelumne River between Salt Springs and the Highway 49 Bridge are eligible for designation under the Wild and Scenic Rivers Act and have requested Congress to designate a portion of these segments as Wild and Scenic under the Act.

21. On either side of the Mokelumne River are Amador County to the north and Calaveras County to the south. These rural counties are smaller in population and less wealthy than the San Francisco Bay Area communities served by EBMUD. During the decade that preceded 2005, these rural counties experienced growing pains as infrastructure and institutional capacities struggled to keep up with developing communities. Both counties are currently exploring new approaches to future development as they update their general plans.

## **B. DESCRIPTION OF PROJECT**

22. The Water Supply Management Program 2040 Project proposes to meet the future water demands of EBMUD's San Francisco East Bay customers by approving, on a programmatic basis, a series of measures to increase water supply through the year 2040. While the plan includes some water conservation, water reclamation, and water rationing, the largest new supplies of water are to come from the Mokelumne River through upcountry reservoir expansions, a conjunctive use project and a potential desalination plant. The 2040 WSMP components that would take water from the Mokelumne River watershed include expansions of the Lower Bear and Pardee Reservoirs, and the Mokelumne Inter-Regional Conjunctive Use ("IRCUP") project, that would skim high winter flows for storage in groundwater basins in Eastern San Joaquin valley. While the order of project development remains uncertain, EBMUD intends that planning, design, and environmental review for the Pardee Dam Expansion could begin about 2015, the final construction decisions are expected about 2023, and the dam could be operational by 2030. EBMUD has financially planned for the first five years of 2040 WSMP implementation.



23. EBMUD intends that certain 2040 WSMP project components will include partners who will cooperate in project implementation and reap additional water storage and availability. While EBMUD states that it wants Amador County, Calaveras County, and San Joaquin County to be "partners" in the upcountry reservoir expansions and the IRCUP, upcountry opposition to the Pardee Dam Expansion has been diverse because of the many potentially adverse impacts of the project.

24. The Project as approved raises the level of Pardee Reservoir by approximately vertical 32 feet, from 568 feet in elevation to 600 feet, and the level of Lower Bear Reservoir by vertical 32 feet. As a result, substantial portions of the area around and above the reservoir would be inundated with reservoir waters.

25. The Project does not adopt feasible program-level mitigation to avoid or substantially lessen of impacts of the reservoir expansions on visual character, Mokelumne River hydrology, fisheries, terrestrial and aquatic ecosystems, cultural and recreational resources and public safety. Instead, the PEIR defers the identification and development of such mitigation to a later time.

### **C. DESCRIPTION OF PROJECT IMPACTS**

26. The PEIR for the Project acknowledges significant impacts on visual and aesthetic resources due to the Pardee reservoir expansion. Due to the rise of waters and alteration in flows that must follow from EBMUD's new proposed operation for the Lower Bear and Pardee Reservoir systems, the Project will also have a number of significant impacts that were not identified in the PEIR, including to Mokelumne River Basin flows critical to aquatic wildlife and fisheries, aquatic, riparian and terrestrial habitat, agricultural lands, public safety (due to loss of exit routes during fires) and elimination of important recreation and cultural resources.

27. For example, the PEIR, the Project's proposal to elevate Pardee reservoir levels will inundate lands from Pardee Reservoir to 1000 feet above the Highway 49 Bridge, thereby eliminating Native American and Gold Rush artifacts, recreational whitewater runs, the Middle

Bar Bridge National Historic Landmark, and the black willow stands still used by the Miwok. Seasonal inundation in this area will reduce tourist use of the area and local tourism revenues, replace wildflower-covered riparian areas with an ugly "bathtub ring," limit if not eliminate body-contact recreation, and conflict with BLM's plan to manage the lands above the Highway 49 Bridge to protect their free-flowing, recreational, scenic, and cultural resources.

28. Removing the Middle Bar Bridge could leave canyon residents living on their one-lane roads with no means of both evacuating the area and receiving critical emergency response assistance. In addition, the secondary and cumulative impacts of growth spawned by additional water supplies provided to upcountry counties could exacerbate current public service shortages, air pollution, and traffic congestion

29. Near Lower Bear River Reservoir, habitat for bald eagle, osprey, northern goshawk, American marten, and Pacific fisher is at risk. In the Mokelumne River below the Bear River confluence, changes in the flow regime to move additional water from the expanded reservoir puts at risk habitat for the foothill yellow-legged frog, and threatens the ongoing implementation of the FERC Project 137 settlement agreement and license.

30. The Project will also contribute to the existing lack of freshwater flows into the Delta due to the Pardee Expansion, which will trap that water in the enlarged reservoir. The PEIR acknowledges that the Delta is currently suffering from significant impacts due to lack of instream flow pulses, but does not analyze this further incrementally cumulative significant impact to the Delta ecosystem. In particular, impounding an additional 126,000 acre-feet of Mokelumne River water in Pardee Reservoir, an additional 18,300 acre-feet of water in Lower Bear Reservoir, and diverting an additional 19,500 acre feet of Mokelumne River water to underground storage through the IRCUP, will further impair already degraded habitat for salmon and steelhead in the lower Mokelumne River and the Delta.

#### **D. DESCRIPTION OF PROJECT REVIEW AND APPROVAL PROCESS**

31. EBMUD began the process that ultimately would lead to its approval of the 2040 WSMP in the winter of 2007. Although EBMUD selected a citizen stakeholder committee to participate in the development of the 2040 WSMP, nobody from Amador or Calaveras County was appointed to sit on the committee.

32. Nevertheless, upcountry interests made their concerns and objections known. On many occasions during the water supply management planning process, representatives of Petitioners attended and spoke at EBMUD Board meetings and sent emails to EBMUD staff regarding the adverse environmental impacts of 2040 WSMP Project components, and flaws in the environmental review process.

33. On July 20, 2008, the Foothill Conservancy provided scoping comments in response to the EBMUD notice of intent to prepare an EIR on the 2040 WSMP. These scoping comments respectfully requested that EBMUD evaluate impacts of the Pardee Expansion program component, including: the loss of recreation resources and economic activity, the destruction of historic and cultural resources, the elimination of an emergency response and evacuation route, the loss of habitat, the cumulative impacts on the Lower Mokelumne River and Delta, the greenhouse gas emissions from dam construction, and the cumulative and growth inducing impacts of providing water to upcountry counties.

34. On March 16, 2009 Petitioners' members were among the 150-person crowd that overflowed the Amador County Water Agency Board Room, and testified in opposition to EBMUD's Pardee Expansion proposal. Additional testimony was provided by a Calaveras County Supervisor who questioned how EBMUD managed to form a citizens advisory committee for the 2040 WSMP and failed to include a single citizen from Calaveras or Amador counties; from a Jackson City Councilman who, while presenting a resolution from the Jackson City Council opposing the raising of the level of Pardee Reservoir, stated "We believe that the option of destroying a significant portion of our community's heritage, recreational opportunities and

economic benefit is not viable, and that East Bay MUD's ratepayers should not benefit from damage inflicted on our citizens."; and from an American Whitewater representative who did not want the scenic river canyon replaced with an ugly "bathtub ring." Testimony from local residents included environmental justice concerns: including testimony by Jackson residents, who wondered why Buckhorn Reservoir in the East Bay was rejected as an alternative, but Pardee Expansion in Amador County remained an option; and testimony from Sutter Creek residents, who expressed concern for financially challenged families in the local area, utilize the Mokelumne as a their primary if not sole source of recreation.

35. On March 30, 2009, Petitioners' representatives were among the 185-person crowd at the San Andreas Town Hall in Calaveras County, and spoke in opposition to EBMUD's Pardee Expansion proposal. In addition to Petitioners' testimony, that night was marked by testimony from a broad spectrum of interests opposed to the Pardee Expansion, including members of the Historical Society of Amador County who opposed the Pardee Expansion due to its harm to historical resources, from long time residents who grew up fishing off the Middle Bar Bridge, a historical resource that proposed to be eliminated by the Project.

36. In addition to Petitioners, a number of government agencies weighed in on the inadequacy of the PEIR. The National Marine Fisheries Service wrote that the PEIR had failed to conduct the required analysis regarding the impacts of the Pardee Expansion on the recovery of anadromous fish species on the Mokelumne River and in the Delta and potential mitigation measures. The United States Forest Service and Pacific Gas and Electric Company expressed concerns that the Bear River Expansion proposal will subvert the delicately balanced wildlife protection flow provisions of the FERC Project 137 Settlement Agreement. The Bureau of Land Management stated that the Pardee Expansion would eliminate important cultural and recreational resources. The City of Jackson noted that the Pardee Expansion proposal would have significant adverse impacts on the tourist and recreation sector of the local economy.

37. During the 2040 WSMP adoption hearing of October 13, 2009, Petitioners' representatives and numerous members of the public summarized the legal violations alleged in this petition and provided written evidence supporting these allegations for the record in proposing impact mitigation measures and alternative procedures for the EBMUD Board to follow to avoid CEQA violations. This included testimony from experts explaining the need to fully consider the Los Vaqueros Expansion as an alternative component of the Project and that the record lacked support for a Statement of Overriding Considerations, since the 2040 WSMP did not adopt the feasible mitigation measure of allowing Pardee Expansion without raising the water level at Pardee Reservoir.

38. On October 13, 2009, the East Bay Municipal Utility District Board of Directors voted on a 4-2 vote to adopt the Project and certify the PEIR.

39. EBMUD's Notice of Determination for the Project was filed on October 20, 2009.

## **VI. LEGAL FRAMEWORK**

### **A. CALIFORNIA ENVIRONMENTAL QUALITY ACT**

40. This case is brought in part pursuant to the California Environmental Quality Act ("CEQA").

Pursuant to Code Civil Procedure §1094.5 and Public Resources Code §21168, a writ of mandate may issue where the agency has committed a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law or if the agency's decision is not supported by substantial evidence.

41. CEQA defines a "significant effect" as a "substantial, or potentially substantial, adverse change." Pub. Res. Code, § 21068. This means that an activity has a significant effect if it "has the potential to degrade the quality of the environment." *see also* 14 Cal. Code Reg. § 15382; *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App. 4th 1165, 1192. The CEQA Guidelines require a mandatory finding of significance for a

project with "possible environmental effects which are individually limited but cumulatively considerable." "Cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." 14 Cal. Code Reg. § 15065(c); *Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 114 ; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 720-721.

42. CEQA applies to discretionary activities undertaken by a public agency. Pub. Res. Code § 21080. CEQA requires environmental review when a project has the potential for significant impacts. Pub. Res. Code § 21151; 14 Cal. Code Reg. § 15061. *See Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal. 4th 105, 119 ("[T]he Legislature intended CEQA to apply to discretionary projects, even when the agency's discretion to fully comply with CEQA is constrained by the substantive laws governing its actions"); *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App.3d 259, 267. The County is subject to CEQA as a local agency with permit authority over development activities. Pub. Res. Code § 21151.

43. As part of CEQA review, the agency undertakes an "Initial Study" of the project. 14 Cal. Code Reg. § 15063. If such Study demonstrates that the project will not have a significant effect on the environment, the agency makes a "negative declaration" to that effect. Pub. Res. Code § 21080(c.) If the "Initial Study" determines that the project may have a significant effect on the environment, an Environmental Impact Report ("EIR") is required. Pub. Res. Code § 21151. *Santa Monica Chamber of Commerce*, *supra*, 101 Cal. App. 4th at 792.

44. CEQA's fundamental policy is that all public agencies "shall regulate such activities so that major consideration is given to preventing environmental damage." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390; Pub. Res. Code § 21000(g.) The "primary means" by which the legislative goals of CEQA are achieved is the preparation of an EIR. *Laurel Heights*, *supra*, 47 Cal.3d at 392; Pub. Res. Code §§21080(d),

21100, 21151; 14 Cal. Code Reg. §15080. The EIR has been described as “an environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Laurel Heights, supra*, 47 Cal.3d at 392; *County of Inyo v. Yorty* (1973) 32 Cal. App.3d 795, 810. An EIR is intended to serve as “an environmental full disclosure statement.” *Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal. App.3d 1013, 1020.

45. CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. CEQA Guidelines § 15002(a)(1). In addition, an EIR must identify mitigation measures and alternatives to the project which may reduce or avoid the project’s significant adverse impacts, thus accomplishing CEQA’s basic statutory goals. *See Laurel Heights, supra*, 47 Cal.3d at 400-403; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; Pub. Res. Code §§ 21002.1, 21100. This analysis of feasible mitigation measures and a reasonable range of alternatives is crucial to CEQA’s substantive mandate that significant environmental damage be substantially lessened or avoided where feasible. Pub. Res. Code §§ 21002, 21081, 21100; CEQA Guidelines, 14 Cal. Code Reg. § 15002(a)(2) and (3). *Laurel Heights, supra*, 47 Cal.3d at 392, 404-405. CEQA requires government agencies to disclose to the public the reasons why they have approved a particular project if it will result in significant adverse environmental effects. CEQA Guidelines § 15002(a)(4). “The EIR process protects not only the environment but also informed self-government.” *Laurel Heights, supra*, 47 Cal.3d at 392.

46. CEQA encourages tiering environmental analyses for separate but related projects to a program EIR. “This approach can eliminate repetitive discussions of the same issues and focus the later EIR or negative declaration on the actual issues ripe for decision at each level of environmental review. Tiering is appropriate when the sequence of analysis is from an EIR prepared for a general plan, policy, or program to an EIR or negative declaration for another plan,

policy, or program of lesser scope, or to a site-specific EIR or negative declaration. Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration. 14 Cal. Code Reg. § 15152(b).

47. Where a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographical scale. However, such deferral must not prevent adequate identification of significant effects of the planning approval at hand. 14 Cal. Code Reg. § 15152(c.)

48. The guiding principle in the review of projects under CEQA is that CEQA must be interpreted so as to afford the fullest possible protection to the environment. *Laurel Heights, supra*, 47 Cal.3d at 390; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. EIRs demonstrate to an apprehensive citizenry that the agency has analyzed and considered the ecological implications of its action. *Sierra Club, supra*; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86; *EPIC v. Johnson, supra*, 170 Cal. App.3d at 609-11.

49. Finally, where an agency finds that significant adverse effects remain, even after the implementation of all feasible mitigation measures, the agency must balance the economic benefits of the project against its environmental harm to determine if the project should proceed. 14 Cal. Code Reg. § 898.1(g); Pub. Res. Code § 21081(d), 14 Cal. Code Reg. § 15093.) This "statement of overriding considerations," as the last step in the analysis, provides critical information to the public to fulfill the law's public disclosure requirement - that the EIR function as "a document of accountability" and "informed self government." *Sierra Club v. State Board of Forestry, supra*, 7 Cal.4th at 1229. (...the board retains the power to approve a plan that has significant adverse effects upon the environment, so long as it justifies its action in light of



"specific economic, social, or other conditions.") However, CEQA requires that EBMUD first identify the adverse effects of the project before it exercises that power. *Id.* at 1233.

## **VII. FIRST CAUSE OF ACTION**

### **(Violation of CEQA; Failure to Identify Significant Impacts of Project)**

50. Petitioner incorporates by reference the allegations in the paragraphs set forth above.

51. Identifying a project as a 'program' does not relieve the agency from having to address the significant environmental effects of that project." *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal. App.4th 182, 202-203. "[A] decision to 'tier' environmental review does not excuse a governmental entity from complying with CEQA's mandate to prepare, or cause to be prepared, an environmental impact report on any project that may have a significant effect on the environment, with that report to include a detailed statement setting forth '[a]ll significant effects on the environment of the proposed project.' (Pub. Resources Code, § 21100.)" *Stanislaus Natural Heritage Project v. County of Stanislaus, supra*, 48 Cal. App.4th at 197. "'[T]iering' is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause." *Id.* at 199. Deferral of a site specific analysis from a program EIR to a later EIR is only allowed if the analysis is currently infeasible, and its "deferral does not prevent adequate identification of significant effects of the planning approval at hand." 14 Cal. Code Reg. § 15152(c).

52. Here, the PEIR fails to identify a number of significant impacts that will occur due to the proposed expansion of Pardee and Lower Bears Reservoirs including but not limited to significant impacts to recreational resources and facilities, cultural resources, public safety, fisheries, aquatic and terrestrial ecosystems. The expansion of these reservoirs will inundate recreational facilities that are utilized by thousands of visitors each year. The expansion will inundate the Electra run,

a recognized world famous white-water rafting venue, and will cause the destruction of the Middle Bar Bridge, a culturally significant resource to local communities and important safety outlet for emergencies. The enlargement of the reservoirs will flood 1100 feet of the Mokelumne River that is currently under consideration for designation as a Wild and Scenic River. The flooding will eliminate untold acres of instream, riparian and upland habitat around and upstream from the reservoirs. The proposed changes to the flow regime of the Mokelumne due to the Lower Bear Reservoir expansions conflicts with the carefully crafted flow regimes established under the FERC Project 137 settlement agreement and license, which were designed to avoid the significant impacts of reservoir operation in the first place. However, the PEIR makes no analysis of the impacts to fish and wildlife associated with the long-term Mokelumne River flow changes from operation of the expanded Pardee and Lower Bear reservoirs. The PEIR also does not identify incrementally cumulative significant impact to the Delta ecosystem that will be caused by the Pardee Expansion, which will trap water in the enlarged reservoir that would otherwise have flowed downstream. The PEIR acknowledges that the Delta is currently suffering from significant impacts due to lack of instream flow pulses, but does not analyze this significant impact.

53. The PEIR does not contain any analysis that demonstrates how the effects of reservoir expansion to these valuable local, state and federal resources will be mitigated to a less than significant impact. Instead, the PEIR merely identifies that result as an objective in the future, without any demonstration that effective mitigation is feasible or even possible. This approach does not meet CEQA's standard that feasible mitigation with clear performance standards be identified at the time of project approval in order to support a finding of no significant impacts. *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1117-1118.

## **VIII. SECOND CAUSE OF ACTION**

(Violation of CEQA; Failure to Prepare and Certify an Informationally Adequate EIR)

54. Petitioner incorporates by reference the allegations in the paragraphs set forth above.

55. An EIR must contain an accurate description of the project's environmental setting. An EIR "must include a description of the physical environmental conditions in the vicinity of the project ... from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." 14 Cal. Code Regs. § 15125(a). "Knowledge of the regional setting is critical to the assessment of environmental impacts. ... The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." *Id.* § 15125(c).

56. The PEIR does not provide an adequate description of the environmental setting relating to the proposed expansion of Pardee and Lower Bear reservoirs in a number of respects. The PEIR does not provide information about the stretches of the Mokelumne River proposed to be inundated, including information regarding the FERC 137 Settlement Agreement, and the rationale for the agreement or explain how past dam-regulated flow regimes on the Mokelumne River damaged fish and yellow legged frog habitat. The PEIR also fails to describe the year-round recreational use in the Middle Bar Reach downstream from the Highway 49 Bridge, the reach that the Pardee Expansion will inundate. The PEIR fails to describe the substantial financial and public resources that have been invested in recreational facilities, nor does the PEIR describe how hypothetical "replacement facilities" could be feasibly located and managed in a way to offset their elimination due to reservoir water inundation.

57. Further, the PEIR does not provide an adequate discussion of the current state of the crashing Delta ecosystem, the agency efforts underway to restore the Delta, or the effect that these recovery efforts might have on the 2040 WSMP efforts to divert even more freshwater away from the Delta. The PEIR also does not provide any environmental setting information regarding

the existing impacts regarding traffic, congestion, noise, aesthetics and other resources in the foothill counties caused in part by accelerating development.

58. The PEIR also fails to contain an adequate project description. A project description must include a "general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities." 14 Cal. Code Reg. § 15124(c). This data is essential to the project description, because it allows the agency to estimate the environmental impacts of a project. Without such data, true impact analyses are impossible, and neither the decisionmakers nor the public can perform their appropriate CEQA functions. "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal's benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (i.e. the 'no project' alternative) and weigh other alternatives in the balance." *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App.3d 185, 192- 193. A "curtailed ...project description draws a red herring across the path of public input." *Id.*, at 197-198.

59. The PEIR's project description does not contain adequate information to identify the impacts to recreational, environmental and cultural resources in and around Pardee and Lower Bear Reservoirs and the Mokelumne River. The project description does not provide adequate information that the reservoir expansions will inundate and thereby eliminate these resources. Further, the PEIR does not describe the Project's future flow regime that will be applicable following reservoir expansion, thereby precluding any analysis of the potential conflicts with the delicately balanced flow regime established by the FERC 137 Settlement Agreement. The PEIR also fails to describe or identify the mitigation that will purportedly mitigate the impacts to these cultural, recreational, public service and environmental resources to a less than significant level. The PEIR also fails to present information about the growth inducing impacts in the foothill

counties that may be caused by the Project.

60. In each instance noted above, the PEIR's failure to provide critical information about the relevant environmental setting and project prejudiced the subsequent impact analyses, the development of mitigation measures, and the consideration of alternatives. As a result, the PEIR failed to evaluate key impacts, failed to consider the root causes of the impacts to which the Project will contribute, and failed to devise and adopt appropriate mitigation measures. *See Friends of the Eel River, supra*, 108 Cal. App.4th at 881 (deficient EIR made “meaningful assessment of the potentially significant impacts of its Project impossible” and the “Agency's failure to proceed as required by law was [therefore] prejudicial.”) *Friends of the Eel River, supra*, 108 Cal. App.4th at 873 (“Alternatives that would reduce the Agency's reliance on water diverted from the Eel River would be among the alternatives that *must be considered* by the Agency in the event it determines that the cumulative impact of the Project and the FERC proceeding is significant.”) By arbitrarily precluding the consideration of key alternative components, and by refusing to consider an alternative designed to eliminate or substantially reduce the significant impacts of the Project on visual, recreational, cultural and environmental resources in the foothill counties and in the Delta, EBMUD violated CEQA.

#### **X. FOURTH CAUSE OF ACTION** (Failure to Respond Adequately to Comments)

65. Petitioner incorporates by reference the allegations in the paragraphs set forth above.

66. A Lead Agency is required to respond in writing to the comments made by agencies and the public during their review period for the draft EIR. The response must describe the disposition of the issue raised, and it must provide detailed reasons when a commenter's suggestion is rejected. The analysis in the response must be reasoned, and its conclusions must be supported by factual information. 14 Cal. Code Reg. § 15088.

67. In approving the Project, EBMUD failed to respond adequately to numerous comments on

the Project draft PEIR, including comments that the draft PEIR failed to identify significant impacts due the expansion of the Pardee and Lower Bear reservoirs, failed to provide adequate information to analyze Project impacts and feasible mitigation and failed to consider mitigation and/or alternatives that would have avoided the need for reservoir expansion.

**XI. FIFTH CAUSE OF ACTION**  
(Failure to Support Findings with Substantial Evidence)

68. Petitioner incorporates by reference the allegations in the paragraphs set forth above.
69. CEQA requires that a lead agency make explicit written findings supported by substantial evidence in the record prior to approving a project that will have significant impacts on the environment. Those findings must be supported by substantial evidence in the record, and they must bridge the analytical gap between the evidence in the record and the ultimate conclusion of the agency. A Statement of Overriding Considerations is a specialized finding of fact that must be supported by substantial evidence in the record.
70. As discussed above, the PEIR failed to provide adequate information to identify significant impacts that will be caused by the Project due to the expansion of Pardee and Lower Bear reservoirs. As a result, the PEIR's findings are not supported by substantial evidence. These include PEIR findings that impacts to recreational, cultural, public service and environmental resources will be less than significant, and that the identified significant impacts to visual and aesthetic resources, or to downstream water quality and fisheries in the Delta, are "significant and unavoidable."

**XII. PRAYER FOR RELIEF**

WHEREFORE, Petitioners pray for judgment as follows:

1. For a Peremptory Writ of Mandate ordering EBMUD (1) to set aside its approval of this Project and PEIR; (2) to reconsider its decision in light of the Court's decision on this petition, and (3) to file a return with the Court showing compliance with the writ of mandate.

2. For a preliminary and permanent injunction enjoining EBMUD, its agents, employees, representatives, and all persons acting in concert or participating with it, from engaging in any activity pursuant to the Project approval until the Project conforms with applicable California law.

3. For reasonable attorney's fees under Code of Civil Procedure § 1021.5.

4. For costs of suit.

5. For such other and further relief as the Court deems proper.

DATED: November 19, 2009

By: \_\_\_\_\_  
Thomas P. Infusino  
Michael W. Graf  
Attorneys for Petitioners

**VERIFICATION**

*Foothill Conservancy et al. v. East Bay Municipal Utility District et. al.,*  
Amador County Superior Court, Case No. \_\_\_\_\_

I, Chris Wright, declare that:

1. I am the Executive Director for Petitioner, Foothill Conservancy, and am authorized to execute this verification on behalf of the Petitioners in this action.
2. I have read the foregoing Verified Petition for Writ of Mandate and know the contents thereof; the factual allegations therein are true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

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

Executed on the 19<sup>th</sup> day of November 2009 at \_\_\_\_\_, California.

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Chris Wright