

1 Michael R. Valentine, General Counsel
Harllee Branch, Staff Counsel
2 California Department of Fish and Game
Office of the General Counsel
3 1416 9th Street, 12th Floor
4 Sacramento, CA 95814
Telephone: (916) 657-4091
5 Fax: (916) 354-3805
hbranch@dfg.ca.gov

6 Daniel G. Shillito, Regional Solicitor
7 Karen D. Koch, Assistant Regional Solicitor
United States Department of the Interior
8 Office of the Regional Solicitor
2800 Cottage Way, Suite E-1712
9 Sacramento, CA 95825
Telephone: (916) 978-5687
10 Fax: (916) 978-5687

11 **STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

13 In the Matter of:) **CALIFORNIA DEPARTMENT OF FISH**
14) **AND GAME AND UNITED STATES**
15 NATIONAL POLLUTANT DISCHARGE) **FISH AND WILDLIFE SERVICE JOINT**
ELIMINATION SYSTEM (NPDES)) **PETITION FOR REVIEW OF FAILURE**
16 PERMIT FOR PAIUTE CUTTHROAT) **TO ACT BY LAHONTAN REGIONAL**
TROUT RECOVERY PROJECT -) **WATER QUALITY CONTROL BOARD**
17 ALPINE COUNTY) **[Water Code § 13220]**

18 **JOINT PETITION FOR REVIEW AND REQUEST FOR RELIEF**

19 Petitioners California Department of Fish and Game ("Department") and the United
20 States Fish and Wildlife Service ("USFWS"), an agency of the United States Department of the
21 Interior, in accordance with Section 13220 of the California Water Code and Title 23, Section
22 2050 of the California Code of Regulations, hereby petition the State Water Resources Control
23 Board ("SWRCB") to review the Lahontan Regional Water Quality Control Board's ("Regional
24 Board") failure to act to adopt its proposed National Pollutant Discharge Elimination System
25 ("NPDES") permit for the use of the piscicide rotenone in the Petitioners' planned recovery

1 project for the Paiute cutthroat trout ("PCT") in Silver King Creek in Alpine County ("the
2 Project"). Such failure to act occurred at the Regional Board's September 8, 2004 meeting.¹

3 The Regional Board's failure to issue the NPDES permit has aggrieved the agencies in
4 the following manner:

- 5 1. It has blocked the Petitioners' execution of the Project and has consequently
6 obstructed the implementation of a final, approved Endangered Species Act
7 ("ESA") recovery plan for the PCT, threatening the future survival of the species;
- 8 2. It has caused the cancellation of the Project for this year, resulting in the waste or loss
9 of significant state and federal funds;
- 10 3. It may set a negative precedent that threatens the Petitioners' ability to use
11 rotenone in the preservation and recovery of valuable species.²

12 The agencies respectfully request that the SWRCB exercise its independent authority and
13 issue the NPDES permit for the Project or direct the Regional Board to do so. The Petitioners'
14 respective addresses and contact information are listed at the beginning of this petition. This
15 petition has been sent to the Regional Board via United States Mail.

16 STATEMENT OF FACTS

17 The PCT is one of the rarest trout subspecies in North America. It is indigenous only to
18 Silver King Creek within the Carson Iceberg Wilderness on the eastern side of the Sierra Nevada
19 range in Alpine County. The PCT is listed as "threatened" under the ESA due to its limited
20 population size and the continuing threat of hybridization with non-native trout.

21 Between 1991 and 1993, the Department successfully used rotenone to remove
22 hybridized and non-native trout from Silver King Creek upstream of the natural fish
23 passage barrier of Llewellyn Falls. Over a decade later, a genetically pure PCT population is
24 thriving in this stream reach.

25 ¹ Because the Regional Board did not take action on the NPDES Permit, there is no resolution or order to attach to this petition pursuant to 23 CCR Section 2050(a)(2).

² The golden trout is the subject of a recently signed joint agreement between the Department, the United States Forest Service, and the United States Fish and Wildlife Service to expend \$1.3 million over the next five years to conserve the species. A main threat to the golden trout, as with the PCT, is hybridization with other trout species. The use of rotenone is the only effective means of eliminating hybridization threats where they occur.

1 Unfortunately, threats to the species continue. Currently, the exclusive PCT habitat
2 upstream of Llewellyn Falls is limited. The population carrying capacity is therefore restricted.
3 Catastrophic events such as forest fires could render the species extinct. Non-native and hybrid
4 trout still inhabit Silver King Creek below Llewellyn Falls only yards from the exclusive PCT
5 habitat upstream. A misguided "bucket biologist" could easily pull a trout from the lower creek,
6 walk a few steps upstream, plant it in exclusive PCT habitat, and set the species on the path to
7 extinction.

8
9 The Project is expected to eliminate or significantly reduce these risks. Rotenone will be
10 used to remove non-natives and hybrids from an additional nine stream miles of habitat below
11 Llewellyn Falls in the mainstem of Silver King Creek and its tributaries. The agencies will then
12 re-introduce genetically pure PCT into lower Silver King Creek. The PCT population is expected
13 to eventually double in size and the species will ultimately occupy its full historic range. The risk
14 of extinction from catastrophic events would thus be significantly reduced. A natural fish
15 passage barrier at the downstream terminus of the Project area will prevent the upstream
16 migration of other trout species. The risk of artificial introduction of non-natives into PCT
17 habitat will be virtually eliminated, since the PCT will occupy the entire subbasin.

18
19 The Department, in concert with the United States Forest Service ("USFS") and the
20 USFWS, has undertaken planning efforts for the Project for nearly a decade. The PCT is within
21 reach of recovery, and our agencies have been active in pursuing that goal. After a public
22 comment period from January 26, 2004, through March 26, 2004, the USFWS finalized its
23 "Revised Recovery Plan for the Paiute Cutthroat Trout" ("Recovery Plan") pursuant to the ESA
24 on August 10, 2004.³ Numerous commentors supported the Recovery Plan, which included the
25 Project as the highest priority recovery action. Completion of the Project is expected to

³ At the September 8, 2004 meeting, the Regional Board refused to accept the USFWS' submission of the Recovery Plan into the record.

1 eventually result in delisting. It has undergone extensive analysis and public comment consistent
2 with the respective legal mandates of each of the Petitioners.

3 On April 4, 2003, the USFWS issued its Biological Opinion ("BIOP") for the Project
4 following consultation with the USFS under section 7 of the ESA. 16 U.S.C. 1531 et seq.; 50
5 C.F.R. 402 et seq. The BIOP concludes that the Project will not jeopardize the PCT and
6 incorporates mitigation measures to ensure that the environmental effects of the application of
7 rotenone are minimized and confined to the Project area.

8
9 On April 10, 2003, the Department issued a final Mitigated Negative Declaration
10 ("MND") for the Project pursuant to the California Environmental Quality Act ("CEQA"). Cal.
11 Public Resources Code § 21000 et seq. The Department received and responded to timely
12 comments from ten individuals and entities, including the Regional Board and Nancy Erman.
13 Both raised allegations that rare or endemic macroinvertebrate species could be present in the
14 Project area that might be impacted by rotenone application. The Department responded to these
15 comments by noting that no evidence demonstrates the presence of any rare or endemic
16 macroinvertebrate species in the Project area. The Department then finalized the MND and
17 approved the Project after finding these potential impacts to be less than significant. The
18 sufficiency of the MND was not challenged in court. The Regional Board did not assume lead
19 agency status or prepare a subsequent Environmental Impact Report ("EIR").
20

21 At this point in time, the Project was expected to be in compliance with state water
22 quality requirements through coverage under the SWRCB's then-existing Statewide General
23 NPDES permit program for aquatic pesticides, which included rotenone.

24 On May 5, 2004, the USFS issued its Environmental Assessment ("EA") for the project
25 pursuant to the National Environmental Policy Act ("NEPA"). 42 U.S.C. 4321 et seq.; 40 C.F.R.
1500 et seq. The EA thoroughly analyzes the proposed application of rotenone and alternatives
to the action. Analysis of other alternatives, such as electrofishing, resulted in the conclusion

1 that the most efficient, safest, and cost effective way to remove non-native trout in Silver King
2 Creek is through the use of rotenone. Numerous public meetings to discuss the EA were
3 convened, including public meetings with the Alpine County Fishery Program on April 26, 2002,
4 April 11, 2003, and April 30, 2004, along with a public meeting with the Alpine County Board
5 of Supervisors on May 20, 2002. Public scoping for the draft NEPA document occurred from
6 December 22, 2003, through January 9, 2004 and comments were solicited from February 11,
7 2004, through March 15, 2004. In many instances, changes were made to the proposed action in
8 response to public comment.
9

10 Comments on the draft EA were received from a number of parties, including the
11 Regional Board and Nancy Erman, who raised several issues, including allegations that no
12 studies have been conducted that are designed to make a determination as to whether rare or
13 endemic macroinvertebrate species are present in the project area. The USFS responded to these
14 comments by noting that agencies are not required under NEPA to analyze remote and
15 speculative impacts of an action, such as the unproven existence of potential rare or endemic
16 taxa. Rather, NEPA requires the analysis of all reasonably foreseeable effects of direct, indirect,
17 and cumulative impacts of a proposed action as dictated by 40 C.F.R. § 1508. The USFS' NEPA
18 analysis revealed no data indicating the presence of rare or endemic taxa in the area. Moreover,
19 the EA prescribes measures to minimize and mitigate the effects of the proposed action, and
20 every precaution will be taken by the agencies to reduce the effects of rotenone to non-target
21 species.
22

23 Amphibian surveys already conducted during the week of August 1, 2004, did not reveal
24 the presence of Yosemite toads or mountain yellow-legged frogs, both candidate species for
25 listing under the ESA, in the treatment area. The USFWS previously observed in its BIOP that
the rotenone application is not expected to seriously affect adult amphibians. Although the BIOP
notes that tadpoles could be killed, no tadpole stage is expected to be present after September 1,

1 2003. In addition, a macroinvertebrate study, using a protocol approved by the LRWQCB, has
2 been implemented during the last two years to monitor the effects of rotenone on the aquatic
3 invertebrate community. Based on the foreseeable effects of the application of rotenone, the
4 USFS made a Finding of No Significant Impact ("FONSI") for the Project, which indicates that
5 any environmental impact of the proposed action has a less than significant effect on the
6 environment. Ms. Erman filed an administrative appeal with the USFS on the EA. Following
7 consideration of that appeal, the USFS upheld its findings. The sufficiency of the EA was not
8 challenged in court.
9

10 With all aspects of environmental compliance in place following extensive environmental
11 analyses, the Project was scheduled to commence during the early part of September, 2004.
12 However, the SWRCB removed rotenone from coverage under its Statewide General NPDES
13 permit for aquatic pesticides in May, 2004. At a public meeting held that month, the SWRCB
14 directed the agencies to seek water quality compliance by filing an application for an individual
15 NPDES permit for the Project with the Regional Board. Department staff filed an application the
16 same day.

17 The Regional Board then issued a tentative NPDES permit on July 8, 2004. Comments
18 were received from a number of parties, including Nancy Erman, who again raised the same
19 allegations that no studies have been conducted to determine whether rare or endemic
20 invertebrate species may exist in the Project area that could be eliminated by rotenone treatment.
21 This after the statute of limitations for legal challenge of the MND had expired and after the
22 USFS's EA was upheld on administrative appeal.
23

24 The Department, USFWS, and USFS, following issuance of the tentative permit,
25

1 proceeded with plans to commence the Project during the first part of September, 2004 in
2 reasonable reliance on the tentative and proposed permits and the Regional Board staff
3 recommendation to adopt. The agencies made arrangements and funding outlays for equipment,
4 staffing, pack horses, and food for four days in the backcountry of the Carson Iceberg
5 Wilderness to be able to seize the brief window of opportunity to safely carry out the Project
6 upon approval.

7
8 Following the consideration of comments, the Regional Board circulated a proposed
9 NPDES permit on August 27, 2004. This proposed permit included a Regional Board staff
10 recommendation to adopt. After the proposed permit was circulated, Regional Board staff mailed
11 a written response to Ms. Erman's comments suggesting that an exhaustive species inventory
12 carried out over a three year period might be reasonable if it could answer questions regarding
13 rare or endemic species.⁵

14 The Regional Board then held a meeting on September 8, 2004 to consider adoption of
15 the proposed permit. The Department, the USFWS, USFS, and Nancy Erman were among the
16 parties making presentations. At the beginning of the meeting, the Regional Board staff withheld
17 its recommendation to adopt. Following consideration of comments, the Regional Board decided
18 to take no action on the permit, citing the issue raised by Ms. Erman regarding possible effects
19 on rare or endemic macroinvertebrate species. Regional Board members and staff then suggested
20 that the agencies carry out an exhaustive species inventory over what could perhaps be a three
21 year period.

22
23 The Department subsequently cancelled the Project for this year because the Regional
24 Board's failure to issue the permit closed the last safe window of opportunity for rotenone
25 application in 2004. Department staff has estimated significant net losses of state funds due to

⁵ The Department's Office of the General Counsel received the Regional Board's written response to Ms. Erman by mail on September 10, 2004 – two days after the Regional Board's September 8th meeting had concluded. This prevented a meaningful response to this issue in the Department's presentation at the meeting since our agency was caught unaware that Regional Board staff was prepared to suggest that more studies were necessary.

1 the Regional Board's failure to act. In addition, all federal funding appropriated for the Project
2 this year has been lost. The future status of the Project, the ultimate recovery of the PCT, and the
3 future of fishery management in California is now uncertain given the obstacles that the Regional
4 Board has placed before the Petitioners.

5 6 **GROUND FOR REVIEW**

7 **The Regional Board's Failure to Act Is Obstructing The Project By Improperly Attacking** 8 **The Sufficiency Of The Department's CEQA Review More Than A Year After All Legal** 9 **Challenges To The Department's MND Had Been Constructively Waived**

10 The Regional Board refused to take action to approve the NPDES permit until the
11 completion of studies in the Project area to prove the existence or non-existence of rare
12 or endemic macroinvertebrates. The Regional Board is thus essentially attacking the sufficiency
13 of the Department's initial study and MND. The Department, as lead agency, had already
14 considered rare or endemic macroinvertebrate issues in its CEQA review. The Department had
15 already considered and responded to related comments from the Regional Board and Ms. Erman.
16 And the Department already found in its MND that the Project would not have a significant
17 effect on these species because there was no data demonstrating their existence in the Project
18 area.

19 The Regional Board has already legally waived its objections to the Department's MND.
20 Thus, the Regional Board was bound by the Department's findings in considering the
21 environmental effects of the Project. Instead, the Regional Board is essentially attempting to
22 force the Department to recommence its environmental review. This after the MND was
23 finalized and beyond legal challenge.

24 CEQA states that it is the lead agency that determines whether a project may have a
25 significant effect on the environment. Cal. Public Resources Code § 21082.2(a). Furthermore,
CEQA mandates that "[t]he lead agency shall be responsible for determining whether an
environmental impact report, a negative declaration, or a mitigated negative declaration shall be

1 required for any project. That determination shall be final and conclusive on all persons,
2 including responsible agencies, unless challenged..." Cal. Public Resources Code Section
3 21080.1. Under Section 15096 of the CEQA Guidelines, "[i]f a responsible agency believes that
4 the final EIR or negative declaration prepared by the lead agency is not adequate for use by the
5 responsible agency, the responsible agency must either: (1) Take the issue to court within 30
6 days after the lead agency files a notice of determination; (2) Be deemed to have waived any
7 objection to the adequacy of the EIR or negative declaration; (3) Prepare a subsequent EIR if
8 permissible under Section 15162; or (4) Assume the lead agency role as provided in Section
9 15052(a)(3)." 14 CCR § 15096(e). Finally, the CEQA Guidelines require that, "[p]rior to
10 reaching a decision on the project, the responsible agency must consider the environmental
11 effects of the project as shown in the EIR or negative declaration." 14 CCR § 15096(f).

12
13 The Department, as lead agency, determined that the Project would not have a
14 significant effect on the environment with the inclusion of mitigation measures. The Department
15 then approved the Project and filed a Notice of Determination on the MND on April 10, 2003.
16 Thirty days passed. No legal action was brought to challenge the sufficiency of the MND by the
17 Regional Board or any other interested party. The Regional Board did not take action to prepare
18 a subsequent EIR. In fact, under the circumstances, preparation of a subsequent EIR would have
19 been prohibited by the CEQA Guidelines.⁶ The Regional Board did not assume lead
20

21
22 ⁶ 14 CCR Section 15162 states that, (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall
23 be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of
24 the following:

- 25 (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the
involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the
previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of
previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at
the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:
- (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
- (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

1 agency status. Again, the CEQA Guidelines would not have allowed such an action.⁷ Based on
2 these considerations, the Regional Board thus waived any objections it might have to
3 the Department's MND.

4 The Regional Board was obligated to consider the Project's effect on the environment as
5 determined by the four corners of the Department's MND pursuant to 15096(f) of the CEQA
6 Guidelines. Instead, the Regional Board attacked the sufficiency of Department's CEQA review
7 and exceeded its legal authority in justifying its decision to withhold approval of the NPDES
8 permit. Consequently, the Regional Board's failure to act was improper.

9
10 **The Regional Board's Failure to Act Is Obstructing the Implementation Of The Highest
Priority Action In The USFWS' Revised Recovery Plan For The PCT**

11 The USFWS' Recovery Plan is the most fundamental tool in conserving, protecting, and
12 ultimately recovering the threatened PCT. In fact, Section 4(f) of the ESA mandates that the
13 USFWS implement the actions in the Recovery Plan. 16 U.S.C. § 1533(f)(1). The Recovery Plan
14 states that the Project is the highest priority action. The Project was reviewed by the USFS
15 pursuant to NEPA. The USFS' EA, which was based in part on the BIOP issued by the USFWS,
16 was upheld on administrative appeal and was not challenged in court.
17
18
19

20 (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more
significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

21 (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one
or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative."

22 Again, a subsequent EIR is prohibited. In this case, there have been no changes in the Project with new or substantially increased significant
23 effects. There are no changed circumstances for the Project. And since the comments of Ms. Erman regarding rare or endemic macroinvertebrate
species had already been considered by the Department in 2003, there is no new information to demonstrate any new significant effects, more
severe significant effects, or new mitigation measures that weren't already before the Department at the time the MND was filed.

24 ⁷ 14 CCR Section 15096(e) allows a responsible agency to take the lead agency role under Section 15052(a)(3) if it believes that a negative
25 declaration prepared by the lead agency is not adequate. Section 15052 states that, "[w]here a Responsible Agency is called on to grant an
approval for a project subject to CEQA for which another public agency was the appropriate Lead Agency, the Responsible Agency shall assume
the role of the Lead Agency when any of the following conditions occur:

....
(3) The Lead Agency prepared inadequate environmental documents without consulting with the Responsible Agency as required by Sections
15072 or 15082, and the statute of limitations has expired for a challenge to the action of the appropriate Lead Agency."

In this case, the Department received comments from the Regional Board on its draft MND and sent an extensive 11 page written response to the
Regional Board addressing its concerns. The Department therefore consulted with the Regional Board pursuant to Section 15052(a)(3). The
Regional Board would consequently not be authorized to assume lead agency status.

Department of Fish and Game and United States Fish and Wildlife Service Petition for Review of Failure to Act by
Lahontan Regional Water Quality Control Board - Page 10

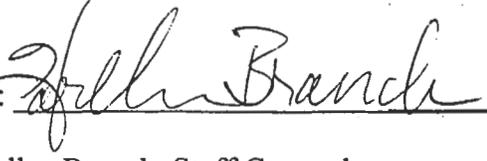
1 Both the ESA and NEPA provide for judicial review of federal agency compliance. A
2 BIOP may be challenged under both the ESA and the Administrative Procedure Act (“APA”) if
3 it appears that the agency’s analyses or conclusions are contrary to law or are arbitrary and
4 capricious. 16 U.S.C. § 1540; 5 U.S.C. § 500 et seq. A NEPA analysis can also be challenged
5 under the APA if it is alleged that a federal agency has been arbitrary and capricious and has not
6 sufficiently considered a project’s environmental effects. 5 U.S.C. § 500 et seq. The Regional
7 Board failed to file a petition for administrative review of either the BIOP or the EA.
8 Furthermore, the Regional Board failed to challenge the federal agencies’ actions in court. It is
9 now using its own administrative process to challenge the sufficiency of the federal agencies’
10 environmental review. By doing so, it has improperly obstructed the implementation of the
11 USFWS’ mandate to implement the Recovery Plan pursuant to the ESA and has threatened the
12 recovery of the PCT.
13

14 CONCLUSION

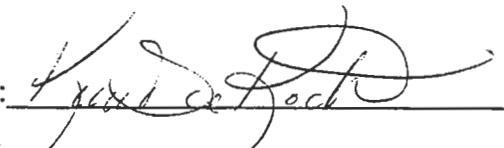
15 Based on the above considerations, the Petitioners again respectfully request that the
16 SWRCB exercise its independent authority to issue the NPDES permit for the Project or direct
17 the Regional Board to do so. Pursuant to Title 23, Section 2050(a)(9) of the California Code of
18 Regulations, the Petitioners state that the substantive issues raised in this petition were before the
19 Regional Board. The Department’s CEQA document is legally part of the Regional Board’s
20 record pursuant to Section 15096(f) of the CEQA Guidelines. The Regional Board thus had
21 notice pursuant to that document and the terms of CEQA and the CEQA Guidelines that its
22 environmental review was bound by the four corners of the Department’s MND. In addition, the
23 USFWS raised the role of the Project in the Recovery Plan. The Regional Board thus had notice
24 that by failing to adopt the permit, it was effectively obstructing execution of the USFWS’
25 Section 4(f) mandate under the ESA.

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

Dated October 8, 2004

By: 

Harlee Branch, Staff Counsel
California Department of Fish and Game

By: 

Karen D. Koch, Asst. Regional Solicitor
United States Department of the Interior