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14 IN THE SUPERIOR COURT OF THE
15 STATE OF CALIFORNIA IN AND FOR THE
16 COUNTY OF MONTEREY

17 DESERT PROTECTIVE COUNCIL, a not-for-profit)
18 membership California Corporation,)

19 Petitioner and Plaintiff,)

20 SIERRA CLUB, a not-for-profit California Corporation,)

21 Petitioner and Plaintiff,)

22 v.)

23 IMPERIAL COUNTY and IMPERIAL COUNTY)
24 BOARD OF SUPERVISORS,)

25 Respondents and Defendants,)

26 WIND ZERO GROUP, INC. and WIND ZERO)
27 RANGES, LLC,)

28 Real-Parties-In-Interest.)

**VERIFIED PETITION FOR WRIT
OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

PARTIES

Petitioner-Plaintiff Desert Protective Council

1. Desert Protective Council is a 54 year old non-profit membership organization with members who reside in Imperial County. The mission of DPC is to safeguard for wise and reverent

1 use by this and succeeding generations those desert areas of scientific, historical, archeological,
2 spiritual and/or recreational value and to educate children and adults to achieve a better
3 understanding and appreciation of California's desert lands. Desert Protective Council participated
4 in the hearings on this matter before the Planning Commission and the Board of Supervisors and
5 submitted extensive written comments opposing approval of the project.

6 **Plaintiff-Petitioner Sierra Club**

7 2. Sierra Club is a not-for-profit membership corporation with hundreds of members
8 who reside in Imperial County. Sierra Club is a petitioner-plaintiff in Sierra Club v. County of
9 Imperial (US Gypsum), filed in 1999, in which issues have been raised relating to adequate
10 mitigation for groundwater impacts arising from groundwater pumping. Sierra Club participated in
11 the Planning Commission and Board hearings held with respect to Ground Zero, and submitted
12 extensive, detailed comments opposing the Project and critiquing the EIR.

13 3. The Sierra Club has had a long history of involvement in groundwater and land use
14 planning disputes in Imperial County over the last 20 years. Water supply is a critical factor
15 constraining growth in Imperial County. Agricultural and domestic uses are dependent entirely upon
16 two sources – the Colorado River (through Imperial Irrigation District) and ground-water pumping
17 from the Coyote Wells Hydrologic Basin.

18 **Respondents, County of Imperial, and Imperial County Board of Supervisors**

19 4. Respondent County, through its Board of Supervisors, on or about December 21, 2010
20 approved the Coyote Wells Specific Plan, a General Plan Amendment in connection with the Wind Zero
21 Project, a Zoning Ordinance to implement uses set out in the Specific Plan for the Project, three
22 Conditional Use Permits relating to wells and an airstrip for the Property, a FEIR for the Coyote Wells
23 Specific Plan, and a Development Agreement between the County and the Developer.

24 **Real-Party-In-Interest Wind Zero Ranges LLC and Wind Zero Group, Inc.**

25 5. Real Parties in Interest Wind Zero Ranges LLC and Wind Zero Group, Inc. are
26 respectively the owner of the project site or an interest in the project site and the project applicant (Wind
27 Zero Group, Inc.).

28 **JURISDICTION AND VENUE**

1 6. This Court has jurisdiction over the matters alleged in this Petition-Complaint pursuant to
2 CCP §§1085, 1086, 1094.5, 1060 (declaratory judgment), and Pub. Res. Code §21167 (CEQA).

3 7. Venue is proper in the County of Imperial under CCP §§ 392, 393, 394.

4 **ADMINISTRATIVE REMEDIES**

5 8. Desert Protective Council and Sierra Club have performed any and all conditions
6 precedent to the filing of this complaint and petition. DPC and Sierra Club participated in all hearings
7 on the Application of Wind Zero Group held by respondent Board in 2010. Sierra Club made oral and
8 (submitted) written statements to the Board before and on the dates of its hearings. Likewise, DPC
9 submitted a letter in opposition to the Project to the Board. Sierra Club and DPC also submitted
10 comments pertaining to the Project to the Planning Commission.

11 9. All of the statements and letters of the petitioners urged the Board to require additional
12 environmental documentation to remedy critical inadequacies in the FEIR as an informational
13 document, or alternatively not to approve the project.

14 **PUBLIC BENEFIT**

15 10. In seeking to compel the Board to discharge its public duties with respect to enforcement
16 of CEQA, DFC and Sierra Club are beneficially interested in this proceeding and are acting in the public
17 interest as private attorney-generals to enforce important rights and if successful, will confer a
18 substantial benefit on the residents of the County to the extent the environmental effects of the Wind
19 Zero Project are appropriately identified and adequately mitigated, upon issuance of this Court’s Writ of
20 Mandate.

21 **FACTUAL BACKGROUND**

22 11. The Coyote Wells Specific Plan for the approved Wind Zero training facility includes a
23 competitive 6.1 mile motor race track course, burn tower, 2 helipads, aircraft landing strip, 56 aircraft
24 hangars, a gated community with 32 luxury townhouses, 150 unit RV park, and 100 room hotel resort
25 and storage facilities, fuel storage, indoor and outdoor shooting ranges, restaurants *etc.*, on 944 acres of
26 land currently zoned for desert residential use (1 dwelling unit/40 acres) immediately adjacent to the
27 residential community of Nomirage, Imperial County. The Project will be built adjacent to the BLM
28 Yuha Basin Area of Critical Environmental Concern (ACEC).

1 12. The project consists of a mixed-use, three-phase development on approximately 944
2 acres in western Imperial County. The proposed project is located within the Ocotillo/Nomirage
3 Community Area Plan. The Coyote Wells Specific Plan Area would in large part function as a gated
4 community with numerous amenities available to users. The project proposes to develop a privately
5 owned law enforcement/military training and motorsports facilities, and commercial establishments
6 along the State Route 98 corridor. It is anticipated that full implementation of the Coyote Wells Specific
7 Plan would occur in three phases and span a total of nine years.

8 13. The project site is located in unincorporated Imperial County and is subject to the
9 Imperial County General Plan and Land Use Ordinance and the Ocotillo/Nomirage Community Area
10 Plan. The proposed project site is currently designated on the Imperial County General Plan Land Use
11 Map as Ocotillo/Nomirage Community Area. The Ocotillo/Nomirage Community Area Plan designates
12 the site as Desert Residential (one dwelling unit/40 acres,) which is consistent with the site's current
13 zoning of R-1, L-40, low-density residential.

14 14. A Bureau of Land Management (BLM) trail bounds the site on the north, and the BLM
15 Yuha Basin Area of Critical Concern lies to the north and east. Molitar and Palo Verde roads bound the
16 site on the west. Interstate 8 runs in an east-west alignment a short distance north of the northern
17 boundary of the site. A 40-foot-wide by 1,900-foot-long private airstrip (Preston) is located near the
18 northwest corner of the site. Rural residential dwellings (the community of Nomirage) on about 1-acre
19 parcels are located along the western edge of the project site. State Route 98 crosses the southern
20 boundary of the site.

21 15. In approving the project the third week of December, the County Board of Supervisors
22 has approved, inter alia, a Conditional Use permit to pump up to 65 AF/y from 2 wells on site, deferring
23 any groundwater studies for 6 years rather than doing site specific studies prior to approvals as required
24 by the ONCAP for any commercial use proposing to use 5 AF/Y or more (1 Acre foot is 325,851 gallons
25 of water.) Final documents also mention additional off-site alternative source for groundwater or
26 Imperial Irrigation DistrictColorado River water to meet project needs that are not studied or evaluated
27 in the Final EIR.

1 16. As part of the 1993 General Plan Update, there were Community Area Plans created for
2 each of the separate communities outside the irrigated portion of the Imperial Valley serviced with
3 Colorado River water by Imperial Irrigation District, with each Community Area Plan to address the
4 specific and unique needs of the planning area. The 1994 Ocotillo/ Nomirage Community Area Plan
5 (ONCAP) covers the southwestern portion of Imperial County to the west of irrigated agriculture, an
6 area where residential use relies solely on the overdrafted Ocotillo/Coyote Wells Groundwater Basin,
7 which was designated as a “Sole Source Aquifer” (SSA) by US EPA in 1996. Because of serious
8 groundwater constraints, agricultural zoning was eliminated, agricultural uses were eliminated, and what
9 had previously been called agricultural or open space zoning became Desert Residential with a
10 minimum lot size of 1 dwelling unit per 40 acres, with a groundwater limitation of 1.5 acre feet/year per
11 lot.

12 17. Approval of zoning changes set forth in the Specific Plan by the Board will allow
13 division of the project site into more than 3,000 lots of 10,000 sq. feet, which is never disclosed or
14 studied in the EIR. Several hundred lots could front onto State Hwy 98 with its 65 mph speed limit and
15 a bend in the road. The Board’s approval will allow for multiple small lot uses on the property without
16 any opportunity for environmental review required by CEQA.

17 18. Noise from private airplanes, helicopters, more than 57,000 rounds of ammunition/day
18 and racing on a 6.1 mile race course and go-kart races across from the existing community raise serious
19 concerns about noise levels well above current ambient noise in the community of Nomirage. The EIR,
20 however, describes the community as very noisy and asserts that the noise of racing and gunfire would
21 methodologically be insignificant for nearby residents based on a calculation of a noise environmental
22 baseline that is seriously methodologically flawed, and mischaracterizes ambient noise levels in
23 Nomirage.

24 19. The project is located over the most sensitive and vulnerable portion of the groundwater
25 basin and, as approved, has the potential for significantly depleting or degrading this fragile portion of
26 the groundwater basin, which is relied upon by the existing residents of Nomirage with their private
27 wells. EPA has designated the aquifer as a sole source aquifer in recognition that for the overlying
28 domestic users there is no physically or financially feasible alternative source of water for domestic

1 purposes if the groundwater supplies are depleted or water quality degraded. Water quality in Nomirage
2 area is a major concern, as some wells already have water of a quality that is no longer potable.

3 20. Petitioners have no plain, speedy and adequate remedy in the ordinary course of law,
4 other than the relief sought in this Petition-Complaint, and are beneficially interested herein for the
5 purposes of standing to bring this action.

6 **FIRST CAUSE OF ACTION**
7 **(Mitigation and Monitoring Plan Provides No**
8 **Mitigation and Fails to Meet CEQA Requirements)**

9 21. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
10 Petition.

11 22. Condition MM 4.7.7d requires the applicant to “install the means of assessing the
12 potential impact of groundwater production at the Project site” prior to recordation of the final map for
13 Phase I. (emphasis added). Three monitoring wells are required “to assess the potential of hydraulic
14 influences outside of the immediate area of production.” Distances are prescribed for the location of the
15 monitoring wells.

16 23. Under condition MM 4.7.7e, the real-party-in-interest is required to implement a
17 groundwater monitoring program which includes installation of pressure transducers to record with
18 precision water level data. The developer is required to produce a monthly report to the Planning
19 Department “to provide a means of assessing the potential of the additional demand exacerbating [sic]
20 the rate of groundwater level decline described in earlier reports.”

21 24. Condition MM 4.7.7f requires implementation for a groundwater sampling program “to
22 collect water quality data from the production well and outlying monitoring wells.”

23 25. Condition MM 4.7.7g requires the applicant to:

24 “enter into a six-year groundwater management plan/agreement with the Imperial County
25 Planning and Development Department to ascertain the potential impact the production
26 of groundwater for the proposed project is having on the described overdrafted basin.
27 The groundwater management plan/agreement shall focus on site specific impacts and
28 though the use of the data collected onsite will establish the specific area of hydraulic
influence, potential for degradation of water quality in the immediate vicinity, and
potential mitigation influences.”

1 26. CUP 08-0031 Condition #8 and related mitigation measures in the FEIR are so vague that
2 they are unenforceable. The conditions do not define terms like: “water quality in the immediate
3 vicinity,” “overdraft in the basin,” and “alternative water supply sources.” The Condition implies that
4 the groundwater management plan will not address impacts off-site on properties not owned by Wind
5 Zero? Moreover, in the proposed findings, the County states; that “the project applicant will be
6 required to enter a groundwater monitoring program to assess the potential impacts of groundwater
7 production at the proposed project site.” (emphasis added). The tract Map conditions provide:

8 “The proposed project shall enter into a six-year groundwater management plan/agreement
9 with the Imperial County Planning and Development Department to ascertain the potential
10 impact the production of groundwater for the proposed project is having on the described
11 over-drafted basin.

12 The groundwater management plan/agreement shall focus on site specific impacts and
13 through the use of data collected onsite will establish the specific area of hydraulic
14 influence, potential for degradation of water quality in the immediate vicinity, and potential
15 mitigation influences.” (emphasis added)

16 27. There is inconsistency between the language of the Tract Map conditions and the
17 Proposed Findings. The Project Developer could construe the project approval as authorizing only
18 monitoring and reporting impacts at the project site.

19 28. If it is determined by the third party consultant that Phase I and Phase II water
20 consumption (33.3-acre feet per year) have caused further overdraft in the basin, the project will not be
21 permitted to develop Phase III without securing an alternative water supply sources. Phase III (project
22 buildout) will be limited to a total of 65 acre-feet per year. If it is determined the alternative water
23 supply sources are necessary, these alternative water supply sources will be subject to a “separate
24 environmental analysis.”

25 29. In the likely event that production from the Project wells has caused “further overdraft”
26 within the six year agreement period, (as found to be a significant impact of the Project) the Project
27 developer must obtain an alternative water supply in order to proceed with Phase III. However, there is
28 no prescribed mitigation for adverse impacts to nearby wells with respect to drawdown, increased
expenses associated with water production for overlying nearby users, or with decline in water quality
that may make water non-potable arising from Project groundwater pumping in Phases I and II. The

1 Mitigation, Monitoring, and Reporting Plan is only a Monitoring and Reporting Plan; it is not a
2 mitigation plan providing any remediation of damage to nearby wells caused by the Project's pumping,
3 in violation of CEQA Guidelines §15126.4. A FEIR must discuss the impacts of mitigation measures
4 and cannot defer feasible mitigation measures until some future date. The FEIR fails to describe
5 feasible measures which could minimize significant adverse impacts, in violation of CEQA Guideline
6 §15126.4.

7
8 **SECOND CAUSE OF ACTION**
9 **(The FEIR Fails to Address Long Term Water Supply Impacts of the Project)**

10 30. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
11 Petition.

12 31. The FEIR fails to address the long-term water supply impacts of the project. It does not
13 identify an alternative source or the environmental impacts of obtaining such a source for the completion
14 of Phase III.

15 32. In *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal.4th
16 412 (2007), the California Supreme Court held that an EIR must clearly explain how the project's long-
17 term water needs might be met, what the impacts would be from exploiting various supply sources, and
18 how those impacts would be mitigated.

19 33. California law requires that an adequate environmental impact analysis for a long-range
20 development plan cannot be limited to the water supply for the first stage of development. California
21 law requires that future water supplies identified and analyzed in an EIR must be reasonably likely to
22 prove available; speculative sources and unrealistic allocations such as "paper water" do not provide an
23 adequate basis for decision-making under CEQA.

24 34. California law requires that where a full analysis leaves some uncertainty regarding the
25 availability of anticipated future water sources, CEQA requires some discussion of possible replacement
26 or alternative supply sources, and of the environmental consequences of resorting to those sources.

27 35. California law requires that CEQA cannot be satisfied simply by providing that future
28 development will not proceed if the anticipated water supply for a project fails to materialize.

1 36. MM 4.7.7.g provides that if Phase I and Phase II water consumption (33.3 afy) “have
2 caused further overdraft in the Basin, the project will not be permitted to develop Phase II without
3 securing alternative water supply sources.”

4 37. The FEIR contains no discussion of the nature of these alternative water supply sources,
5 where they would be obtained, or the environmental effects of obtaining them in the future. (The
6 alternative water supply would have to be at least an additional 31 afy per year.)

7 **THIRD CAUSE OF ACTION**

8 **(The FEIR and Mitigation, Monitoring and Reporting Plan Fails to Include Feasible**
9 **Measures to Mitigate Impacts to Users of Groundwater Near to the Project Whose**
10 **Overlying Beneficial Water Uses May Be Impaired With Respect to Well Production,**
11 **Water Quality and Expense of Pumping Attributable to Wind Zero’s Pumping of**
12 **Groundwater From the Over-Drafted Sole Source Aquifer.)**

13 38. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
14 Petition.

15 39. The FEIR finds (Impact 4.14.1.3):

16 “The proposed project could result in the degradation of groundwater supplies or
17 interfere substantially with groundwater recharge such that there would be a net
18 deficit in aquifer volume or a lowering of the local groundwater table (e.g., the
19 production rate of preexisting nearby wells would drop to a level which would not
20 support existing land uses...for which permits have been granted).”

21 40. The mitigation measures adopted by the County with respect to the Wind Zero project do
22 not minimize significant adverse impacts reasonably expected to be caused by groundwater pumping to
23 fulfill project purposes (64 afy). An EIR must propose and describe mitigation measures to minimize
24 the significant environmental effects identified in the EIR. Pub. Res. Code §§ 21002.1(a), 21100(b)(3),
25 CEQA Guideline § 15126.4. Guideline §15126.4(a) provides that an EIR shall describe feasible
26 measures which could minimize significant adverse impacts. A mitigation measure must be designed to
27 minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that
28 impact. Guideline§15370.

41. The proposed project involves pumping up to 65 afy for the three phases of the Project
(although the FEIR acknowledges that as much as 89 afy maybe “needed” upon Project completion).

42. The FEIR fails to estimate possible declines in nearby wells attributable to project
pumping, even through the County has hydrological studies performed in connection with the US

1 Gypsum expansion and modernization project and other information that show that declines in nearby
2 wells in Nomirage and Ocotillo will likely occur. Some wells could go dry, and in all wells so affected
3 costs of pumping will significantly increase. Moreover, as the drawdown increases, water quality is
4 likely to deteriorate. The Findings adopted by the Board in connection with the US Gypsum project
5 acknowledge that:

6 “As the depth to groundwater decreases, [sic] the saline water that is present at the water
7 table may eventually reach the screened interval of some wells. Several wells have
8 relatively short screened intervals so that the saline water present at the water table could
9 affect the quality of the water in certain wells.”

10 43. The FEIR acknowledges the Basin is in overdraft, and according to the US Gypsum
11 FEIR, will decline approximately 500 AF/year, given the anticipated (cumulative) groundwater
12 withdrawals. (This figure is calculated based on a disputed estimate of inflow (recharge) into the Basin
13 of 1077 AF/yr.) The USG FEIR states: “The condition of overdraft is characterized in the basin by
14 substantial groundwater declines over the past 30 years and by the water balance studies, all of which
15 indicate a negative change in storage.” US Gypsum FEIR at 4.0-55.

16 44. The proposed mitigation measures provide for monitoring wells and further studies (at
17 least for six years), but provide no relief to neighboring overlying users who may be adversely affected
18 by the groundwater withdrawals for the project. For example, there is no provision requiring the Project
19 proponent to provide for domestic and landscaping needs of overlying users with potable water, when
20 and if water quantity and quality are adversely impacted, until such time as their overlying rights can be
21 fulfilled in perpetuity either by pumping or “substitute” water.

22 45. Nor to the extent that increased pumping from Wind Zero wells could degrade water
23 quality in individual wells due to lateral migration of higher-TDS water from other areas of the basin,
24 has there been any attempt to mitigate those effects. Wind Zero is not being required to provide
25 mitigation for overlying users whose water quality has become non-potable and below applicable water
26 quality standards (an effect reasonably likely to occur in light of information presented to (and known)
27 by the County).

28 46. Under the Mitigation Monitoring and Reporting Program Wind Zero (under its permit)
has no obligation whatsoever to mitigate for the continuing effects caused by its groundwater pumping
associated with its project. It has an obligation only to report and monitor.

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4 **FOURTH CAUSE OF ACTION**
5 **(Mitigation and Monitoring Plan)**

6 **The County Has No Authority to Authorize Wind Zero to Engage in Ground-Water**
7 **Pumping in an Overdrafted Sole Source Aquifer That Could Result in Permanent**
8 **Impairment of the Rights of Overlying Owners of Neighboring Land to Available**
9 **Groundwater of Sufficient Quality and Amount to Fulfill Overlying Beneficial Uses On**
10 **Their Property, Or to Burden Them With Increased Costs of Producing Water.**

11 47. Guideline § 15041 provides that a “lead agency for a project has authority to require
12 feasible changes in any or all activity involved in the project in order to substantiate lessen or avoid
13 significant effects on the environment consistent with applicable constitutional requirements. Guideline
14 § 15126.4(D)(4) provides that mitigation measures must be consistent with all applicable constitutional
15 requirements.

16 48. The County has authorized Wind Zero to engage in pumping which, could result, over the
17 time span of the project, in serious impairments (or extinguishment) of the rights of the overlying
18 owners to reasonable beneficial use of the groundwater below their property, including water of
19 sufficient quality to fulfill the overlying land uses, which include drinking water for domestic use. The
20 County has authorized Wind Zero to engage in a future physical taking of water in violation of an
21 overlying landowner’s correlative property rights in groundwater, to the extent its pumping decreases
22 the amount of water accessible to the owner of water rights and/or impairs water quality. *Washoe*
23 *County v. U.S.* (2003), 319 F3d 1320, 1326. The County has conferred a license on Wind Zero to
24 engage in pumping that could deprive the overlying owners of their senior water rights. (A right to
25 extract groundwater for beneficial use is derived from overlying land ownership and is rooted in the
26 California Constitution). *City of Barstow v. Mohave Water Agency* (2000), 23 Cal. 4th 1224,1240).

27 49. The paramount right of the overlying landowner in the use of so much of the percolating
28 waters as he needs for reasonable beneficial use on his land is entitled to protection against injury by
29 such taking of the water for non-overlying use as will cause him to be deprived of his own lawful use.
30 The owner of land overlying a percolating groundwater supply is entitled to protection against a taking
31 of water that results in such a lowering of the groundwater level in his existing wells as to render his

1 means of diverting the water inadequate. *Lodi v. East Bay Municipal Utility District* (1936), 7 Cal.2d
2 316, 335-344.

3 50. In *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, the DEIR concluded that the
4 quarry project could cause water levels and pumping rates to decline during the operational life of the
5 quarry. The Mitigation for the project required that if, as a result of monitoring, an impact is found,
6 replacement water would be provided. The Court of Appeals found that there was insufficient evidence
7 to support the EIR's conclusion that the proposed mitigation measures were adequate to address the
8 potential and significant impacts of the Project on water resources. In holding that the water
9 replacement mitigation measures were inadequate, the Court noted that the mitigation measure would
10 not "provide neighboring residents with the ability to use water in substantially the same manner they
11 were accustomed to doing if the Project had not existed.

12
13 51. This failure to hold the overlying rights holders harmless is not appropriate under CEQA,
14 in light of the FEIR findings. Impact 4.14.1.3 states:

15 "The proposed project could result in the degradation of groundwater supplies or interfere
16 substantially with groundwater recharge, such that there would be a net deficit in aquifer
17 volume or a lowering of the local groundwater table level (e.g., the production rate of pre-
18 existing nearby wells would drop to a level which would not support existing land uses or
19 planned uses for which permits have been granted. "

20 Impact 4.7.7 states:

21 "The proposed project, in combination with existing, approved, proposed and reasonably
22 foreseeable development, would contribute to the cumulative effects [sic] degradation of
23 groundwater quality."

24 Impact 4.14.1.4 states:

25 "The proposed project in combination with other projects in the cumulative study area could
26 contribute incrementally to cumulative impacts to groundwater supply and recharge."

27 52. Under Appendix G of the CEQA Guidelines, a project will have a significant adverse
28 impact on hydrology and water quality if its implementation results in the following:

29 "Substantially deplete groundwater supplies or interfere substantially with groundwater
30 recharge so that there would be a net deficit in aquifer volume or a lowering of the local
31 groundwater gable level (e.g., the production rate of pre-existing nearby wells would drop to
32 a level which would not support existing land uses or planned uses for which permits have
33 been granted)...[or] otherwise substantially degrade water quality."

1
2 **FOURTH CAUSE OF ACTION**
3 **(County Has Not Approved Legally Feasible Mitigation Measures Nor Has It**
4 **Proposed Mitigation Consistent With Its Groundwater Ordinance.)**

5 53. Under Guideline §15040(c) mitigation measures that go beyond the powers conferred by
6 law on lead and responsible agencies are legally infeasible. *Kenneth Mebane Ranches v. Superior Court*
7 (1992) 10 Cal.App.4th 276, 291. Under Guideline § 15364, “feasible” is defined as being accomplished
8 “in a successful manner within a reasonable period of time, taking into account, economic,
9 environmental, legal, social, and technological factors.” (emphasis added). Agencies have a duty to
10 impose mitigation measures that are legally feasible.

11 54. The EIR fails to describe feasible measures which could minimize significant adverse
12 impacts. Guideline § 15126.4 (a)(i). Therefore the FEIR must be set aside. In its approval of mitigation
13 measures, the County failed to adopt legally feasible measures which could minimize significant adverse
14 impacts. In effect it seems to be deferring the formulation of mitigation measures until the groundwater
15 management plan is formulated.

16 55. Finally, the County, in approving the Project, will not be acting consistently with its own
17 groundwater ordinance, and the legal obligation in Court Ordinance, §92204.00, establishing first
18 priority among groundwater use to “overlying domestic uses...legally existing on the effective date of
19 this ordinance or (b) developed thereafter on property zoned R-1 or R-2 on the effective date of this
20 ordinance.” The Ordinance states the “intent of the Board of Supervisors to recognize that such Priority
21 Groundwater Uses have a prior right to groundwater with the County...” The Project’s Mitigation and
22 Monitoring Plan has no meaningful enforceable mitigation conditions and allows Wind Zero to act in a
23 manner harmful to its neighbor’s first priority uses, that are given first priority under the County’s
24 Ordinance.

25 **FIFTH CAUSE OF ACTION**
26 **(Failure of FEIR to analyze the County’s De Jure Authorization of Division**
27 **of the 943 acre parcel into small lots.)**

28 56. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
Petition.

1 57. The Zoning Ordinance enacted by the Board implementing the Coyote Wells Specific
2 Plan by designating zoning applicable to the project constitutes an authorization to the project applicant,
3 without any future detailed required environmental documentation under CEQA to divide the project
4 site into 10,000 square feet lots.

5 58. The FEIR fails to address the possible environmental effects of parceling the site into
6 small lots or the effects of such authorizations on other land uses in the County.

7 59. The Zoning Ordinance enacted to implement the Coyote Wells Specific Plan designates
8 the project site as Open Space Preservation, Recreation, Education and Training (CW-E&T) Zone,
9 Residential (CW-R1) zone, Tourism Zone, Residential-Townhouse, Residential RV Zones. These zones
10 occupy approximately 850 acres of the 943 acre site.

11 60. Some or all of these zones declare uses on 10,000 sq ft. or smaller lots as compatible with
12 the zoning designation.

13 61. The environmental implications of division of the project site into as many as 3000 small
14 parcels must be addressed in the FEIR. It was not, in violation of CEQA Guideline §15126.

15 **SIXTH CAUSE OF ACTION**
16 **(Inconsistency of Specific Plan with ONCAP General Plan)**

17 62. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
18 Petition.

19 63. The Ocotillo Nomirage Community Area Plan requires a geohydrology study to assess
20 and verify that adequate water supply is available for projected demand prior to approval of the Coyote
21 Wells Specific Plan and any related CUP. This portion of the ONCAP Plan was not amended by the
22 Board in connection with its General Plan Amendments for this project.

23 64. The CWSP Zoning Plan contemplated that:

24 "A Hydrology study of the groundwater basin shall be initiated by the County of Imperial
25 Planning & Development Services Department in connection with the EIR for the Coyote Wells
26 Specific Plan. This study will assess the availability of water, the impact of the project on
27 existing water resources and appropriate mitigation measures." CWSP Zoning Plan, p67.

28 No such hydrogeology was performed in connection with Specific Plan approval, in violation of Govt.
Code §65450, 65451, 65454.

1 65. The proposed 944 acre development is located in the overdrafted Ocotillo-Coyote Wells
2 Groundwater Basin, designated by the United States Environmental Protection Agency as a Sole Source
3 Aquifer. To be a sole source, the aquifer must supply more than 50% of a community's drinking water.
4 The area is currently zoned Desert Residential with 40 acre minimum lot sizes with a per parcel water
5 preservation goal of 1.5 acre feet per year water limit (Ocotillo Nomirage Community Area Plan, p 15).
6 The Final Mitigation Monitoring and Reporting Program (FMMRP) for the Wind Zero Project proposes
7 a six-year groundwater management plan to monitor consumption, adjust usage, and locate alternative
8 water supply sources as necessary (FEIR 4.0-4, MM 4.7.7g). By failing to perform a geohydrology study
9 as required by ONCAP before the Project is approved, the FEIR lacks evidence that adequate
10 groundwater is available to support the expansive project, data regarding the significance of the impact
11 of project water use (e.g., degradation of groundwater supplies, interference with groundwater recharge,
12 lowering the groundwater table), specific effective feasible mitigation efforts and implementation plan,
13 reasonable feasible alternatives to the proposed water usage in excess of current zoning requirements,
14 and substantial evidence of how and when feasible alternative water sources will be obtained and
15 utilized as required by law.

16 66. The existing General Plan Land Use Element for the Ocotillo Nomirage Community Area
17 Plan states “a site-specific geohydrology study is required if a proposed commercial development is to
18 be served by groundwater and the amount of water requested exceeds five (5) acre feet per year.” p.22.
19 This standardized process is used to determine the adequacy of long-term water availability prior to
20 approval of commercial development. It necessarily ensures any agency findings and decisions are based
21 upon technical evidence and potential environmental issues have been considered.

22 67. The Board’s approval of the Project without a groundwater study that would provide an
23 evidentiary analysis of environmental consequences and successful mitigation measures would be
24 inconsistent with the existing land use plan and would have no legally supportable basis. *See Laurel*
25 *Heights Improvement Association v. Regents of the University of California*, 47 Cal.3d 376 (1988).

26 68. A groundwater study should thoroughly describe current water constraints in this desert
27 area and analyze how the water demand in the proposed development project may impact the limited
28 water supply in this isolated desert area. As certified, the FEIR fails to describe how proposed water use

1 by the Project will interfere with current residential water surplus or impact the availability of
2 groundwater for undeveloped residential lots overlying the groundwater basin. Local residents may be
3 detrimentally affected by anticipated use but how significant the interference with their water
4 consumption or water quality is unknown. The FEIR fails to provide specific evidence of the availability
5 of sufficient water supply for 65 acre feet per year, the basis of that calculation, specific measures
6 imposed to ensure project requirements can be limited to 65 acre feet per year, reasonably foreseeable
7 environmental consequences of Wind Zero's failure to self-limit water consumption to 65 acre feet per
8 year, and alternate development plans because the basin is locally overdrafted and no alternative water
9 source is secured or even potentially identified. As the maximum water usage expected in current
10 residential zoning is a maximum of about 35 acre feet per year, and commercial projects exceeding 5
11 acre feet per year require a geohydrology study, the FEIR and FMMRP fail to document specific
12 mitigation measures to address the reasonably foreseeable significant impact of excess water
13 consumption. Finally, there is no evidence offsite groundwater sources exist and if so, any significant
14 environmental impact of utilizing them. Deferring to some future undefined period the environmentally
15 significant analysis of potential overdraft and degradation of current groundwater and identification of
16 alternative feasible groundwater sources in an area designed by the EPA as Sole Source Aquifer is
17 inadequate and unacceptable under CEQA.

18
19 **SEVENTH CAUSE OF ACTION**
(Inconsistent Project Description)

20 69. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
21 Petition.

22 70. CEQA requires that there be a consistent project description CEQA Guideline §15124.

23 71. The November, 2010 FEIR for the Coyote Wells Specific Plan describes the project as a
24 military training facility. This amplifies the Project Description, which previously described the project
25 as exclusively a law enforcement training facility.

26 72. The FEIR does not discuss the environmental impacts of possible uses associated with a
27 military training facility, although the project description was modified shortly before the Board's
28 December 21 meeting to describe the project as also a military training facility.

1 73. The Coyote Wells Specific Plan FEIR states (modifying pages 4.1-5, first paragraph):

2 “implementation of the Coyote Wells Specific Plan would develop the
3 944 acre parcel with a gated community, privately owned public
4 agencies and military training and motorsports facilities...” (FEIR, p.
5 4.0-27)

6 74. A similar modification is made modifying page 4.1-5 in the discussion following impact
7 4.1.2, first paragraph (FEIR, p. 4.0-27)

8 **EIGHTH CAUSE OF ACTION**
9 **(Improper Noise Environmental Baseline)**

10 75. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
11 Petition.

12 76. The FEIR fails to establish, using methodologically sound measuring, an accurate noise
13 environmental baseline for the project, in violation of CEQA Guideline §15125.

14 77. Determining that the environmental baseline for noise in the residential community of
15 Nomirage was already substantial and close to County maximums, the FEIR erroneously concluded that
16 the significant incremental noise from the projects heliports, air strips, test driving track, and multiple
17 shooting ranges would not constitute a significant impact and need not be mitigated.

18 **NINTH CAUSE OF ACTION**
19 **(Flawed Cumulative Impacts Analysis)**

20 78. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
21 Petition.

22 79. The FEIR finds: “The Proposed Project, in combination with existing, approved,
23 proposed, and reasonably foreseeable development would contribute to the cumulative effects of
24 degradation of water quality, changes to run-off patterns, and the potential for increased flooding.”
25 Impact 4.7.6 (See MM 4.7.1, 4.7.2a, 4.7.2b).

26 80. The FEIR finds: “The Proposed Project, in combination with other projects in the
27 cumulative study area, could contribute incrementally to cumulative impacts to groundwater supply and
28 impacts.” (47.7c-b).

1 81. The FEIR does not list, study, or examine the other projects in the cumulative study area
2 which contribute incrementally to degradation of water quality and to groundwater supply and impacts,
3 in violation of CEQA Guideline §15130.

4 82. The FEIR does not contain a list of past, present, and probable future projects producing
5 related or cumulative impacts. Guideline §15130(b)(1)(A).

6 83. The FEIR contains no evaluation or description of regional or area-wide conditions
7 contributing to the cumulative impact. Guideline §15130(b)(1)(B)(1).

8 84. The FEIR contains no description of the location of the past, present and probable future
9 projects. Guideline §15130 (b)(1)(B).

10 85. The FEIR contains no summary of the expected environmental effects to be produced by
11 those projects. §15130(b)(2)

12 86. The FEIR contains no analysis of the cumulative impacts and examines no feasible
13 options for mitigating or avoiding the projects contribution to any significant cumulative effect.
14 Guideline s§15130(b)(3).

TENTH CAUSE OF ACTION (Declaratory Relief)

15
16 87. Petitioners hereby incorporate by reference paragraphs 1 through 20 of this Complaint-
17 Petition.

18 88. An actual and present controversy has arisen and exists between Petitioners and the
19 respondents (County) in that the County maintains it has acted lawfully in certifying the FEIR, and
20 approving a Zoning Ordinance, General Plan Amendment, Specific Plan, three Conditional Use Permits,
21 and a Development Agreement in connection with the Wind Zero Project.

22 89. Petitioners have alleged in Causes of Action One through Nine multiple violations of
23 CEQA, and Land Use Planning Law relating to the above-cited approvals.

24 90. Petitioners have no plain, speedy, and adequate remedy in the course of law.

25 91. Petitioners seek declaratory relief against respondents, as set forth below.

26 92. A declaration of the Court is necessary and proper at this time to determine whether
27 Respondents have acted in accordance with law.

1
2
3 **PRAYER FOR RELIEF**

4 1. On their First Cause of Action, Petitioners ask the Court to issue a Writ of Mandate
5 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraphs
6 1-29 of this Petition, and to set aside the Boards certification of the EIR.

7 2. On their Second Cause of Action Petitioners ask the Court to issue a Writ of Mandate
8 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraph 4
9 of this Petition, and to set aside the Board’s certification of the EIR.

10 3. On their Third Cause of Action Petitioners request the Board to set aside all of its
11 approvals of the Wind Zero Project, as set forth in Paragraph 4 of this Petition, and to set aside the
12 Board’s certification of the EIR.

13 4. On its Fourth Cause of Action, Petitioners ask the Court to issue a Writ of Mandate
14 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraph 4
15 of this Petition, and to set aside the Board’s certification of the EIR.

16 5. On their Fifth Cause of Action Petitioners ask the Court to issue a Writ of Mandate
17 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraph 4
18 of this Petition, and to set aside the Board’s certification of the EIR.

19 6. On its Sixth Cause of Action Petitioners ask the Court to issue a Writ of Mandate
20 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraph 4
21 of this Petition, and to set aside the Board’s certification of the EIR.

22 7. On its Seventh Cause of Action Petitioners ask the Court to issue a Writ of Mandate
23 directing the Board to set aside its approvals of the Wind Zero Project, as set forth in Paragraph 4 of this
24 Petition, and to set aside the Board’s certification of the EIR.


25 8. On its Eighth Cause of Action Petitioners ask the Court to issue a Writ of Mandate
26 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraph 4
27 of this Petition, and to set aside the Board’s certification of the EIR.
28

1 9. On its Ninth Cause of Action Petitioners ask the Court to issue a Writ of Mandate
2 directing the Board to set aside all of its approvals of the Wind Zero Project, as set forth in Paragraph 4
3 of this Petition, and to set aside the Board's certification of the EIR.

4 10. On its Tenth Cause of Action Petitioners ask the Court to issue a Declaratory Judgment,
5 declaring that the Board's approvals of the Wind Zero Project, as set forth in Paragraph 4 of this
6 Petition, and the Board's certification of the EIR were not in accordance with provisions of CEQA and
7 provisions of Planning and Zoning Law cited above in this Petition.

8 Petitioners seek attorney's fees and costs, if it prevails, and for any such other relief as may be
9 just and proper.

10
11
12 Date: 1/25/11



13 Laurens H. Silver, Esq.
14 California Environmental Law Project
15 Counsel for Sierra Club

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3 **VERIFICATION**
4

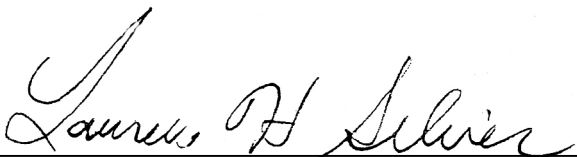
5 I, Laurens H. Silver, declare:

6 1. I am an attorney for the Petitioners, which have authorized me to make this
7 verification on its behalf.

8 2. I have read the foregoing Petition for Writ of Mandate and Complaint for
9 Declaratory Relief (“Petition”) and know the contents thereof. I certify that the allegations
10 contained in the Petition are true of my own knowledge, except as to those matters which are
11 therein alleged on information and belief, and as to those matters, I believe them to be true. I
12 represented Sierra Club and Desert Protection Council in connection with the matters set forth in
13 this Complaint-Petition, appeared through a letter to the Board of Supervisors in connection with
14 litigation for groundwater impacts, on behalf of petitioners, and have personal knowledge of the
15 matters set forth in the Complaint-Petition by reason of my representation of Sierra Club since
16 1989 in matters pertaining to the groundwater resources and land use planning activities of
17 Imperial County.

18
19 3. I declare under penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct.

21 Executed on 1/25/ 2011 at Richmond, CA.

22
23 
24 _____
25 Laurens H. Silver