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MITSUBISHI OPENING BRIEF

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

Case No. SCV 43289
DATE: June 15, 1998
TIME: 8:30 a.m.
DEPT: 2

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR WRIT OF PEREMPTORY MANDATE
(Public Resources Code
Section 21000 *et seq.*)

SPIRIT OF THE SAGE COUNCIL, an
unincorporated association,

Petitioner,

vs.

COUNTY OF SAN BERNARDINO,
Respondent,

and

MITSUBISHI CEMENT COMPANY,
Real Party in Interest.

I.
INTRODUCTION

1. This is a citizen suit filed by Petitioner[1] against Respondent and Real Party in Interest[2] to enforce compliance with the California Environmental Quality Act, Public Resources Code ("PRC") section 21000 et seq. (hereinafter, "CEQA"). The project at issue ("Project) consists of a revision to an approved mining and reclamation plan for a 35-acre expansion of the existing Cushenbury Mine Quarry on patented mining claims within the San Bernardino National Forest. The Project is located within the Lucerne Valley Planning Area, adjacent to State Route 18, westside, fourteen miles south of Marble Canyon Road.

2. In its Verified Petition for Writ of Mandate filed November 21, 1997 ("Petition"), Petitioner challenged Respondent's approval of the Project as violating CEQA because Respondent failed to prepare an environmental impact report ("EIR") before approving the Project. Pursuant to CEQA, Respondent prepared an Initial Study to determine whether preparation of an EIR was required for

the approval of the Project. On October 21, 1997, Respondent approved a Mitigated Negative Declaration concluding that the Project, as mitigated, would not have any significant effects on the environment, and that an EIR therefore was not required. In approving the Project, the Board of Supervisors rejected the recommendation of County planning staff to require additional mitigation measures for the Project.

3. The environmental impact report is "the heart of CEQA" and the environmental "alarm bell" which is designed to alert the public and officials to environmental impacts of projects before it is too late to avoid those impacts. Under CEQA and the controlling case law, an EIR *must* be prepared whenever substantial evidence supports a "fair argument" that a project "may" cause significant environmental impacts. The courts have observed that this "fair argument" standard creates a low threshold for requiring EIR preparation. Moreover, the issue of whether an EIR is required is a purely *legal* issue that warrants no deference to the agency decision-maker.

4. As discussed below, Respondent violated CEQA by determining that the Project as mitigated would not result in significant environmental effects and thus concluding that an EIR was not required for the Project. In particular, Respondent approved an off-site mitigation plan to mitigate impacts to the four endangered and threatened carbonate plant species endemic to the site area. The mitigation plan contained inadequate mitigation in the form of untested "revegetation" of these plants off-site. State and Federal resource agencies with expertise in, and public trust duties over, these plants opposed the level of mitigation chosen because the proposed revegetation method is inconclusive and speculative, and because the 2:1 ratio of off-site revegetation for each acre disturbed on-site was patently inadequate. County planning staff also recommended a higher ratio of such mitigation in order to minimally protect these plant species and to comply with CEQA. There was no reasonable basis for Respondent to conclude that the mitigation measures selected would in fact be effective in reducing the Project's impacts to below levels of significance, as Respondent found in approving the Project without an EIR.

5. Respondent's failure to prepare an EIR also meant that there was no meaningful analysis of other potential significant environmental impacts of the Project, namely: impacts on threatened desert bighorn sheep; and interference with visual, aesthetic, educational and scientific pursuits.

6. Not only was there a "fair argument" that the Project as mitigated "may" cause significant environmental impacts. An EIR also was required for the independent reason that CEQA requires the agency to make "mandatory findings of significance" when a project has the potential to reduce the number or restrict the range of a rare or endangered plant or animal. When such "mandatory findings of significance" are triggered, as they were here due to the presence of the four plant species on-site, the agency *must* prepare an EIR, rather than merely a mitigated negative declaration.

7. Finally, an EIR was required for the additional reason that there was substantial disagreement among the experts — including among the State and Federal resource agencies, County planning staff, and Real Party's environmental experts — as to whether 2:1 replacement, revegetation or translocation would adequately mitigate the Project's impacts, where no documented studies prove that these measures are successful.

8. Because an EIR was not prepared, there was no analysis of *alternatives* to the Project that might substantially achieve the Project's goals while removing the threat to the effected species' survival and/or recovery. Nor was there any analysis of the readily evident *cumulative impacts* of the Project together with impacts of other mining operations in the area.

9. Respondent must be forced to comply with CEQA so that government decision-makers and citizens alike may be informed of the Project's true environmental impacts, and so the Project's significant environmental impacts may truly be mitigated to levels of less than significance. Petitioners therefore respectfully request that the Court issue a Peremptory Writ of Mandate, pursuant to C.C.P. section 1087, ordering that the Project approval be set aside, and that the expansion be enjoined unless and until an adequate EIR is certified.

II.
STATEMENT OF FACTS

A. Overview of The California Environmental Quality Act

10. In 1970, the California Legislature enacted CEQA, Public Resources Code §21000, *et seq.*, as a means of forcing public agency decision makers such as the County to document and consider the environmental implications of their actions. CEQA's fundamental goal is to fully inform the decision makers and the public as to the environmental consequences of proposed projects, and to assure members of the public that their elected officials are making informed decisions.

11. CEQA requires governmental agencies such as the County to seek feasible means to reduce or avoid significant environmental damage that otherwise could result from their actions. CEQA limits agencies from approving projects (such as the expansion approved here) with significant adverse impacts when feasible alternatives can substantially lessen such impacts.

12. The cornerstone of the CEQA process is the preparation of an EIR by the public agency which proposes or approves a major project. The primary function of the EIR is to discuss the important environmental consequences of a proposed project and to provide the agency and the general public with mitigation measures and alternatives to the project that would have less serious environmental consequences. (P.R.C. section 21061.) "The environmental impact report is '"the heart of CEQA"' and the 'environmental "alarm bell"' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.'" *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229 (citation omitted.)

13. An EIR is a detailed statement setting forth the following information: all significant effects on the environment of the proposed project; any significant effect on the environment that cannot be avoided if the project is implemented; any significant effect on the environment that would be irreversible if the project is implemented; mitigation measures proposed to minimize significant impacts on the environment; alternatives to the proposed project; growth-inducing aspects of the proposed project; and reasons for determining that any environmental impacts are not significant. (P.R.C. sections 21061, 21100.)

14. EIR's are also intended to demonstrate to apprehensive citizens that the agency has, in fact, analyzed and considered the environmental implications of its actions. Thus, the California Supreme Court has stated that the CEQA process "`protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. "[A] paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision." *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354.

15. Under CEQA, an agency must first prepare an "initial study" of the project. If the initial study

reflects that a project may cause significant impacts, the agency must then prepare an EIR to study the impacts in detail. If the initial study reflects that a project would not cause significant impacts, the agency need not prepare an EIR but may instead prepare a "negative declaration," which is "a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (P.R.C. section 21064.)

B. Description and Procedural History of the Project

16. The Project consists of a 35-acre expansion of the existing mine quarry through an application to amend the existing reclamation plan. (Administrative Record ("AR") 13.)[3] The Cushenbury Mine and cement plant are located eight miles southeast of Lucerne Valley, adjacent to State Route 18. The site consists of 790 acres. The mine is operated pursuant to an existing Mine Reclamation Plan (84M-016) and a Plan of Operations for that portion within the National Forest. The mine is located primarily on private lands with a small portion (approximately six acres) located on federal land. Excavation of limestone at the mine is accomplished by drilling and blasting a series of "benches," each twenty-five feet wide and forty-five feet high, simultaneously at various locations throughout the quarry. The processing of the limestone into cement occurs at the cement plant adjacent to the quarry. This process generates 350,000 tons of waste rock per year, which is cast down slopes at the west end of the quarry. (AR 83.)[4]

17. County planning staff prepared an Initial Study (AR 33-54) and proposed a "Mitigated Negative Declaration" based on several mitigation measures included therein. The Initial Study recognized the presence on the site of one federally listed threatened and three federally listed endangered plant species:

Five plant species that occur on limestone and dolomite substrates in the San Bernardino Mountains have been listed as threatened or endangered by the U.S. Fish and Wildlife Service (USFWS). Four of these plants: Parish's daisy (*Erigeron parishii*) Cushenbury milkvetch (*Astragalus albens*), Cushenbury buckwheat (*Eriogonum ovalifolium* var. *vineum*) and Cushenbury oxytheca (*Oxytheca parishii* var. *goodmaniana*) are found on the site. (AR 35.)

18. The Initial Study noted that "loss, reduction or deterioration of plant habitat may occur as a result of the disturbance of 35 acres of new quarry." (AR 46.) The Initial Study also noted:

The Reclamation Plan incorporates revegetation with native species, including the carbonate endemic plants, along with the placement of additional lands under a conservation easement. The conservation easement provides both a mitigation bank and a permanent reserve to compensate for impacts to the listed plant species. (AR 35.)

19. The Initial Study concluded, however, that mitigation measures consisting of a revegetation program will reduce the potential impacts to below a level of significance. (AR 46.) At one time, those proposed mitigation measures (AR 47-48) included a conservation easement involving the off-site planting at a rate of three acres for each one acre of carbonate species habitat disturbed (i.e., destroyed) on-site. (AR 47.) The Mine Reclamation Plan explained:

The habitat bank and preserve will be established by means of a conservation easement for lands of comparable habitat value at a ratio of three (3) to one (1). Of this total (105 acres), two-thirds (70 acres) will constitute a mitigation bank. When the carbonate endemic species have been established on a reclaimed area of the mine, equal areas of the bank can be mined subject to the regulatory

requirements existing at that time. The remaining one-third (35 acres) will remain subject to the conservation easement in perpetuity. (AR 73.)

20. In addition to these plants, it was recognized that the desert bighorn sheep, a sensitive wildlife species and a state threatened game species, was observed on the site. (AR 77.)

21. After receiving Real Party's application for the Project, on or about January 21, 1997 the County caused to be prepared an Initial Study under CEQA to determine whether preparation of an EIR was required for approval of the Project. (AR 307-338.) On or about September 11, 1997, based on the Initial Study, the San Bernardino County Planning Commission approved the Project, approved a Mitigated Negative Declaration, determined that the mitigation measures contained therein reduced the Project's environmental impacts to below a level of significance, and determined that preparation of an EIR, including public review and comment, was not required. The Planning Department Staff Report recommended approval of the project "subject to the Conditions of Approval and the Mitigation Monitoring and Compliance Program." (AR 8.)

22. On or about September 19, 1997, Real Party appealed the decision of the Planning Commission to the San Bernardino County Board of Supervisors. (AR 136-138, 145.) In the appeal, Real Party sought removal of Condition of Approval Number 43 ("Condition 43") from the Revised Mining Reclamation Plan. Condition 43 required Real Party to set aside land within a conservation easement for the purpose of protecting threatened or endangered plants. In particular, Condition 43 provided for a two -to-one (2:1) ratio of off-site permanent habitat replacement that would be conserved to minimally offset the on-site habitat acres expected to be destroyed by the Project. Condition 43 was presumed to mitigate the Project's impact on federally-listed endangered carbonate-dependent plant species to below a level of significance, in compliance with the Initial Study prepared under CEQA. In its appeal, Real Party sought a revision to a one-to-one (1:1) ratio.

23. County planning staff issued a Report and Recommendation recommending that the Board of Supervisors deny the appeal and retain the mitigation measures contained in Condition 43. (AR 148-150.) *Petitioner submits that this document may be the most significant single document in the administrative record in concisely framing the issues and summarizing the key facts of this case.*

24. Despite the recommendation of the County planning staff that the County deny the appeal and retain Condition 43, on or about October 21, 1997 the County Board of Supervisors granted Real Party's appeal and approved the Project, finding that the Mitigated Negative Declaration was prepared in accordance with CEQA, that an EIR was not required, and that the Revised Mining Reclamation Plan without Condition 43 would not result in significant impacts to the environment, including the aforementioned plant species. (AR 2, 135.) On October 23, 1997, the Clerk of the Board filed a Notice of Determination. (AR 1.)

III.
CEQA REQUIRED THE COUNTY TO PREPARE AN ENVIRONMENTAL IMPACT REPORT FOR THE PROJECT

A. Legal Standards

25. The standard of judicial review of the County's approval of the Project is the substantial evidence standard. (P.R.C. section 21168; C.C.P. section 1094.5(c).) In a legal challenge of an agency's decision not to prepare an EIR, CEQA provides:

> If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared. (P.R.C. §21080(d)(emphasis added).) See also P.R.C. section 21082.2(d).

26. California courts, including our Supreme Court, apply a "fair argument" standard to determine whether an EIR is required. Under this test, an EIR is required when substantial evidence in the record supports a "fair argument" that significant impacts *may* occur.[5] These decisions are consistent with CEQA Guideline, section 15384(a), which defines "substantial evidence" as evidence such "that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[6]

27. This "fair argument" standard creates a "low threshold" for requiring preparation of an EIR. (*Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310; *No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, 75.)

28. The issue of whether an EIR was required is a <u>legal</u> issue, meriting no deference to the agency:

> [T]he question is one of law, i.e., `the sufficiency of the evidence to support a fair argument.' [Citation.] Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.

(*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318; see also *NRDC v. California Fish & Game Commission* (1994) 28 Cal.App.4th 1104, 1116; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151.)

29. A negative declaration may be prepared only when, after completing an initial study, an agency determines that a project "*would not* have a significant effect on the environment." (Pub. Res. Code Sec. 21080(c)(emphasis added).) Such a determination can be made only if "[t]here is no substantial evidence in light of the whole record before the lead agency" that such an impact <u>may</u> occur. (Pub. Res. Code Sec. 21080(c)(1)(emphasis added).)

30. CEQA authorizes the use of "mitigated negative declarations" — as was approved here — only when there is "no substantial evidence in light of the whole record before the public agency that the project, as revised, <u>may</u> have a significant effect on the environment." (P.R.C. section 21064.5)[7] As discussed below, substantial evidence in the record supports a *fair argument* that the Project, as proposed, may have significant impacts on the environment. Therefore, an EIR was required.

B. A "Fair Argument" Can Be Made That The Project "May" Have Significant Impacts On The Environment

1. There Was No Reasonable Basis From Which to Conclude That Significant Impacts To Threatened and Endangered Carbonate Plants Were Mitigated By The Revegetation Program

31. The Project site contains four threatened and endangered carbonate plant species endemic to the carbonate deposits of the San Bernardino Mountains. These four plants were listed as threatened and endangered pursuant to a final rule issued by the United States Fish and Wildlife Service ("USFWS") on August 24, 1994. (AR 623-635)

32. The Project's impacts to the four endangered and threatened carbonate plant species were

undisputed. The adequacy of the mitigation was disputed. In its final rule listing these plant species, the USFWS observed, with respect to two of the plants, Parish's daisy and Cushenbury buckwheat, that off-site revegetation was of dubious value in actually preserving the species:

[G]ermination or survival under horticultural conditions does not accurately represent conditions required for long-term survival in the wild. The results of... studies are preliminary and inconclusive, and the long-term viability of species under cultivation is questionable. In addition, the normal life histories and other habitat characteristics of substrate endemics are not maintained in horticultural settings. (AR 628.)

33. Before approving the project, Petitioner and others made Respondent aware of the Project's significant adverse impacts and the inadequate mitigation measures. Petitioner wrote an exhaustive comment letter to Respondent dated October 18, 1997, (AR 568-573), contending that the Mitigated Negative Declaration violated CEQA and failed to adequately address impacts to, inter alia, the four endangered and threatened carbonate plant species and the desert bighorn sheep. (AR 568-569, 571.) Petitioner requested preparation of an EIR as well as additional mitigation measures to adequately mitigate the Project's impacts. (AR 569, 570.)

34. State and Federal resource agencies with expertise in resource protection opposed approval of the Project without an EIR. For example, in a February 20, 1997 comment letter to the County, the California Department of Fish and Game ("DFG")[8] wrote:

The Department . . . finds that the [Mitigated Negative Declaration] [MND] is seriously deficient with regard to mitigation for the threatened/endangered carbonate endemic plants. The proposed mitigation measures are inadequate because permanent compensation habitat would be set aside at a 1:1 ratio, resulting in a 50% loss of listed threatened/endangered species. The project further proposes to establish a "mitigation bank" that would be set aside only temporarily, and from which credits would be withdrawn if carbonate plants are grown on reclaimed areas. This proposal is inconsistent with the Resource Agency's Conservation Banking policy, dated April 7, 1995. (AR 609.)

35. In an August 11, 1997 letter, the DFG wrote:

> [T]he Department remains concerned that the proposed mitigating measures, involving compensation through permanent set-aside at a 1:1 ratio and temporary mitigation at an additional 2:1 ratio, will result in significant, residual adverse impacts to the carbonate endemics... [T]he Department will not object to certification of the MND provided that: 1) permanent compensation habitat be protected at a ratio of 2:1, rather than the proposed 1:1; 2) the remaining 1:1 temporary mitigation area may be withdrawn subject to future successful restoration of carbonate habitat and carbonate rare plants, (including the four listed species and also CNPS List 1B plants) provided that the Department and the Service approve performance standards and success criteria, and that such withdrawalfrom preserved status does not diminish the integrity and habitat value of the remaining preserve areas. (AR 583.)

36. In a February 21, 1997 comment letter to the County, the United States Fish & Wildlife Service ("USFWS") wrote:

> The mitigation for impacts to biological resources described in the [Mitigated Negative declaration] would not be adequate to reduce project related impacts to below a level of significance. The proposed mitigation is to preserve one acre for each acre disturbed, and to set aside an additional two acres which can be mined contingent upon "successful reclamation" of previously mined areas. Without a

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habitat management plan for areas to be preserved in perpetuity, and acceptable success criteria for restored areas, this proposal would be considered less than 1:1. (AR 607-608.)Nonetheless, Respondent concluded that the impacts of the Project, as mitigated, would not be significant.

37. The fatal defect of the Initial Study and the Mitigated Negative Declaration is that they adopted mitigation measures to cure adverse environmental impacts, without substantial evidence that the mitigation measures would be effective in successfully preserving the endangered and threatened carbonate plants and ensuring that they will propagate. County planning staff candidly admitted with respect to another recent mine project in the area that "there has not been much experience with successful revegetation efforts." (AR 666.) There are nor established success criteria for this type of mitigation, and there is little assurance that revegetated plants will reproduce to form a successful plant community. (AR 566, 567, 601.) The Initial Study did not offer any meaningful analysis of the effectiveness of the revegetation plan chosen. Respondent has provided no reasonable basis from which to conclude that the mitigation measures will be effective. (*Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692 (EIR deficient because no evidence indicating whether proposed mitigation measures were attainable).) As a result, Petitioner and the citizens of San Bernardino County can have no confidence in the Initial Study's conclusion that approval of the Project will not result in significant adverse impacts if the mitigation measures are implemented.

38. An EIR would have actually studied the effectiveness of various alternative mitigation measures, including various revegetation ratios. Because there was no EIR, there was no reasonable basis in the record for the Board of Supervisors' determination to reject the minimal ratio that planning staff determined to be necessary as minimal mitigation for the disturbance of these plant species. There is no reasonable basis in the record for the Board's selection of a lesser degree of mitigation.

39. An EIR would have contained a required study of feasible *alternatives* to the Project that would achieve all or a substantial portion of the Project's goals while avoiding the Project's adverse environmental. (P.R.C. sections 21100, subd. (b)(4), 21002.) A reasonable range of alternatives be must considered. (CEQA Guidelines, section 15126(d).)[9] The alternatives that must be considered under CEQA include the project as planned and a "no-project" alternative. (CEQA Guidelines, section 15126(d)(4).) Unfortunately, because an EIR was not prepared, *no* alternatives to the Project were identified or studied.

40. An EIR also would have contained a thorough analysis of cumulative impacts, which are defined as "possible effects of a project that are individually limited but cumulatively considerable . . . when viewed in connection with past projects, the effects of other current projects, and the effects of probable future projects." (P.R.C. section 21083(b).) "[C]onsideration of the effects of a project . . . as if no others existed would encourage the piecemeal approval of several projects . . . [and] would effectively defeat CEQA's mandate to review the actual effect of the project upon the environment." (*Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306.) A cumulative impacts analysis would have considered the Project's impacts in conjunction with impacts from several other area mines — impacts that, according to the USFWS, have combined to create an increasingly significant adverse impact on these sensitive plants:

The imminent and primary threat facing these species is the ongoing destruction of the carbonate substrates on which they grow by activities associated with limestone mining, including direct removal of mining materials, disposal of overburden on adjacent unmined habitat, and road construction. (AR 629.)

41. If an EIR were prepared and determined that the Project would have significant impacts, this

conclusion would not necessarily signal the death knell for the Project. That is because, consistent with CEQA, an EIR would study feasible mitigation measures to substantially lessen or avoid otherwise significant adverse environmental impacts. (P.R.C. sections 21002, 21080, subd.(a), 21100, subd.(b)(3).) The difference would be that an EIR would analyze potential mitigation measures much more thoroughly than the Initial Study and Mitigated Negative Declaration, and would provide a rational basis for the selection of revegetation ratios or other mitigation measures.

42. In addition, even where a project's significant impacts cannot feasibly be "substantially mitigated," the agency may nevertheless approve a project if it adopts a "statement of overriding considerations" stating specific reasons why the project's "benefits" rendered "acceptable" its "unavoidable adverse environmental effects." (CEQA Guidelines, sections 15043, subd. (B), 15093; *see also* P.R.C. section 21081, subd. (B).)[10]

43. Finally, the Initial Study itself was legally inadequate. The purpose of the initial study is to "[p]rovide documentation of the factual basis" for concluding that a negative declaration will suffice and that an EIR is not required. (CEQA Guidelines, section 15063(e).) An initial study must "disclose data or evidence upon which the person(s) conducting the study relied. Mere conclusions simply provide no vehicle for judicial review." (*Citizens Assn. For Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.) The Initial study is inadequate because it is conclusory and lacks data supporting its conclusion that the speculative off-site mitigation would adequately protect these sensitive plant species.

2. The Board's Approval of the Project Without "Condition 43" Weakened The Already Unproven Mitigation, and Thus Rendered The Project's Impacts on Endangered and Threatened Carbonate Plants Even More Significant

44. Real Party appealed to the Board the Planning Commission's decision and sought to rescind Condition 43 from the mitigation plan. On or about October 21, 1997, the County Planning Department issued a "Report/Recommendation" recommending that the County deny Real Party's appeal and retain Condition 43. (148-150.) The Report/Recommendation noted that Condition 43 was the direct result of comments submitted by resource management specialists at the United States Fish & Wildlife Service and the California Department of Fish & Game, who determined that Condition 43 was a *minimum* requirement for mitigation. (AR 578-580, 583, 607-608, 609-610.) The Report/Recommendation also noted that County Planning "[s]taff included the resource agencies' request as the final proposed *mitigation in order to ensure a defensible environmental documents consist[ent] with CEQA."* (AR 149.)

45. Again, the Initial Study did not offer any meaningful analysis of the effectiveness of the selected revegetation plan. An EIR would have analyzed the effectiveness of potential mitigation measures, including various revegetation ratios.

As discussed above, there was no substantial evidence that the mitigation measures, even including Condition 43, would adequately mitigate the Project's impacts to these plant species. Therefore, given Respondent's decision to grant Real Party's appeal and modify the minimal protections afforded by Condition 43, more than substantial evidence supports a "fair argument" that the Project, as actually approved, "may" have a significant environmental impact.

3. Respondent Was Required to Make a Mandatory Finding of Significance and Prepare an EIR Because the Project Will Reduce the Number and Restrict the Range of Rare and Endangered Plants

46. Section 15065(a) of the CEQA Guidelines requires an agency to make "mandatory findings of significance" when, inter alia, "[t]he project has the potential to . . . [r]educe the number or restrict the range of a rare or endangered plant ..." When an initial study concludes that any of these impacts may occur, the lead agency must prepare an EIR rather than a negative declaration.

47. In *Mira Monte Homeowners Assn. v. Ventura County* (1985) 165 Cal.App.3rd 357, the proposed project involved the subdivision of a 23-acre tract into residential lots, where the site contained a wetland and a vernal pool with rare plant species. The county had determined that the project might have a significant effect on the environment and prepared an EIR, and the issue was whether the discovery of new information regarding the vernal pool and wetlands required a supplemental EIR. The court held in the affirmative. The Court noted that "a finding of significance is required if the range of a rare or endangered plant is restricted," 165 Cal.App.3d at 364 n.10, that the impacts were significant "[b]y definition," 165 Cal.App.3d at 364, and that a "subsequent or supplemental EIR must examine the affected plant populations as part of its evaluation of the environmental impact." 165 Cal.App.3d at 364 n.10. See also *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1551 (noting that *Mira Monte* involved facts that were significant "[b]y definition"). Unlike *Mira Monte,* here an EIR was not prepared in the first instance, notwithstanding the fact that the impacts triggered mandatory findings of significance. See also *Environmental Council of Sacramento v. Board of Supervisors* (1982) 135 Cal.App.3d 428, 438; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000 ("[i]n specified instances proposed projects must be found to have a significant impact on the environment") (emphasis in original).Because the impacts of the Project triggered CEQA's "mandatory findings" of significance, an EIR was required.

4. Respondent Was Required to Prepare an EIR Because of Expert Disagreement on the Adequacy of the Mitigation Measures for the Endangered and Threatened Carbonate Plant Species

48. The CEQA Guidelines, Section 15064(h)(2) provide: "If there is disagreement between the experts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR." See also *Mira Monte Homeowners Assn. v. Ventura County* (1985) 165 Cal.App.3rd 357, 364 n.10 (noting that where experts disagree regarding plant species, "an EIR should disclose and summarize the disagreement"). As discussed above, experts from DFG and USFWS — the "trustee agencies" with the specific expertise and the public trust duties to protect California's rare plants and other resources — indicated that the mitigation measures would not fully reduce impacts on plant species to below levels of significance, even *with* Condition 43. County planning staff apparently believed that the mitigation measures, as long as they contained Condition 43, would mitigate these impacts. (AR 148-150, 354-359.) Real Party's in-house environmental experts contended that the impacts would be completely mitigated even *without* Condition 43, AR 339, 344-347, an argument that ultimately carried the day with the Board of Supervisors.

49. Because of the substantial disagreement among these experts over whether the mitigation measures would reduce impacts to below levels of significance, an EIR was required to address this disagreement.

5. An EIR Was Required To Analyze the Project's Impacts On Desert Bighorn Sheep, A California Threatened Game Species

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50. An EIR also was required because there is a fair argument that substantial evidence exists that the Project may significantly impact the desert bighorn sheep. This species has been declared a threatened game species under California law. (AR 646) The "Baseline Biological Survey" prepared for Real Party in August 1995 recognized these potential impacts to the bighorn sheep:

The only sensitive wildlife species encountered on the site was desert bighorn, which is protected as a game species in the state of California. Mining of the additional areas *will displace individuals of this species to adjacent habitat.* (AR 432 (emphasis added).)

51. Petitioner requested that an EIR be prepared to study the Project's potential adverse impacts on the desert bighorn sheep population. (AR 571.) Respondent's Initial Study, however, virtually ignored potential impacts of the Project on the desert bighorn. The Initial Study's only mention of the desert bighorn was the following unsupported conclusion:

The only "sensitive" species believed to exist on the site was desert bighorn (*Ovis canadensis nelsoni*), a state protected game species... Potential effects to the desert bighorn are considered to be non-significant due to the large range of the animal and lack of specialized habitat area on the project site. (AR 46.)

52. Substantial evidence in the record (Real Party's baseline Biological Survey) supports a "fair argument" that the Project *may* cause significant impacts to desert bighorn. Therefore an EIR was required to identify, analyze, and, if possible, mitigate any impacts found to be significant. Because the Initial Study utterly failed to address the Baseline Survey's conclusion that the Project would displace sensitive bighorn sheep, the Initial Study conclusion that the Project would not significantly impact the bighorn was not based on substantial evidence.

IV.
CONCLUSION

53. Based on the foregoing, Petitioner respectfully requests that the Court: find that Respondent, in approving the Project and certifying the Mitigated Negative Declaration, violated CEQA; issue a Peremptory Writ of Mandate declaring that Respondent's actions are null and void; order Respondent to vacate and set aside the Notice of Determination dated October 21, 1997; and, in the event Real Party seeks approval of any future application for expansion of the existing Cushenbury Mine Quarry, order Respondent to prepare an EIR with scientifically supported mitigation that will conserve the affected plant and wildlife species.[11]

Dated: December 10, 1998

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FOOTNOTES

1 Petitioner is the Spirit of the Sage Council, an unincorporated non-profit association whose effected members and supporters have a strong interest in the conservation of San Bernardino County's flora and fauna (including threatened and endangered species), natural resources, ecosystems, open spaces, and quality of life through wise planning and stewardship.

2 Respondent is the County of San Bernardino ("County"). Real Party in Interest is Mitsubishi Cement Corporation, the project applicant and the owner and operator of the Cushenbury Mine. For convenience, Respondent and Real Party in Interest shall be referred to herein collectively as "Respondent".

Respondent has certified and lodged with the Court a copy of the administrative record for this matter, upon which this lawsuit is based, and portions of which will be referenced throughout this memorandum.

3 A detailed discussion of the operations of the mine and cement plant is contained in the Mine Reclamation Plan. (See AR 82.)

4 *Friends of "B" Street v. City of Hayward*, (1980) 106 Cal.App.3d 988, 1000-1003; *Brentwood Assn. For No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504; *No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, 75; see also *Sundstrom v. County of Mendocino* (1988) 2020 Cal.App.3d 296, 304-310; *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602-1603; *NRDC v. California Fish & Game Commission* (1994) 28 Cal.App.4th 1104, 1116; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151.

6 The CEQA Guidelines, Cal. Code Reg., tit. 14, sec. 15000 et seq., have been issued and revised by the California Resources Agency, pursuant to P.R.C. section 21083. Although the California Supreme Court has declined to decide whether the Guidelines are mandates or merely interpretive aids, the Court has noted that, "at a minimum," courts should "afford them great weight ..." (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 391, n.2.

7 `Mitigated negative declaration' means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid . . . or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (P.R.C. section 21064.5.)

8 "The California Department of Fish and Game is a trustee agency with regard to designated rare or endangered native plants. `Trustee agency' is a state agency having jurisdiction by law over natural resources which are held in trust for the people of the State of California and are affected by a project." *Mira Monte Homeowners Assn. v. Ventura County* (1985) 165 Cal.App.3rd 357, 364 n.9.

9 "[T]he discussion of alternatives shall focus on alterna-tives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." (CEQA Guidelines, section 15126(d)(1).)

10 This was done for the earlier-approved Arctic Canyon mine expansion, for which an EIR was prepared and a statement of overriding considerations issued. (AR 650.)

11 Petitioner reserves the right to seek provisional injunctive relief, if necessary, in the event of imminent threat to federally listed plant species and/or state protected bighorn sheep.