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MITSUBISHI REPLY BRIEF

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Case No. SCV 43289

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

DATE: June 15, 1998
TIME: 8:30 a.m.
DEPT: 2

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

In its opening brief ("Pet. Brf."), Petitioner showed that substantial evidence in the record demonstrated that the specific mitigation proposals approved for the Project were unproven, uncertain, and unlikely to be effective. Thus, substantial evidence supports a "fair argument" that the Project "may" cause significant adverse impacts on threatened and endangered plants. This substantial evidence consisted of the independent analyses of numerous resource agencies with expertise on the subject — including the DFG, FWS, and even the County's own planning department. (See Pet. Brf. at 10, 13-16.)

If an EIR had been prepared, as CEQA required, Respondent and the public would have had the opportunity to fully consider and comment upon project alternatives, including various mitigation alternatives, as well as cumulative impacts of this mine expansion with nearby mines. (Pet. Brf. at

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16-19.) In that event, the hotly disputed mitigation issues now before the Court could have been examined in full detail, as only an EIR could have accomplished. Because no EIR was prepared, the key issue of adequate mitigation was not thoroughly or systematically addressed below, and in fact was rushed through with an additional last-minute modification as part of the final Project approval. As a result, not only was CEQA violated, but the resulting decision — a mine expansion project that will destroy rare plants without demonstrated adequate mitigation — is one in which the decision-makers and their constituents were poorly informed and in which they can have little confidence.

In its opposition brief, Respondent and Real Party[1] argue that significant impacts will not occur because the Project includes two separate mitigation measures, revegetation and conservation, that the conservation measure will be removed only if the revegetation measure is successful, and even then the conservation easement will still retain at least 35 acres. Yet, as discussed below, the record amply demonstrates that each of these two components is flawed, untested, and uncertain. Combining two defective components does not make them more effective, either singly or together, and does not allow Respondent to avoid the "fair argument" standard which required it to prepare an EIR.

Respondents also argue that CEQA's mandatory findings of significance were not triggered, because the Project as mitigated would not reduce or restrict the range of these rare plants, and because there is no disagreement among experts as to the Project's impacts. Yet, merely stating that impacts on plants will be mitigated does not circumvent the mandatory finding required by CEQA, and one could not imagine a more divergent set of expert opinions on a project's proposed mitigation than is reflected on this record.

In addition, Respondent attempts to defend the Initial Study's cavalier dismissal of the desert Bighorn sheep, which real party's biological study found would be displaced by the Project. But this post hoc rationalization cannot substitute for an EIR, once impacts on the species were found to be significant.

Finally, Respondent argues that Petitioner lacks standing to raise the issue of the desert Bighorn sheep and to request an EIR. This argument is easily dismissed, as both issues are squarely before the Court.

One purpose of an EIR is to resolve "uncertainty created by conflicting assertions" and to "substitute some degree of factual certainty for tentative opinion and speculation." *No Oil, Inc. v City of Los Angeles* (1975) 13 Cal.3d 68, 85.)

This case, with its complex, novel, and disputed mitigation measures, is precisely the type of CEQA case in which an EIR is necessary.

Finally, the implications of this suit are broader than this one mine. Several major limestone mines exist in the vicinity of the Cushenburry Mine. This will not be the last expansion of an existing limestone mine in the area, as immense but limited quantities of lucrative limestone exist in these mountains, with some mines holding resource extraction permits well into the next century. Thus, this lawsuit will not only determine whether there will be adequate mitigation for destruction of the rare plants and other resources on the Project site, but it also may determine parameters for plant and wildlife mitigation for future mine expansions by Real Party and other companies. If Respondent's violation of CEQA is allowed to stand, it will send a message to Real Party and to other mining corporations that Respondent will allow them to continually expend on the cheap, without paying for the actual environmental analysis necessary to ascertain effective mitigation, if any, of the impacts of their action. Granting Petitioner's requested writ, on the other hand, will demonstrate that no business, no matter how economically valuable to the County, may operate so as to jeopardize the County's precious natural resources in violation of State law.

II.

SUBSTANTIAL EVIDENCE SUPPORTS A "FAIR ARGUMENT" THAT THE PROJECT AS MITIGATED MAY HAVE SIGNIFICANT ADVERSE IMPACTS

A. There Was No Reasonable Basis From Which to Conclude That Significant Impacts To Threatened and Endangered Carbonate Plants Would Be Mitigated Either By 2:1 or 1:1 Permanent Offsite Mitigation

In its brief, Respondent notes that the Board did not remove the three-to-one conversation area, but rather provided for further reduction of the conservation area by an additional 35 acres in the event Mitsubishi replants 100% of the plants on-site after completion of mining. (Resp. Brf. at 16-17.) The potential reduction of an additional 35 acres of the conservation area (to a 1:1 mitigation ratio), Respondent argues, is consistent with allowing the initial reduction of an initial 35 acres from the conservation area (to a 2:1 ratio) in the event of a 50% revegetation success rate on-site. (Id. at 17.) Thus, Respondent argues, "[i]f withdrawing 35 acres from the conservation easement is acceptable mitigation for the first 50% of the number of plants, withdrawing [an additional] 35 acres from the conservation easement is also acceptable for the second 50%." (Ibid.) Respondent also argues that mitigation is "guaranteed." (Resp. Brf. at 13.)

The planning commission and the resource agencies only hesitantly accepted the first proposed reduction in the conservation easement but rejected the second proposed reduction[2]. Nonetheless, the Board approved the Project without an EIR.

In *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, the court held that the board of supervisors violated CEQA by approving the project based on a negative declaration without first resolving uncertainties regarding the project's potential to cause significant environmental impacts. Because the success of mitigation was uncertain, the court held that the board could not have reasonably determined that significant impacts would not occur. (202 Cal.App.3d at 306-308.) In *Sundstrom* and in other published CEQA cases involving mitigation measures that were questionable, uncertain, or deferred, including cases in which the project ultimately was approved, an EIR was required to adequately study those mitigation measures. See, e.g., *Laurel Heights Improvement Assn. V. Regents* (1988) 47 Cal.3d 376, 412, 420; *Concerned Citizens v. Los Angeles Unified School Dist*. (1994) 24 Cal.App.4th 826, 840-843; *Del Mar Terrace Conservancy, Inc. v. City Counci*l (1992) 10 Cal.App.4th 712, 740-741.

Here, Respondent's focus on two separate mitigation measures, revegetation and *conservation*, cannot obscure the fact that each of these components in this case is flawed and uncertain, as the record demonstrates. Regarding the conservation component, the U.S. Forest Service[3] noted: "Mitsubishi's mitigation bank proposal is vague and lacks key information necessary to analyze the effects or predict the success rate of the plan." (AR 601.) The USFWS noted that the Project lacked "a habitat management plan for areas to be maintained in perpetuity." (AR 608.)

In addition, the record evidence suggests that the revegetation is equally speculative. Experts at the Forest Service noted: "[A] reclaimed mine landscape is not suitable habitat for carbonate endemics unless species diversity, cover, age, class, and drainage patterns are similar to unmined land in a natural state." (AR 601.) Yet nowhere in the record, either in Condition 43 or elsewhere, is there discussion of specific methods that will create "species diversity, cover, age, class, and drainage patterns" that will be "similar to unmined land in a natural state."

The Forest Service further queried: "What do they mean by `carbonate species being established on a reclaimed area of the mine'? How many individuals? How many species? What about habitat

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quality?" (Id.) These questions were not answered. The Forest Service also noted that, based on its extensive studies within the region, the ability of carbonate endemic plants to survive on non-carbonate soils is temporary at best: "Just because carbonate endemics have been established on a reclaimed area does not mean they will be there in 20, 50 or 200 years." (AR 601.)

The DFG, in its comments contained in the 1996 EIR for Mitsubishi's Arctic Canyon Mine, noted:

> [I]t is not realistic to expect restoration to recreate functional carbonate habitat comparable to that found in undisturbed habitats. Restoration is problematic and experimental, and while some vegetative cover may ultimately be reestablished, large areas... would be impossible to restore. Because revegetated areas are unlikely to return to functional habitat comparable to that of undisturbed areas, this should not be relied upon to compensate for project impacts. (AR 810.)

In response, the County conceded "*that the current reestablishment of the rare carbonate plant species is unproven and will initially be experimental.*" (Id., *emphasis added*)

The Forest Service experts, along with a representative of Real Party, took a field trip of four "enhanced sites" following mining activity, which demonstrated the mixed results, at best, of revegetation. (AR 598-600.) One of the sites, Water Tank Hill Site, "had hardly anything growing on it." (AR 599-600.) Another site, the CKD Dump Site, was "enhanced" in 1989, but by 1997 only one of the endangered plant species, *Atriplex*, had revegetated. (AR 600.) The Forest Service concluded that, even many years after revegetation, "[t]he lands were far from restored..." (AR 598.)

The USFWS contractor for the San Bernardino Mountains Carbonate Endemic Plants Draft Recovery Plan, Conservation Ecology Services (AR 574), echoed these comments:

[T]he goal of "revegetation" falls short of the "ecological restoration" that would be required to provide meaningful long-term conservation of the 50% of the listed plants that can survive for five years. And the five year monitoring period tells us little about whether those plants' lineages will be sustained through natural reproduction and establishment over time. If they can get the plants to stay alive for five years but they don't produce offspring, or their offspring cannot establish or reproduce, it appears that even though condition Number 43 will be fulfilled, one-third of the conservation easement will be removed for further loss, but the translocated plants could eventually die out. This could amount to a loss of 100% of the listed plants effected by this decision. (AR 566.)

Conservation Ecology Services considered the proposed revegetation especially problematic due to the lack of specific success criteria and the inadequacy of the five-year monitoring period. (AR 566.) The USFWS also noted that the Project lacked "acceptable success criteria for restored areas." (AR 608.) The Specialty Minerals EIR apparently held up by Respondent as a mitigation model provides for a mitigation monitoring program of ten years. (AR 997.)

Thus, the notion that the Project site can be completely "reclaimed" and that the threatened and endangered plants could be reestablished within five years is unsupported and speculative.

In summary, the success of the proposed revegetation is uncertain, and it cannot be conclusively determined that revegetation is feasible, *i.e.*, "capable of being accomplished in a successful manner within a reasonable period of time." (CEQA Guidelines, Section 15364.) Thus, the Project even as mitigated "may" have significant impacts. In other words, regardless of how many acres, occupied or unoccupied by these species, are kept in conservation easements, the potential impacts will still exist on the mine expansion area and decrease the currently existing habitat. Therefore, an EIR is required.[5]

B. Under CEQA Guidelines, Section 15065(a), an EIR Was Required Because the Project Has The Potential To Reduce The Number and Restrict the Range of Rare and Endangered Plants

In its opening brief, Petitioner pointed out that the Project "has the potential to... [r]educe the number or restrict the range of... rare or endangered plant[s]," (Pet. Brf. at 20), and that therefore an EIR was *mandated* under CEQA Guidelines, Section 15065(a). (Id.) This was noted not only by Petitioner but by agencies such as the USFWS. (AR 607-608.) In response, Respondent claims that, due to its mitigation measures, the Project *would not* reduce the number or restrict the range of these plants. (Resp. Brf. at 18.) Section 15065(a) by its own terms does not allow the proponent to "mitigate away" potential impacts to rare plants and natural resources without preparing an EIR. If

Respondent's unsupported argument were adopted, the Legislature's requirement of a "mandatory" finding of significance would succumb to ad hoc mitigation exceptions that would swallow up the rule, to the detriment of the rare and endangered species for which this mandatory provision was designed to protect. In any event, given the uncertainties of the proposed mitigation, while these measures might possibly *reduce* the Project's potential to harm the number and range of these plants, they do not remove that potential.

C. Under CEQA Guidelines, Section 15064(h)(2), an EIR Was Required To Address The Expert Disagreement Over The Mitigated Negative Declaration

In its opening brief, Petitioner noted that the administrative record reflected disagreements among experts — County planning staff, the Lilburn Corporation (Mitsubishi's environmental consultant), DFG staff, and USFWS staff — over whether the mitigation measures would reduce the Project's impacts to below levels of significance. (Pet. Brf. at 22; AR 148-150, 339, 344-347, 354-359, 583, 607-608, 609-610.)[6] Petitioner then noted that, under the mandatory findings of significance of CEQA Guidelines, Section 15064(h)(2), an EIR was required to address the expert disagreement. (Pet. Brf. at 21-22.)

In its opposition brief, Respondent attempts to circumvent Section 15064(h)(2) by arguing that there is no disagreement as to the specific methods of mitigation, but only as to the number of acres to be kept in a permanent conservation easement. (Resp. Brf. at 20.) This argument must fail. The various environmental experts disputed the adequacy of revegetation as well as the level of conservation mitigation necessary to mitigate the Project's impacts. (Pet. Brf. at 22.)

Respondent suggests that the Project as mitigated received the approval of the DFG and USFWS. (Resp. Brf. at 13, 16.) This, too, is incorrect. (*See* Pet. Brf. at 14-15.) Both the DFG (AR 583) and the USFWS (578, 607-608) opposed the Project as approved and indicated that an EIR was required. While these resource agency experts considered the general concept of mitigation, they objected to Respondent's level of and lack of success criteria for off-site "conservation" mitigation, and they also objected to the purported efficacy of the on-site "revegetation" or "reclamation" mitigation contained in the approved Project. Therefore, an EIR was required under Section 15064(h).[7]

In addition, Respondent attempts to avoid the effect of CEQA Guidelines, Section 15064(h)(2) by arguing that DFG and USFWS did not provide a basis for their recommendations that higher acreages be preserved permanently in the conservation easement. (Id. at 20.) Respondent's argument is incorrect (as the record comments of these agencies reflect. More importantly, Respondent's argument only underscores the disagreement among the experts. This argument cannot be waged and won in this litigation, by either side. The mandatory findings of significance of CEQA Guidelines, Section 15064(h)(2) require preparation of an EIR.

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Finally, Respondent's reliance on *Browning-Ferris Industries of California v. City Council of the City of San Jose* (1986) 181 Cal.App.3d 852 is entirely misplaced. In Browning-Ferris, the city had already prepared an EIR; thus Guidelines, Section 15064(h) did not come into play. The expert disagreement regarding the project's impacts came into play only *after* preparation of the EIR, when the respondent city council needed to determine whether to approve the project. *"Disagreement among experts does not make an EIR inadequate... "* (CEQA Guidelines, Section 15151, *emphasis added.*) Accordingly, Respondent's unsupported conclusion that without an EIR "CEQA gives the Board of Supervisors authority to choose between experts," (Resp. Brf. at 21), is mistaken, is not supported by the *Browning-Ferris* case, and is contrary to the plain language of CEQA Guidelines, Section 15064(h). The Board may only "choose" between disagreeing experts *after* preparing an EIR. (*See* CEQA Guidelines, Section 15151.)

D. An EIR Was Required Because A Fair Argument Supports Substantial Evidence That The Project May Have Significant Impacts on Desert Bighorn Sheep

In its opening brief, Petitioner demonstrated that substantial evidence in the record (namely, Real Party's Baseline Biological Survey) supported a "fair argument" that the Project *may* cause significant impacts to desert Bighorn sheep, and that therefore an EIR was required to identify, analyze, and, if possible, mitigate any impacts found to be significant. (Pet. Brf. at 22-23.)

In its opposition brief, Respondent argues, first, that Petitioner is barred from asserting this CEQA violation because it failed to raise this issue properly at the administrative level. This argument should be rejected, as impacts to the desert Bighorn were raised in great detail in Petitioner's October 18, 1997 letter to Respondent. (AR 571.) The primary purpose of the exhaustion doctrine is to ensure that public agencies are given an opportunity to respond to factual and legal issues before their actions are subjected to judicial review, and to provide the agency a chance to address errors or disputes at the administrative level and avoid needlessly burdening the courts. *See*, e.g., *Corona-Norco Unified School District v. City of Corona* (1993) 17 Cal.App.4th 985, 997; *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 89. Given Petitioner's comments, (AR 571),

Respondent was made aware of concerns about Bighorn sheep prior to its approval of the Project. Moreover, Petitioner was not required to first argue the Bighorn sheep issue before the planning commission to preserve the issue for litigation. A project opponent may satisfy the exhaustion requirement by stating objections to the agency body with the final authority to approve a project (i.e., the Board of Supervisors), even though he or she may have failed to state such objections to an inferior agency body. See *Browning-Ferris, supra,* 181 Cal.App.3d at 859-861; *San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 749.

Even if Petitioner had not raised the issue of Bighorn sheep below, Petitioner still would have standing to raise the issue, because the issue was raised by the DFG. After noting that "onsite species of concern include... desert bighorn sheep (*Ovis canadensis nelsoni*), a state of California Protected Species," (AR 265), the DFG then objected to approval of the MND and requested preparation of an EIR, including "acceptable mitigation strategies for these important biological resources." (AR 266.) In order for a CEQA issue to be properly brought in court, P.R.C. Section 21177(a) requires only that the particular issue be raised "to the public agency orally or in writing *by any person...*" (*Emphasis added.*) In order for Petitioner to have standing to bring suit, P.R.C. Section 21177(b) requires only that Petitioner "objected to the approval of the project orally or in writing..." In sum, Petitioner may raise issues in this litigation that others raised below and that it did not, as long as Petitioner at least objected to the Project below, which it unquestionably did.

Once Respondent's exhaustion arguments are dismissed, it becomes clear that the potential impacts to desert Bighorn triggered the EIR requirement. Respondent's own documents state that the desert Bighorn sheep (Ovis canadensis nelsoni) is located at the Project site (AR 46, 77, 432), that it is a sensitive species and a state protected game species (id.), and that the Project "will displace" individuals of this species. (AR 432.) Because significant impacts ("displacement") were posed to desert Bighorn sheep, Respondent was required under CEQA to prepare an EIR to identify, evaluate, and, if possible, mitigate the impacts.

Nonetheless, the Initial Study dismissed these impacts in a single conclusory sentence. (AR 46.) Respondent attempts to justify this failure by reiterating record comments about wildlife in general (not necessarily Bighorn sheep), labeling such comments as a "thoughtful assessment" of impacts on desert Bighorn sheep, and then concluding summarily that no potential impacts exist. (Resp. Brf. at 23-24.) However, this post hoc commentary simply cannot substitute for an analysis of the impacts to desert Bighorn sheep. Once the record demonstrated a fair argument that significant impacts may occur, Respondent was required to prepare an EIR.[8]

E. Petitioner Has Not "Waived" Its Request For An EIR

Respondent, in its final argument, contends the Petitioner may not seek preparation of an EIR because it did not request an EIR before the planning commission. For the same reasons as with the Bighorn sheep issue discussed in Section II.D, *supra,* this argument must be rejected. Petitioner requested that the Board of Supervisors order that an EIR be prepared, and that is enough. (AR 569.) Even if it were not enough, requests for an EIR were made to the planning commission by the USFWS (AR 608), DFG (AR 610), and others, and Petitioner objected generally to the Project.

III.
CONCLUSION

For the reasons discussed above and in Petitioner's opening brief (Pet. Brf. at 24), Petitioner respectfully requests that the Court issue the Peremptory Writ and other relief requested. //

Dated: May 26, 1998

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FOOTNOTES

1 An EIR would have addressed environmental impacts to the entirety of the Cushenburry Canyon mining site, instead of continuing to allow the "piecemealing" of the Project area and thus the incremental destruction of limestone soil habitats and species in the region. The failure of previous reclamation efforts at other mined areas is well documented in the record and discussed infra.

2 Hereinafter in this brief, "Respondent" shall refer collectively to Respondent County of San Bernardino and Real Party Mitsubishi Cement Company.

3 The project proponent apparently had made the same argument for 2:1 mitigation of endemic carbonate plants with respect to the Arctic Canyon mine project, and DFG and other agencies rejected that ratio as too low to protect these species. (AR 607-608, 808.)

4 A portion of the Cushenburry Mine is located within the San Bernardino National Forest. (AR 59, 61.) In 1984, Real Party's predecessor in interest received a Plan of Operations from the Forest Service for that portion of the Cushenburry Mine located on federal lands. (AR 612-622.)

5 Respondent's argument that the approved plan is "superior" to the Planning Commission's approved mitigation because it includes an incentive to replace 100% of the plants by revegetation on site, (Resp. Brf. at 17), is a red herring, given the aforementioned known problems with revegetation.

6 Respondent also received comments from the United States Forest Service (AR 594) and from its expert endemic carbonate plant consultant, Conservation Ecology Services. (AR 565-567, 574-577.)

7 Respondent ignored not only these expert agencies but also the comments submitted by USFWS consultant Conservation Ecology Services, which stated that Condition 43 was an absolute minimum toward actual mitigation. (AR 565-567, 574-577.)

8 Respondent's clarification that Section 670.5 of the Fish and Game Commission regulations does not apply to the desert Bighorn subspecies, (Resp. Brf. 22-23), does not alter Respondent's duty to prepare an EIR addressing impacts to this subspecies.