

Spirit of the Sage Council

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BIODIVERSITY

MITSUBISHI CEQA PETITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN BERNARDINO

SPIRIT OF THE SAGE COUNCIL, an) CASE NO.
unincorporated association,)
)
Petitioner,)

v.

COUNTY OF SAN BERNARDINO,
Respondent,
and
MITSUBISHI CEMENT CORPORATION,
Real Parties
in Interest

PETITION FOR PEREMPTORY WRIT OF
MANDATE
(Public Resources Code
Section 21000 et seq.)

Petitioner alleges through this Petition as follows:

THE PARTIES

1. Petitioner Spirit of the Sage Council (“Petitioner” or “Sage Council”) is an unincorporated non-profit association based in Pasadena, in Los Angeles County that receives a 501(c)(3) non-profit fiscal sponsorship from Social and Environmental Entrepreneurs, Inc., Malibu, California. Sage Council, including its members and supporters, some of whom reside in the County of San Bernardino, have a strong interest in the conservation of San Bernardino’s flora and fauna (including threatened and endangered species), natural resources, ecosystems, open spaces, and quality of life through wise planning and stewardship. Sage Council and its members and supporters enjoy and have a strong interest in preserving the integrity of, among other things, the San Bernardino National Forest, including the area that is the subject of the Project, and including the carbonate species of plants and the desert bighorn sheep that are jeopardized by the Project. The decision of Respondent will have detrimental impacts on Sage Council, its members, and agents, who reside in the County of San Bernardino and/or visit the area of the Project. Sage Council includes its members, agents and individuals who protested Respondent’s action preceding the filing of this Petition. Sage Council provided comments and wrote letters objecting to Respondent’s action here.

2. Respondent San Bernardino County (“Respondent” or “County”) is a local government agency and subdivision of the State of California charged with complying with applicable provisions of state law, including the California Environmental Quality Act (“CEQA”). The Board of Supervisors of San Bernardino County is the duly constituted legislative body and highest administrative body in

the County and is charged with the final duty of ensuring, among other things, that all applicable federal, state and county laws are fully and faithfully obeyed and implemented. Respondent San Bernardino County, through its Board of Supervisors, approved a Mitigated Negative Declaration for the Cushenbury Limestone Mine Expansion project (“Project”) and finding that such approval would not result in significant adverse impacts to the environment.

3. Real party in interest Mitsubishi Cement Corporation (“Real Party” or “Mitsubishi”) is the proponent of the Project and submitted an application for a revision to its existing Mining Reclamation Plan for a 35-acre expansion to its existing 191-acre limestone quarry located on the west side of Highway 18, on the north-facing slope of the San Bernardino Mountains.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

4. In 1970, the California Legislature enacted CEQA, Public Resources Code §21000, et seq., as a means of forcing public agency decision makers such as Respondent to document and consider the environmental implications of their actions. CEQA’s fundamental goal is to fully inform the public and the decision makers as to the environmental consequences of proposed projects and to assure members of the public that their elected officials are making informed decisions. CEQA requires governmental authorities, such as San Bernardino County, to seek feasible means to reduce or avoid significant environmental damage that otherwise could result from their actions. It forbids agencies from approving projects with significant adverse impacts when feasible alternatives can substantially lessen such impacts.

5. The cornerstone of the CEQA process is the preparation of a draft and final Environmental Impact Report (“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 and to provide the agency and the general public with mitigations and alternatives to the project that would have less serious environmental consequences.

THE PROJECT

6. The 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 on federal land within the San Bernardino National Forest and privately held trust lands. The Project is located within the Lucerne Valley Planning Area, adjacent to State Route 18, westside, fourteen miles south of Marble Canyon Road.

7. After receiving Real Party’s application for the Project, the County caused to be prepared an Initial Study under CEQA to determine whether preparation of an EIR was required under CEQA for approval of the Project.

8. 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 minimally 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.

9. On or about September 19, 1997, Real Party appealed the decision of the Planning Commission to the San Bernardino County Board of Supervisors. 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 the ratio of habitat replacement acres that would be required to be conserved to offset the habitat acres that are expected to be destroyed by the Project's mining operations and related activities. Condition 43 was designed 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.

10. On or about October 21, 1997, the County Planning Department issued a "Report/Recommendation" recommending that the County deny the appeal and retain Condition 43. The Report/Recommendation noted that Condition 43 was the direct result of comments submitted by the United States Fish & Wildlife Service and the California Department of Fish & Game, and that "[s]taff included the resource agencies' request as the final proposed mitigation *in order to ensure a defensible environmental documents consist[ent] with CEQA.*"

11. Nonetheless, the Board of Supervisors for Respondent County of San Bernardino granted Real Party's appeal and approved the Project, finding that the Mitigated Negative Declaration was prepared in accordance with CEQA and that the Revised Mining Reclamation Plan without Condition 43 would not result in significant impacts to the environment, including the aforementioned carbonates and desert bighorn sheep.

FIRST CAUSE OF ACTION

(Failure to Prepare Environmental Impact Report)

12. Petitioner hereby realleges and incorporate by reference §§1-11, above, and §§13-50, below, as though fully set forth herein.

13. CEQA requires the preparation of an EIR whenever a project "may have a significant effect on the environment." The CEQA Guidelines provide that an EIR is required if "substantial evidence" indicates that the project may cause a significant effect on the environment. The CEQA Guidelines define "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, Section 15384(a).)

14. Substantial evidence in the record exists indicating that the Project "may have a significant effect on the environment."

15. Respondent was made aware of the potential significant adverse environmental effects of the project in comments by Petitioner and others. Petitioner wrote an exhaustive comment letter to Respondent dated October 18, 1997. In addition, state and federal resource agencies with expertise in resource protection opposed approval of the Project without an EIR, even before Condition 43 was removed by the Board of Supervisors.

16. For example, in a February 20, 1997 comment letter to the County, the California Department of Fish and Game, addressing the Mitigated Negative Declaration before Condition 43 had been deleted, 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.

17. In an August 11, 1997 letter, the Department of Fish and Game 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 withdrawal from preserved status does not diminish the integrity and habitat value of the remaining preserve areas.**

18. In a February 21, 1997 comment letter to the County, apparently before Condition 43 was included and subsequently removed, the United States Fish & Wildlife Service wrote:

[T]he 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 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.

19. The failure to prepare an EIR precluded an analysis of alternatives to the Project. Pursuant to CEQA, Respondent had a duty to identify a range of reasonable alternatives and to describe these alternatives in sufficient detail to be of informational value to themselves and to the public. The discussion of alternatives is required to focus on those that were capable of substantially reducing or eliminating any significant adverse environmental effects. Because an EIR was not prepared, there was no analysis of alternatives that are capable of achieving the Project's goals and of substantially reducing the adverse environmental impacts.

20. The failure to prepare an EIR also precluded an effective analysis of the cumulative effects of the Project with other Projects and/or impacts in the region. CEQA requires that a lead agency analyze not only the environmental effects of a project within the project's own boundaries, but the cumulative impacts the project will have in an area-wide or regional context, including cumulative effects along with other projects. The cumulative environmental impacts of the Project in conjunction with other projects were not examined, including cumulative impacts on state and/or federally listed threatened and endangered flora and fauna of the Project along with other projects, including other mining operations in the area. These cumulative impacts should have been studied in the Initial Study and mitigated to the maximum extent practicable.

21. Respondent's failure to prepare an EIR was an abuse of discretion, was not based on substantial evidence, was legal error, and resulted in a violation of CEQA.

SECOND CAUSE OF ACTION

(Certification of Negative Declaration Based on Inadequate Initial Study)

22. Petitioner hereby reallege and incorporate by reference ¶¶1-21, above, and ¶¶23-50, below, as though fully set forth herein.
23. Under CEQA, where it is not certain to the project proponent at the outset whether or not a project may have a significant effect on the environment, a project proponent may prepare an Initial Study in order to make this determination. If the Initial Study indicates that the project may have a significant effect on the environment, the project proponent must prepare an EIR. If the initial study indicates that the project would not have a significant adverse impact on the environment, including rare species of flora and fauna, or that specific mitigation measures would reduce the project's environmental impacts to below levels of significance, the project proponent may prepare a Negative Declaration or Mitigated Negative Declaration indicating that an EIR need not be prepared.
24. In order to be legally adequate under CEQA, an Initial Study must contain documentation of the factual basis for concluding that a negative declaration will suffice, or that mitigation measures contained a mitigated negative declaration will actually reduce the project's impacts to below levels of significance. An Initial Study must disclose data or evidence upon which the persons preparing the study relied. An Initial Study containing mere conclusions, including unsupported conclusions regarding the effectiveness of the mitigation measures, will not satisfy the requirements of CEQA.
25. The Initial Study prepared by Respondent in connection with the Project here does not meet the requirements of CEQA. The Initial Study is flawed and defective because it fails to adequately analyze impacts of the project on, inter alia, endangered and/or threatened plants, wildlife and habitat, and other natural resources.
26. Because of the above-described flaws, Respondent's reliance on an Initial Study that was inadequate under CEQA was legally erroneous, not based on substantial evidence, and an abuse of discretion and a violation of CEQA.

THIRD CAUSE OF ACTION

(Failure of Decision-Maker to Address or Evaluate Important Information |Regarding Environmental Impacts of the Project Documented That Was Put Before the Decision-Maker)

27. Petitioner hereby reallege and incorporate by reference ¶¶1-26, above, and ¶¶28-50, below, as though fully set forth herein.
28. The United States Fish and Wildlife Service contracted with an expert plant ecologist to prepare the San Bernardino Mountains Carbonate Endemic Plants Draft Recovery Plan ("Plan").

The Plan noted:

The carbonate endemic plants were listed as endangered or threatened as a group because they belong to the same ecosystem, occupy carbonate substrates, and have the same threats. Protection of the carbonate plants depends on protecting the integrity of their natural community context. It is expected that these species will be conserved as a group and reclassified to threatened status and/or delisted as a group.

29. The Plan stated, inter alia, that:

Limestone mining is the imminent and primary threat facing these [endangered/threatened plant] species. Direct removal of mined materials, disposal of overburden on adjacent unmined habitat, and road construction destroy or modify these plants' habitats.

30. The Plan went on to discuss the various deleterious impacts of limestone mining operations to sensitive carbonate species. These impacts include habitat fragmentation, edge effects, alterations to habitat hydrology and moisture regimes, soil compaction, windblown sedimentation, air pollution, and even microclimatic changes that may result from removal of vegetation.

The Plan also stated:

[T]he second-largest active limestone quarry, with an annual production of 800,000 tons, is operating in the vicinity of Marble Canyon, a few miles east of Furnace Canyon. Expansion of an overburden pile is eliminating a sizeable portion of *Astragalus albens*. The County of San Bernardino has approved expansion of this operation into private land in Arctive Canyon and Cushenbury Quarry. The expansion will affect, by a low estimate, 0.4 acres of *Efrogeron parishii*, 1.2 acres of *Astragalus albens*, 14.6 acres of *Eriogonum ovalifolium* var. *Vineum*, and 9.1 acres of *Oxytheca parishii* var. *Goodmaniana*... [T]he expansion significantly affects these species. To mitigate the effects, the County of San Bernardino requires dedication in a conservation easement of habitat with the same densities of plants at a three-to-one ratio, plus investigation into the restoration of mined areas. However, the County of San Bernardino does allow for the mining of two thirds of the conservation easement if reclamation produces equivalent densities of plants. Though this does not adequately mitigate the loss of the plants, it does represent the start of preserving populations on private lands in this area. Six kilometers (4 miles) east of Furnace creek is the deeply-incised Cushenbury Canyon, where a mining operation produces 2 million tons of limestone annually, making it the largest of the active limestone mines. The rocky slopes surrounding Cushenbury Canyon have *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, and *Astragalus albens*. A number of populations have already been negatively affected by mining and road construction...

One population of *Oxytheca parishii* ssp. *goodmania* was also rediscovered in the Cushenbury Canyon area in 1978. Two other populations have been located through the San Bernardino National Forest surveys. A few populations of *Erigeron parishii* occur on alluvial substrates below the mouth of Cushenbury Canyon and a recent proposal to mine these alluvia for sand and gravel would threaten these populations. A 115-kilovolt power line proposed for construction through Cushenbury Canyon may affect *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, *Oxytheca parishii* ssp. *goodmania*, and *Astragalus albens*. (underlining added.)

31. The Plan also warned that transplantation of sensitive carbonates would not necessarily be effective:

One particularly relevant general principle is that plants restricted to specialized soils (including limestone and serpentine) can usually be cultivated on more ordinary soils, but it does not follow that they can be conserved by planting them on ordinary soils. While the plants might grow on such sites, they would be unlikely to persist in competition with plants that are not restricted to specialized habitats.

32. The Initial Study failed to consider significant information contained in the Plan, including but not limited to the cumulative impacts of the project with other projects. The Plan noted: A few populations of *Erigeron parishii* occur on alluvial substrates below the mouth of Cushenbury Canyon

and a recent proposal to mine these alluvia for sand and gravel would threaten these populations. A 115-kilovolt power line proposed for construction through Cushenbury Canyon may affect *Erigeron parishii*, *Eriogonum ovalifolium* var. *vineum*, *Oxytheca parishii* ssp. *goodmania*, and *Astragalus albens*.

The Initial Study failed to discuss the cumulative impacts on these carbonates of the Project in combination with either the proposed sand and gravel mine or the power line construction. Instead, the Initial Study concluded, without discussion or explanation, that “[t]he project impacts are not significant when considered with similar and nearby projects.”

33. The Initial Study also completely failed to address the Plan’s conclusion that the County’s proposed conservation easement and restoration of mined areas do “not adequately mitigate the loss of the plants...” In fact, the Initial Study reached precisely the opposite conclusion: “The proposed project would not have a significant effect on the environment... and a negative declaration should be prepared.”

34. Finally, the Initial Study ignored impacts of the project on a sensitive species, the bighorn sheep. The “Baseline Biological Survey” prepared for Real Party Mitsubishi in August 1995 concluded:

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.

Yet the only mention of the bighorn sheep in the Initial Study is the following unsupported and conclusory statement:

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.

35. Because the Initial Study failed to consider significant information contained in the Plan – and in particular failed to analyze the Project’s cumulative impacts along with other projects identified in the Plan, failed to address the Plan’s conclusion that the mitigation measures would not adequately mitigate the loss of these plants, and failed to address the Baseline Survey’s conclusion that the Project would displace sensitive bighorn sheep – the Initial Study was legally erroneous, not based on substantial evidence, and an abuse of discretion and violated CEQA.

FOURTH CAUSE OF ACTION

(Certification of Mitigated Negative Declaration Based on Initial Study That Improperly Concludes That Significant Impacts Are Mitigated By Mitigation Measures)

36. Petitioner hereby realleges and incorporates by reference ¶¶1-35, above, and ¶¶37-50, below, as though fully set forth herein.

37. Respondent concluded that the project, as originally proposed, had a potential to have a significant effect on the environment, but that the project had been modified by incorporating into the conditions of approval measures to mitigate the potential impacts. Respondent therefore prepared a Mitigated Negative Declaration.

38. The Initial Study recognized that the Project would result in a “[r]eduction of the numbers of

any unique, rare, threatened, or endangered species of plants or animals.” The Initial Study concluded, however, that “[i]mplementation of... mitigation measures will reduce the potential impacts to below a level of significance.”

39. The Initial Study’s conclusion that the proposed mitigation measures would reduce the environmental impacts to below levels of significance was not supported by substantial evidence.

40. Respondent’s reliance on an Initial Study that improperly concluded that significant impacts would be mitigated by the mitigation measures selected was legally erroneous, was not based on substantial evidence, was an abuse of discretion, and violated CEQA.

FIFTH CAUSE OF ACTION

(Failure to Make Mandatory Finding of Significance and Prepare EIR Where Project Will reduce the Number of or Restrict the Range of Rare or Endangered Plant or Animal)

41. Petitioner hereby realleges and incorporate by reference ¶¶1-40, above, and ¶¶42-50, below, as though fully set forth herein.

42. Section 15605 of CEQA requires a lead agency to make a mandatory finding of significance and thereby require an EIR if a project will reduce the number and/or restrict the range of a rare or endangered plant or animal. Without adequate mitigation, a Mitigated Negative Declaration is not appropriate.

43. It is undisputed that the Project will reduce the number of and restrict the range of the sensitive carbonate plant species, and that it will restrict the range of the desert bighorn sheep. Because the Project does not contain adequate mitigation measures, an EIR is required.

44. Respondent’s failure to prepare an EIR was legally erroneous, was not based on substantial evidence, was an abuse of discretion, and violated CEQA

PRAYER FOR RELIEF

45. By reason of the foregoing, Respondent has violated the California Environmental Quality Act by approving the Project and by certifying the Mitigated Negative Declaration for the Project, notwithstanding the fatal defects described above.

46. Respondent’s approval of the project and the Mitigated Negative Declaration constitutes legislative action resulting in judicial review pursuant to the standards of Public Resources Code §21168.5 and a traditional mandamus proceeding under California Code of Civil Procedure §1085. The standard of review set forth in Public Resources Code §21168.5 authorizes a writ to issue when there has been a prejudicial abuse of discretion. Abuse of discretion is established if Respondent has not proceeded in the manner required by law, or if the determination or decision is not supported by substantial evidence.

47. Petitioner has a clear, present and beneficial right to the proper performance by Respondent of its duties under CEQA. Petitioner is beneficially interested in the issuance of a Writ of Mandate by virtue of the facts set forth previously, and in that the general public will otherwise be adversely affected by the actions of Respondent herein challenged.

48. Petitioner has performed, or is excused from performing, all conditions precedent to the filing of this Petition, having raised each and every breach of duty which was required to be raised with

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Respondent prior to the filing of this Petition through comments submitted to Respondent and the San Bernardino County Planning Commission.

49. Petitioner has no plain, speedy or adequate remedy in the ordinary course of the law other than the relief herein sought.

50. On November 20, 1997, Petitioner sent Respondent and Real Party In Interest, by United States Mail, notice that this action would be filed in San Bernardino County Superior Court, as required by Public Resources Code section 21167.5. That notice identified the subject matter and the project involved in this action. A copy of that notice is attached hereto as Exhibit A.

WHEREFORE, Petitioner respectfully prays for judgment as follows:

1. That this Court find that, by approving the Project and by certifying the Mitigated Negative Declaration, Respondent has violated the California Environmental Quality Act and the Guidelines promulgated thereto;
2. That this Court issue its Peremptory Writ of Mandate declaring that the decision rendered by Respondent on or about October 21, 1997, and any resolution of Respondent with respect thereto, are null and void and of no force and effect;
3. That this Court order Respondent to vacate and set aside the purported decision made on or about October 21, 1997, and any resolution of Respondent with respect thereto;
4. That there be issued a Writ of Mandate ordering Respondent to prepare an Environmental Impact Report or a legally adequate Negative Declaration, within a reasonable date from the issuance of the Writ of Mandate, in the event Real Party wishes to pursue the Project;
5. That until such time as Respondent and Real Party comply with CEQA with respect to this Project, such parties be enjoined and restrained from taking any physical actions toward development or completion of this Project, including any grading, clearing, digging, or similar actions;
6. That Petitioner be awarded its reasonable costs incurred in this action, including attorneys' fees; and
7. For such other and further relief as the Court deems just and proper.

Dated: November 20, 1997

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