Eagle Mountain

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Summary of Litigation.

In the Mojave Desert, about 200 miles east of Los Angeles, there exists the remains of a vast open-pit iron ore mine operated by Kaiser Steel Corporation until 1983. For the last decade, entities affiliated with Kaiser have sought to develop and operate a landfill on the site. The Eagle Mountain Landfill and Recycling Center project has been especially controversial because it is surrounded on three sides by Joshua Tree National Park, and because portions of the project lie within habitat of the threatened desert tortoise.

After years of legal challenges to the project under CEQA, the California Court of Appeal in May found the second EIR for the project to be adequate, reversing an earlier ruling by San Diego Superior Court Judge Judith McConnell. (*National Parks and Conservation Association v. County of Riverside*, 71 Cal.App.4th 1341 (1999).) The Supreme Court recently denied review of the case, thereby resolving all CEQA claims.

The authors of this article are attorneys who worked on opposite sides of the case in both the trial and appellate courts. John Henning, Jr., of Weston, Benshoof, Rochefort, Rubalcava and MacCuish LLP, represented the appellants, County of Riverside and the entities that own and plan to develop the landfill (collectively referred to as "MRC"). Jan Chatten-Brown, of Chatten-Brown & Associates, represented the project opponents, including the National Parks and Conservation Association and desert residents (collectively referred to as "NPCA").

Background.

Eagle Mountain is planned to be the nation's largest landfill, accepting up to 20,000 tons of trash per day for the next 100 years. The project also includes the operation of a 52-mile private railroad line, as well as improvements to a townsite adjoining the landfill. The townsite now has a limited population with a privately operated prison at the site. Both the landfill site and the land for the townsite were granted by the federal government to Kaiser for purposes of mining.

Environmental review for the project began almost a decade ago. The trial judge found the first EIR for the project inadequate in 1994, and issued a writ identifying specific deficiencies and ordering the preparation of a new EIR. The County then prepared a second EIR, and filed a return to the writ seeking to have it discharged. In 1997, the project opponents filed objections to this return, arguing that the deficiencies had not been corrected. The trial court agreed in part and, in February 1998, issued an order sustaining certain of objections, setting aside the new EIR, and refusing to discharge the 1994 writ.

The trial court generally found there was not substantial evidence in the record to support two findings made in the EIR, i.e., that: (1) various impacts to the Park were insignificant after mitigation; and (2) impacts to the desert tortoise were insignificant after mitigation. With regard to the Park in particular, the trial court found the EIR deficient in numerous respects. First, it found that the analysis did not adequately assess impacts on the "wilderness experience" of visitors to the Park. Second, it found no support for the County's use of less sensitive thresholds of significance for noise impacts in certain areas of the Park. Third, it found that the EIR had not adequately studied potential effects on the Park's biological resources in light of a phenomenon

known as “eutrophication,” which involves the addition of nutrients to a nutrient scarce region. Fourth, it found that the EIR's night lighting analysis had failed to take into account lighting from the expanded townsite.

MRC appealed the trial court’s order, and in May, 1999, the Court of Appeal reversed the trial court, ordering it to overrule the objections to the return and discharge the 1994 writ. The project opponents filed a petition for rehearing with the Court of Appeal, which was denied. They then petitioned the Supreme Court for review, and were joined by several amici, including numerous national environmental organizations and the California Attorney General. The Supreme Court denied review on July 21, 1999, with Justices Kennard and Chin voting for review.

JAN CHATTEN-BROWN SECTIONS

1. What is the proper standard of review on appeal of a post-writ order under CEQA?

*Chatten-Brown***:** Generally, petitions for writs in CEQA actions are reviewed de novo on appeal because the trial court has no advantage in evaluating the credibility of witnesses and compliance is a question of law. However, an important feature of this case is that it involved a return to a writ issued in 1994, from which no appeal was pursued. That 1994 writ required certain issues to be specifically addressed in a new EIR, including an analysis of the impact of the landfill project "on the natural peace and solitude, the clean air, the pristine desert (i.e., the 'wilderness experience') offered by Joshua Tree."

In attempting to comply with the writ, the EIR divided the analysis of wilderness impacts into an analysis of resource impacts, such as air, noise, and views, on the one hand, and what the Court of Appeal referred to as the "subjective" wilderness experience, on the other hand. Although the EIR admitted impacts on Joshua Tree's wilderness experience would be significant, the EIR failed to fully disclose how adverse these impacts would be. The EIR concluded without analysis that "it is possible that" the wilderness experience for "some individuals" would be significantly impacted because "[a]lthough mitigations can be applied to specific wilderness resources, they are not applicable to individual experiences . . . ." The trial court rejected this approach, but the Court of Appeal found the approach permissible.

Even though at one point in its opinion the Court of Appeal stated the trial court's task was to determine whether there was compliance with the trial court's 1994 judgment, the Court

of Appeal reviewed the EIR de novo for compliance with CEQA. Interestingly, the Court even suggested they could review deficiencies in the EIR other than those identified by the trial court, which in the absence of a cross-appeal would normally be considered improper.

By examining the EIR for compliance with CEQA rather than compliance with the 1994 writ, the Court of Appeal's decision establishes an unfortunate precedent which threatens to undermine settled principles regarding the finality of judgments and collateral estoppel. By directing the trial court to discharge a writ, the Court of Appeal essentially set aside the requirement for an analysis of the impacts on wilderness experience in the 1994 judgment. No deference was given to the trial court's interpretation of its own requirement for an analysis of the wilderness experience.

Furthermore, the Court's reliance on Barthelemy v. Chino Basin Municipal Water District (1995) 38 Cal.App.4th 1609 seems to be part of a recent trend among some appellate courts to construe the requirement to set aside an EIR when an agency has not proceeded in the manner required by law by limiting that inquiry to whether there is substantial evidence to support a decision not to analyze an impact. This is contrary to direction from the Supreme Court that the failure to analyze impacts is a violation of CEQA if the failure to include the information frustrates the goal of allowing for an informed public and decisionmakers. It is also contrary to the Supreme Court's mandate that "In determining whether the agency proceeded in a manner required by law, the courts have held CEQA must be interpreted "so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language . . . ." Mountain Lion v. Fish and Game Commission (1997) 16 Cal.4th 105, 112.

One further point applicable to the standard of de novo review in CEQA cases may be worth consideration: When a trial court grants a petition or sustains petitioners' objections to a return to a writ, under the de novo standard the petitioners have the burden of proving the EIR inadequate. However, as a result of standard appellate procedures, they only have one opportunity to brief the issues, while the approving agency and real party in interest have the first and last bite of the apple. In this case petitioners are convinced this procedure prejudiced them. Specifically, NPCA believes the Court's confusion about their position on several relevant issues was a function of the inability to respond to a number of points made in MRC's reply.

2. Should a holistic approach have been used for the analysis of the "wilderness experience" in Joshua Tree?

Chatten-Brown: The only way to properly analyze the wilderness experience is to conduct an analysis of the cumulative physical impacts of the project as they affect the quality of the human experience of wilderness. Even if individual resource impacts (air, noise, odor, light and view) are less than significant, the impact to individuals who have gone to remote areas to experience solitude in the wilderness could be cumulatively considerable and should have been analyzed. To examine only discrete resource impacts, as permitted by the Court of Appeal, is like trying to determine the impact of a knife attack on the Mona Lisa by evaluating the cut in the canvas, the noise of the tear, and the loss of some paint, rather than the impact on the experience of viewing a great painting.

To some extent, the cumulative impact has a psychological dimension. While project proponents asserted the psychological impacts of a project need not be analyzed, federal case law has required such an analysis, as long as the psychological impact is related to a physical impact, and none of the California case law is to the contrary.

Usually, a cumulative impact analysis studies a single impact, such as traffic from the project and the contribution to that impact from existing and planned projects. However, a cumulative impact analysis is also required when considering a variety of types of effects from a single project. The CEQA Guidelines recognize the need for such an analysis: "Cumulative impacts" refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (a) The individual effects may be changes resulting from a single project or a number of separate projects. CEQA Guidelines § 15355. The EIR failed to conduct such an analysis.

3. How are thresholds of significance derived from statutory/regulatory sources?

Chatten-Brown: Establishing appropriate thresholds of significance plays a critical role in the CEQA process. No reported case discusses how, if at all, substantive California and federal laws, regulations, and guidance documents may affect the appropriate standard or threshold of significance. However, NPCA believes important substantive standards should have been applied by the Court in this case.

In enacting the California Desert Protection Act, Congress explicitly stated that the same high standard of environmental protection should be applied to all areas of Joshua Tree.

Specifically, Congress stated: "the nondesignated wilderness within Joshua Tree should receive statutory protection by designation pursuant to the Wilderness Act."

The Organic Act, the primary governing statute of the national parks, supports the conclusion that a very low protective threshold is to be applied to impacts to Joshua Tree. By means of the Organic Act, Congress set forth the purpose of national park systems: "to conserve the scenery and the natural and historic objects and the wildlife therein, and to provide for the enjoyment of the [Parks] in such manner and by such means as will leave [the Parks] unimpaired for the enjoyment of future generations." (This does not mean, however, that "zero impact" is allowed, as MRC convinced the Court NPCA was arguing.) Despite these federal mandates, the County applied weaker standards to certain lands in the Park, which the County labeled "non-wilderness" lands. The Court accepted the County's differentiation between "wilderness" and "non-wilderness" lands and the use of County residential noise standards, based upon some evidence in the record that a small portion of the lands contained some infrastructure. This seems to ignore both federal law and the mandate that the significance of impacts may be different depending upon the setting impacted. Surely national parks, of which there are eight in California, should receive a high level of protection. Thus, the EIR should have applied a low threshold of significance to Joshua Tree National Park.

4. What is the relationship of a "no jeopardy" opinion under endangered species laws to a "no significant impact" finding under CEQA?

Chatten-Brown: Because one of the species of animals potentially impacted by the landfill project is the threatened desert tortoise, the County of Riverside was required to consult with responsible state and federal wildlife agencies to avoid jeopardizing the continued survival and recovery of the tortoise. During this consultation, the wildlife agencies imposed various mitigation measures on the project, including fencing along a highway, a tortoise awareness program, and surveying for tortoise before construction activity. Based on these measures, the agencies concluded the project would not jeopardize the continued survival of the desert tortoise population, and issued "no jeopardy" opinions. However, the impact will be significant because the County's approval of the project allowed up to 160 tortoises to be taken by harassment, and 117 tortoises to be killed over the expected lifetime of the project. Despite the distinct and separate purposes behind CEQA and the endangered species laws, the Court relied heavily upon the "no jeopardy" opinions in concluding substantial evidence supported the County's conclusion that impacts to the desert tortoise were mitigated below a level of significance.

Since the "no jeopardy" opinions consider an entire species as a whole, rather than individual members of the species, the Petition for Review and amici briefs filed in support of the Petition challenged the Court's holding, relying upon the California Supreme Court's previous decision in Mountain Lion v. Fish and Game Commission (1997) 16 Cal.4th 105, 114. They argued compliance with endangered species laws cannot be equated with reducing impacts below the level of significance. Measures designed to avoid jeopardizing the desert tortoise

population do not necessarily avoid the potential for reducing the number or restricting the range of a species, which would still constitute a significant impact on the threatened desert tortoise.

5. What is a court's obligation to examine the effectiveness of mitigation measures?

Chatten-Brown: The trial court rejected the finding of no significant impact on the desert tortoise in part because there was no commitment to fence the rail line through desert tortoise habitat. MRC's response was that, until fencing was required, a biologist would inspect the tracks before each train proceeded. The record did not reflect the speed of the trains, but it did show that each day five to six 5,000 foot trains would make round trips to and from the landfill during full operation, traveling both day and night, seven days a week. Biologists preceding the train would have to be very swift and have excellent eyesight. Furthermore, once seen and removed, the tortoises would have to stay put. It seems ludicrous to believe that this measure would be effective, but the Court concluded the effectiveness of the measure was not a proper question.

Because it is the policy of CEQA to mitigate or avoid significant environmental effects of proposed projects, courts should have an important role to play in evaluating the efficacy of mitigation measures. A court's inquiry should not end after verifying that an agency has imposed mitigation measures. A mere requirement that mitigation measures be imposed would elevate form over substance as any mitigation measure-- whether effective or not-- would constitute substantial evidence that an adverse impact has been mitigated. Rather than deferring to an agency's conclusions that mitigation measure will be effective, in order to effectuate the CEQA's policy of mitigating or avoiding significant environmental effects, courts should

examine the evidence supporting a mitigation measure's effectiveness. Plainly, courts can apply common sense in the evaluation of the feasibility of mitigation measures. Courts need not "uncritically rely on every study or analysis put forward by a project proponent in support of its position." *Laurel Heights Imp. Ass'n v. Univ. of Cal.* (1988) 47 Cal.3d 376, 409 fn. 12. In fact, substantial evidence, as defined in CEQA, includes the "reasonable inferences" drawn from information. Guidelines §15384.

Recently, some appellate courts have taken this important role in evaluating mitigation measures quite seriously. For example, the Court of Appeal agreed it could be fairly argued that it is improper and ineffective to allow actual take of an endangered or threatened species to be mitigated by the provision of potential habitat. *San Bernardino Valley Audubon Society v. Metropolitan Water District of Southern California* (1999) 71 Cal.App.4th 382, 396. Similarly, in *Bolsa Chica Land Trust v. Superior Court (California Coastal Commission)* (1999) 71 Cal.App. 4th 493, 508-509, the Court of Appeal interpreted Public Resources Code Section 30240 as not allowing treatment of sensitive habitat values as intangibles which could be moved from place to place. It is unfortunate that the Court refused to examine the effectiveness of the mitigation measures in this case.

6. When experts disagree on whether an impact is "speculative" is further study necessary?

Chatten-Brown: A major concern of the National Parks Service ("NPS") was the impact on the ecosystem of the addition of nutrients to the desert, a process known as "eutrophication." Well credentialed experts representing NPS expressed the opinion that eutrophication was very

likely and requested a detailed analysis of the issue. However, the County rejected such an analysis as unnecessary on the basis of a single expert's opinion that such a phenomenon would not occur. Displaying a great amount of deference to the County's conclusions, the Court of Appeal upheld the County's refusal to study eutrophication, asserting the process was speculative. The Court stated that the trial court could not reject the EIR merely because there was a difference of opinion among experts and held that, in any case, there was substantial evidence to support the conclusion that the operation of the landfill would contain all refuse sufficiently so that eutrophication would not occur. Such deference is inappropriate.

Where an agency refuses to analyze an environmental impact requested by a cooperating agency with specific expertise, less deference to the lead agency should be accorded. Numerous federal courts interpreting the judicial role in reviewing NEPA decisions (which are persuasive authority in interpreting CEQA) have declined to defer to the responsible agency where it has failed to properly analyze potential impacts identified by other agencies with more applicable expertise.

NPS is a governmental agency with authority over Joshua Tree National Park, a resource that may be affected by the proposed landfill. The County of Riverside is not an expert agency on impacts to desert ecosystems. NPS experts, particularly those with intimate knowledge of the ecology of deserts, have far more appropriate expertise in this area. Despite these facts, the Court in this case relied upon the County's conclusions.

Because this case concerns a lead agency's failure to analyze an environmental impact in an EIR when requested by an agency with expertise, rather than a dispute as to the sufficiency of

the analysis, the Court should have more closely scrutinized the refusal to study the potential of eutrophication .

7. May an expert conclude that an impact is insignificant without laying the foundation for that conclusion?

Chatten-Brown: NPCA argued the EIR should have considered sources of lighting such as from car headlights and new commercial buildings that would result from an expanded townsite. Despite the California Supreme Court's statement that evidence from experts which is clearly inadequate or unsupported is entitled to no judicial deference (*Laurel Heights I*, 47 Cal.3d at 409, fn. 12), the Court stated "[c]ase law provides that an expert can make a judgment on existing evidence, without further study, that a particular condition will have no significant impact." Under the circumstances, this was an extraordinary conclusion. It also seems contrary to the trend in federal and state courts to reject "junk science."

Recently, the United States Supreme Court has reemphasized the need for courts to fulfill their "gatekeeping" obligation to keep unreliable expert opinion out of the courts. *Kumho Tire Company v. Carmichael* 119 S.Ct. 1167, 1171 (1999). Such a function was explained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786 (1993) in the context of "scientific" knowledge, but *Kumho Tire* has extended the application of that obligation to any testimony based on "technical" and "other specialized" knowledge. *Kumho Tire, supra,* 113 S.Ct. at 1171.

The California Supreme Court has interpreted the California Evidence Code to require an even more rigorous, cautious, and conservative examination of expert evidence than that which

is required by *Daubert*, including a requirement for "general acceptance" of an opinion within the relevant expert community before it is regarded as reliable. *People v. Leahy* (1994) 8 Cal.4th 587, 603. Although these cases are concerned with the admission of unreliable evidence by courts in a different context, similar principles could be applied to the use of expert opinion in the CEQA context.

JOHN HENNING SECTIONS (same headings and numbers)

1. What is the proper standard of review on appeal of a post-writ order under CEQA?

Henning: Because of the unusual posture of this case as an appeal from a trial court's order finding noncompliance with its earlier writ, the appeal presented a novel issue concerning the standard of review. Although CEQA writ petitions are generally reviewed de novo on appeal, giving no deference to the determinations of the trial court, the petitioners here argued that the trial court should have been given deference because it was determining compliance with its own writ.

The Court of Appeal rejected this argument (going so far as to call it "feeble"), and held that the de novo standard applied to a return. The Court strongly implied that where a trial court issues a writ requiring further environmental review under CEQA, and the public agency subsequently files a return saying it has complied with the writ, the proper yardstick for measuring the adequacy of the return is CEQA.

The project opponents retooled their argument somewhat in their petition for review to the Supreme Court, stating that the 1998 order was based upon an "interpretation" of the 1994 writ, at least to the extent that the subsequent order defined the scope of the "wilderness experience" analysis mandated by the earlier writ. On that ground, they argued that the appeal was a collateral attack on the 1994 writ, and that the Court of Appeal, by reversing the 1998 order, was essentially reversing the 1994 writ, and accordingly acted beyond its jurisdiction.

The Supreme Court denied review, so we do not know how it viewed this argument.

However, it is difficult to imagine why a trial court's subsequent "interpretation" of an earlier writ should be subject to an especially deferent standard of review, since it is impossible for a litigant to anticipate what the interpretation will be until it is made. This is especially so where, as here, the "interpretation" is applied to the court's review of a new environmental document, such as an EIR, that did not even exist when the original writ was issued.

With regard to the standard of review, the Court of Appeal also reaffirmed an important limitation on the power of the courts generally in reviewing agency actions under CEQA. Citing to *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, the Court noted that in evaluating disputes over whether relevant information was omitted from the EIR, a court should simply determine whether the agency's reasons for proceeding as it did were supported by substantial evidence -- not whether the agency "proceeded in a manner required by law". While this may appear to be a fine distinction, it is essential in practice. Before a lead agency arrives at its ultimate conclusions in an EIR, it must make many decisions on subsidiary matters, such as the proper methodology and scope of analysis. These subsidiary decisions, as the Court of Appeal pointed out, are "ultimately based on factual issues" and thus subject to the deferent "substantial evidence" standard.

2. Should a holistic approach have been used for the analysis of the "wilderness experience" in Joshua Tree?

Henning: The trial court in its 1994 writ had ordered something heretofore not seen under CEQA, i.e., an analysis of the impacts of the landfill project on the "wilderness experience" of visitors to Joshua Tree. The County included a section in the new EIR

concerning the wilderness experience. This section evaluated numerous impact categories, such as odor, noise, and night lighting, which had the potential to affect the aesthetic experience of visitors to the park, using objective, expert-based criteria. The EIR also acknowledged that there could be an unquantifiable, more "subjective" component of the wilderness experience, but did not attempt to study that component. The trial court essentially found that the subjective component should have been studied, such as through a visitor survey proposed by the park staff.

The Court of Appeal approved of the County's approach, noting that the objective analysis had effectively taken subjective visitor responses into account, by examining "every possible sensory impact on a Park visitor which might then result in the subjective responses that were reasonably possible or probable." In addition, the Court emphasized that CEQA is directed toward adverse changes in physical conditions. It likened the visitor study proposed by park staff to studies of "social effects" that need not be prepared under CEQA, and found that it would not add useful information regarding physical conditions. (*CEQA Guidelines*, sec. 15131(a).)

The Court of Appeal did not directly address petitioners' claim that the various categories of aesthetic impacts on the wilderness experience of park visitors should be treated as "cumulative impacts" and analyzed cumulatively rather than separately under *CEQA Guidelines* sec. 15355. This may be because the petitioners did not clearly frame their argument under the rubric of the cumulative impact rule until they petitioned for rehearing and review by the Supreme Court.

In any event, petitioners' point is an intriguing one. The cumulative impact rule is generally applied to require analysis of the cumulative effects of *multiple projects* on a single

impact category, such as traffic, and the case law uniformly goes to that issue. However, as petitioners point out, the Guidelines are susceptible to an interpretation that cumulative effects may include multiple changes "resulting from a single project."

Petitioners' argument may have some appeal in the context of a sensitive environment like park wilderness. However, the wholesale application of the concept could cause much mischief. Project opponents would surely like to have all impacts of every project treated as "cumulative" to each other for the purposes of environmental analysis, thereby increasing the chance that the cumulative impact would be found significant and require mitigation. Yet, the task would be difficult, if not possible, to complete in most cases. For example, if an office project has insignificant traffic impacts, as measured by traffic volumes, and insignificant air quality impacts, as measured by the concentration of pollutants, how would the EIR "cumulate" these two dissimilar analyses, and what common measurement would it use?

3. How are thresholds of significance derived from statutory/regulatory sources?

Henning: In considering the impacts of this project on the park, the County made a distinction between areas designated as "wilderness" by federal law, and the remaining areas of the park, known as "nonwilderness". The record showed that the portions of the nonwilderness areas were disturbed by human activity, such as dirt roads and power lines. Using this distinction, the County applied a higher threshold of significance for various impacts to the nonwilderness lands, including noise. The trial court did not think the distinction was supportable.

On appeal, the petitioners contended that the wilderness/nonwilderness distinction was

inconsistent with statements in various federal statutes, regulations, and guidance documents, which spoke to the extreme sensitivity of park lands generally. However, the Court of Appeal upheld the distinction, noting that it raised a typical "substantial evidence" question under *Barthelemy*, *supra*.

The ruling on this issue reinforces the Court's holding (discussed in section (2), above) that subsidiary decisions made by a lead agency while preparing the EIR are subject to deferent, substantial-evidence review. However, the decision is also important in that it implicitly rejected a related argument made by petitioners, which is that the federal pronouncements should, as a matter of law, have guided the County's selection of thresholds of significance for the park.

Of course, in their application of CEQA, lead agencies have long made use of significance thresholds found in the statutes, ordinances and regulations of other jurisdictions. For example, noise thresholds are often based upon local noise ordinances, and air quality thresholds are derived from the regulations promulgated by regional air districts. However, this has typically been done at the discretion of the agency, whereas in this case the petitioners argued that the application of the outside standard was mandatory.

Here, the Court of Appeal rejected petitioners' argument that the federal standards should necessarily trump the factual evidence gathered by the County concerning the difference between wilderness and nonwilderness lands. In doing so, it confirmed that the use of outside standards rests in the discretion of the lead agency.

This case was the first to discuss section 15064(h) of the recently amended CEQA Guidelines, which provides comprehensive guidance on the derivation of significance thresholds from statutory and regulatory sources. The petitioners claimed the new Guideline requires the

use of such sources to formulate thresholds; the County argued it merely *permits* their use to support a finding of insignificance. However, the Court of Appeal did not decide that issue, noting that the Guideline did not apply because it was adopted after the trial court's order was issued. It is unclear from the decision whether the outcome would have been different if the new Guideline had applied.

4. What is the relationship of a "no jeopardy" opinion under endangered species laws to a "no significant impact" finding under CEQA?

Henning: In making its determination that impacts of the project on the threatened desert tortoise were insignificant after mitigation, the County relied in part on a "no jeopardy" opinion issued by the U.S. Fish & Wildlife Service (USFWS) under the Endangered Species Act (ESA). The no-jeopardy opinion found that with the implementation of certain specified mitigation measures, the project would not "threaten the continued existence" of the desert tortoise. The opinion was accompanied by an incidental take permit under ESA, which provided that the project would be reevaluated by USFWS if it led to the death of more than one tortoise per year.

The Court of Appeal, in turn, found that the County's determination of insignificant impact to the tortoise was supported by substantial evidence, making reference to the no-jeopardy opinion and other evidence in the record, including a study conducted by independent biologists.

Neither the County nor the Court of Appeal relied solely on the no-jeopardy opinion for their respective findings concerning the desert tortoise. Yet petitioners insisted that both had improperly "equated" a federal no-jeopardy finding under ESA with a finding of insignificant

impact under CEQA.

There is an argument that a no-jeopardy finding is not necessarily sufficient, standing alone, to justify a finding of insignificant impact under CEQA. The ESA focuses on threats to a species generally, while CEQA could be construed to require analysis of impacts to individual members of the species. However, this case was not a good test of the general principle. First, the mitigation measures imposed in this particular no-jeopardy opinion were probably more exacting than necessary to support a no-jeopardy finding, as evidenced by the one-tortoise "take" limitation. Second, the no-jeopardy opinion simply did not stand alone; the mitigation measures were independently studied by expert biologists and found to adequately protect the tortoise.

In their petition to the Supreme Court, the petitioners and various amici made a rather remarkable argument. Citing to *Mountain Lion v. Fish and Game Commission* (1997) 16 Cal.4th 105, they said that whenever the EIR for a project reduces the number of a threatened species, the impact must be declared significant *as a matter of law*. However, that was not the holding of *Mountain Lion.* And while it is generally difficult to draw conclusions from the Supreme Court's denial of review, the vigor with which this particular argument was advanced, and the fact that it was squarely presented here, may be indicate that the Court did not agree with petitioners' expansive interpretation of the case.

5. What is a court's obligation to examine the effectiveness of mitigation measures?

Henning: A recurring issue in this case was the effectiveness of certain mitigation measures designed to protect the desert tortoise. In particular, because the 52-mile private rail line serving the landfill will cross through critical desert tortoise habitat, one measure required

that MRC install "tortoise fencing" in locations to be determined in the future by the USFWS and/or California Department of Fish and Game. These fences, combined with a culvert system, would guide tortoises away from the tracks and allow them to cross below.

The County found that this measure and others would together mitigate the impacts on the tortoise to a level of insignificance. The trial court disagreed with this conclusion, based in part on its observation that the fencing measure did not require the entire rail line to be fenced.

In reversing the trial court's holding on the desert tortoise, the Court of Appeal did not specifically address the effectiveness of this or any other mitigation measure. Rather, it noted that expert biologists and the affected government agencies had determined that the measures were adequate, and that this, along with other evidence in the record, was enough to support the County's conclusions.

The petitioners chided the Court of Appeal for not evaluating the effectiveness of the tortoise mitigation measures. They argued in their petition for review to the Supreme Court that the appellate court had an affirmative obligation to address the issue of effectiveness in the opinion rather than simply defer to the determinations of the experts and the County. However, the petitioners' demand was unreasonable. There can be no substantive rules about the content of a judicial opinion, whether in CEQA or otherwise. Moreover, in this case, the deference the Court of Appeal gave to the experts and the County was entirely proper given that such deference is mandated by CEQA.

6. When experts disagree on whether an impact is "speculative", is further study necessary?

Henning: Perhaps the most ominous effect of the landfill as posited by the petitioners was a phenomenon known as "eutrophication". The theory is that when nutrients are introduced into a nutrient-deprived ecosystem, certain animal and plant species will eat those nutrients and will tend to proliferate, thereby causing a domino effect on other species and upsetting the entire ecosystem.

Eutrophication was, by all accounts, not an easy thing to study or quantify. Although the phenomenon has been shown to occur in marine environments, there were no existing scientific studies demonstrating its existence in a desert environment, or resulting from a landfill. The mere lack of such studies certainly raises the question whether eutrophication qualified as a "speculative" impact under CEQA and was therefore not deserving of further study. (*See Laurel Heights Improvement Association v. Regents of the University of California* (1985) 47 Cal.3d 376, 413, 415.)

Yet the County did undertake to study eutrophication, primarily through an expert report which concluded that mitigation measures would confine nutrients to the site, and therefore prevent the phenomenon from occurring. The petitioners' complaint was that the County could have studied eutrophication more. In particular, the petitioners referred to certain scientific studies proposed by park staff, some of which would have taken several years to complete. Other experts said that such studies would not yield useful data.

The Court of Appeal held that the County was entitled to rely on its experts, and found that in light of analysis already done and the experts' doubts as to the value of further study, the

impact was indeed speculative and need not have been analyzed further. The Court also drew on another important CEQA tenet in noting that the County was entitled under CEQA to reject further study as "infeasible for economic or planning reasons." (*See Chapparal Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1146 and fn. 8.)

This case squarely addresses the circular reasoning used by petitioners in many cases involving hypothesized impacts. In such cases, when existing scientific knowledge is insufficient to determine whether an impact is significant, the lead agency may wish to find the impact speculative and truncate discussion. However, petitioners inevitably argue that this lack of knowledge places a burden on the agency to develop the necessary knowledge, sometimes at great expense and/or over a long time horizon, before making its conclusions. This case reaffirms that the agency has latitude to find that impacts are speculative and that additional studies are infeasible.

7. May an expert conclude than an impact is insignificant without laying the foundation for that conclusion?

Henning: One of the more important holdings in the Court of Appeal's opinion arose from a relatively small issue in the case, i.e., the EIR's failure to expressly include in the night lighting analysis the effect of the incremental increase in lighting associated with the expansion of the neighboring townsite, especially the planned addition of several hundred new homes. The County conceded that this component of lighting was missing from the analysis, but noted that the impact of additional homes was *de minimis* on its face, in light of existing light sources at the townsite.

The Court of Appeal upheld this analysis. It characterized the EIR as concluding that the expansion of the townsite "will not make much difference," and held that under such circumstances an expert may conclude, without further study, that a condition will not have a significant impact.

This ruling is important because it recognizes the practical fact that an expert performing an analysis of a potential impact category must make many "first-cut" determinations as to what *not* to study. Although it is prudent for an expert justify the omission of analysis whenever feasible, any rigid requirement that an EIR mechanistically recite and justify every single omission would dramatically increase the scope of the expert's task and cause the typical EIR to balloon in size.

Postscript: Potential future litigation under NEPA over land exchange.

Because the Bureau of Land Management must issue a Record of Decision to exchange the land which is required for the project, there may well be a federal NEPA challenge to BLM's action.