NOTES FOR CEQA AT 40 CONFERENCE PRESENTATION

My purpose: Provide a general overview of the role the courts have played over the last 40 years in the enforcement and development of CEQA. My observation is that he courts have been supportive of the policy of CEQA and have made it more effective in guiding more responsible governmental decisions. I hope to make my point by discussing a handful of leading cases, all of which I am sure you are familiar.

I also note that Mr. Shute's statistics show a large proportion of CEQA cases challenging government decisions have resulted in success for petitioners.

In deciding disputes arising under CEQA, the courts have done what they usually do in interpreting statutes:

1. <u>They fill in the gaps left (intentionally or unintentionally) by the Legislature and</u>
2. <u>Resolve ambiguities and uncertainties in the statutory language.</u>

When the Guidelines were promulgated by the Executive Branch, the courts have shifted their focus to interpreting those regulations as much, if not more so, than the underlying statutes. In either case, though, the courts applied various tools of interpretation, all of which are designed to determine and enforce the intent of the Legislature, which is the keystone of any analysis of a CEQA statute or regulation.

<u>*Friends of Mammoth*</u>

The California Supreme Court established the foundational principle for interpreting and applying CEQA in *Friends of Mammoth* -- the very first case the court decided under the original version of the statute. There, the court was called

on to fill in the gap in the law left by the Legislature's failure to define the term "project." The court needed to do this to resolve the question of whether CEQA applied to private activities that require some type of governmental approval.

Drawing on the broad language of the original legislative enactment, the Supreme Court discerned that "the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." The Supreme Court later called this "[t]he foremost principle under CEQA." Applying that principle in the case before it, the Supreme Court determined that CEQA *did* apply to private activities.

As we know, the first of many "the sky is falling" or "the world is ending" periods followed that case. Yet, the legislature codified the Court's interpretation that same year - albeit with some tightening of procedures but not changing the fundamental policy.

Moving forward from *Friends of Mammoth*, we can see how this foundational interpretive principle has continued to guide the courts in their interpretation and application of CEQA throughout the years.

No Oil

In *No Oil*, the second CEQA case to reach the Supreme Court (and the first one after the 1972 legislation that followed in the wake of *Friends of Mammoth*), the court was called on to fill in another gap in CEQA: the Legislature's failure to define the term "significant." The court needed to do this to resolve the question of how an agency should decide whether a pending project requires an EIR. The

trial court had interpreted CEQA to compel preparation of an EIR only when "there is a reasonable possibility that the project will have a momentous or important effect of a permanent or long enduring nature." The Supreme Court threw out this overly restrictive test, and, applying the foundational interpretive principle from *Friends of Mammoth*, promulgated the "fair argument" standard. Specifically, the court said that "since the preparation of an EIR is the key to environmental protection under CEQA, accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." This "fair argument" standard is one of the two most important parts of CEQA in my opinion. The other being the requirement that any feasible mitigation measures must be adopted and must be enforceable.

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Laurel Heights I

In *Laurel Heights I* , the Supreme Court was called on to determine the conditions under which an EIR has to discuss the environmental effects of anticipated future activities related to the proposed project. The court decided that "an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."

While the court's construction of CEQA furthers the foundational principle of interpreting CEQA to afford protection to the environment, what we see also in *Laurel Heights I* is a dose of pragmatism tempering that goal. Hypothetically, at

least, with "affording the ***fullest possible*** protection to the environment" as the governing principle, the court could have required analysis of any significant environmental affect that arguably could result from *any* possible future activity. The court recognized, however, that if preparation of an EIR were required too early in the process, the EIR might have to engage in "'sheer speculation as to future environmental consequences.'" At the same time, allowing preparation of the EIR too late is dangerous because "bureaucratic and financial momentum . . . behind a proposed project . . . provide[e] a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project."

In balancing these concerns to come up with the test that it did -- framed in terms of what is "a reasonably foreseeable consequence of the initial project" -- the Supreme Court essentially recognized a reasonableness limitation to the foundational interpretive principle from *Friends of Mammoth*. In other words, it can be said that in the wake of *Laurel Heights I,* CEQA is to be interpreted in such manner as to afford the fullest possible protection to the environment, not just within "the reasonable scope of the statutory language," but more broadly, within "the scope of reason." Thus, environmental idealism tempered with reasonable pragmatism is the balance the court attempts to strike in the interpretation and application of CEQA. <u>This balance is what, in my opinion, kept the Legislature from overreacting on many occasions and severely cutting back on CEQA.</u>

<u>*Communities for a Better Environment*</u>

Communities for a Better Environment was not the typical CEQA case, in that it did not involve a challenge to a project but instead involved a challenge to the 1998 revision of the CEQA Guidelines. This was one of the few times the

Executive Branch, in my opinion, attempted to modify a core principle of CEQA - in this case - the "fair argument standard" through the regulatory process. Of particular significance was the invalidation of Guidelines section 15064(h) as contrary to the fair argument approach. The regulation specified that a change in the environment was not a significant effect if the change complied with a regulatory standard that met certain requirements. The court of appeal recognized the guideline would permit a finding an effect is not significant based on compliance with aregulatory standard, "regardless of whether other substantial evidence would support a fair argument that the effect may be environmentally significant.

Vineyard Area Citizens

In the *Vineyard* case, the Supreme Court was called on to deal with phantom water supplies often identified to serve large developments. Quite simply, "how firmly future water supplies for a proposed project must be identified [in an EIR] or, to put the question in reverse, what level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan." The court explained that "[t]he ultimate question under CEQA . . is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project. If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives--including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases--and discloses the significant foreseeable environmental effects of each alternative, as

well as mitigation measures to minimize each adverse impact." This, in my opinion is a sensible and reasonable means of dealing with a significant issue.

Bay-Delta Programmatic EIR

The *Bay-Delta* case involved the CEQA requirement that "an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts." The Supreme Court interpreted and applied this requirement in determining that a programmatic EIR was not defective for failing to discuss an alternative to the CALFED Program of reduced exports of Bay-Delta water. In doing so, the court specifically relied on the CEQA Guideline that expressly applies the "rule of reason" in the place of any "ironclad rule governing the nature or scope of the alternatives to be discussed."

This decision would seem to be a step backward for CEQA but it was not for the simple reason -that this was a Programatic EIR which served a much different purpose than that of a project specific EIR.

In closing, I would like to just quickly run a couple areas where the courts have adhered to the fundamental principles of the Mammoth case.

1. Broad standing is afforded to persons challenging decisions
2. Broad interpretation of Code of Civil Procedure Section 1021.5, the private attorney general law, utilizes the "catalyst theory" of success as well as special consideration of fees for petitioners whose attorney's proceed on a contingency basis.

CASE LIST

Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247

No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68

Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376 (*Laurel Heights I*)

Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412

Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (2008) 43 Cal.4th 1143