CASE NO. S219783 SUPREME COURT COPY

IN THE SUPREME COURT OF CALIFORNIA

SIERRA CLUB, REVIVE THE SAN JOAQUIN, and
LEAGUE OF WOMEN VOTERS OF FRESNO

Plaintiffs and Appellants

v.

COUNTY OF FRESNO

Defendant and Respondent

FRIANT RANCH, L.P.

Real Party in Interest and Respondent

After a Published Decision by the Court of Appeal, filed May 27, 2014
Fifth Appellate District Case No. F066798

Appeal from the Superior Court of California, County of Fresno
Case No. 11CECG00726
Honorable Rosendo A. Peña

ANSWER TO *AMICI CURIAE* BRIEFS OF ASSOCIATION OF IRRITATED RESIDENTS ET AL., CENTER FOR BIOLOGICAL DIVERSITY, LEADERSHIP COUNSEL FOR JUSTICE AND ACCOUNTABILITY, AND NORTH COAST RIVERS ALLIANCE

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I.
INTRODUCTION

It is understandable that petitioners challenging projects under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[1] would desire the courts to review the sufficiency of environmental impact reports (EIRs) with no deference to the lead agencies who prepared them. A project opponent cannot obtain a favorable de novo standard of review, however, simply by uttering the incantation "the EIR fails as an informational document." By *definition,* an environmental impact report (EIR) is "an informational document." (§ 21061.) To succeed in serving this function, the EIR must comply with all explicitly mandated procedural requirements *and* must be supported by substantial evidence. (§ 21168.5.) In other words, questions regarding the sufficiency of an EIR as an informational document are not limited solely to procedural questions.

The arguments of amici North Coast Rivers Alliance (NCRA) and Center for Biological Diversity (CBD) significantly downplay the rigor of the substantial evidence standard. NCRA and CBD suggest that under the substantial evidence test, courts would have to uphold EIRs that set forth only bare conclusions, provided those conclusions are supported by

[1] Unless otherwise specified, hereafter all statutory references are to the Public Resources Code.

substantial evidence somewhere in the record. Indeed, CBD suggests that the substantial evidence standard provides no review at all.

NCRA and CBD are wrong. Real Party in Interest Friant Ranch, L.P. (Real Party) does not argue that such minimalist efforts at compliance pass legal muster. Implicit in the substantial evidence standard of review is a requirement for EIRs to *analyze* and *explain* the evidence on which their conclusions are based. As this Court has emphasized, "the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 404 (*Laurel Heights I*).)

While CEQA requires EIRs to provide agencies and the public with "detailed information" about the significant effects of a proposed project, neither the Act nor the Guidelines specify what amount of "detail" or analysis is sufficient. (§§ 21061, 21100; Guidelines, §§ 15126.2.)[2] Instead, lead agencies administering CEQA must determine, on a case-by-case basis, what levels of detail and analyses are necessary and appropriate for any given project and any given specific impact. Lead agencies are in the best position to make these decisions because they have the technical expertise necessary to do so.

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[2] The CEQA Guidelines (hereafter, "Guidelines") are codified in California Code of Regulations, title 14, section 15000 et seq.

In reviewing a claim that an EIR lacks sufficient detail or analysis of a required topic, a court therefore should not step into the shoes of the lead agency and determine, de novo, whether more information and analysis is required. Instead, the court should examine the EIR's discussion of a required topic in light of the complexity of the underlying issues as reflected in the administrative record *as a whole*. In other words, in evaluating whether the extent of an EIR's discussion of a required topic is sufficient under CEQA, a court should apply the substantial evidence test. NCRA and CBD have failed to offer persuasive reasons for a different, less deferential approach.

This Court should also reject the arguments of amici Association of Irritated Residents et al. (collectively, "AIR") and Leadership Counsel for Environmental Justice and Accountability (LCJA) to the effect that the subject EIR's air quality analysis violates CEQA. Because amici's arguments talk in broad generalities, they do not address the arguments made by Real Party in its briefs before this Court, and are not based upon the administrative record. These amici's briefs thus add little to the discussion of the actual issues before this Court. As Real Party previously explained in its Opening Brief on the Merits and its Reply Brief on the Merits, substantial evidence supports the County of Fresno's conclusion that the air quality analysis is sufficient. The analysis fully complies with the directive of Guidelines section 15126.2, subdivision (a), that an EIR

"should" discuss the relevant specifics of the "health and safety problems caused by the physical changes."

Finally, the Court should reject the arguments of AIR and CBD that Friant Ranch's operational air quality mitigation measure violates CEQA. Like the Court of Appeal below, AIR ignores the fact that Mitigation Measure #3.3.2 will be enforced through the Mitigation Monitoring Program adopted by the County for Friant Ranch. And like Appellants Sierra Club et al. (collectively, "Appellants"), CBD misconstrues Real Party's argument as suggesting that CEQA's mitigation requirements do not apply to significant and unavoidable impacts. Real Party has said nothing of the sort. Real Party has simply noted the practical reality that quantified performance standards may not be feasible or necessary in every case, particularly for plan-level projects, such as Friant Ranch. Since lead agencies generally invoke performance standards as a basis for showing a commitment to mitigate impacts to less-than-significant levels, there is no generally applicable legal requirement that mitigation measures for significant unavoidable impacts must always include performance standards in order to meet CEQA standards.

For the reasons presented herein, in Real Party's prior briefs, and in the amici briefs filed by other parties in support of Real Party, the Court should reverse the Court of Appeal below and hold (i) that the sufficiency of EIRs' discussions of required topics are reviewed under the substantial

evidence standard; (ii) that the Friant Ranch EIR's air quality analysis complies with CEQA's procedures and is supported by substantial evidence; and (iii) that substantial evidence demonstrates that MM #3.3.2 is enforceable, is not impermissibly deferred, and otherwise complies with CEQA.

II.
ARGUMENT

A. NCRA and CBD Are Mistaken in Suggesting that Only through De Novo Review Can Reviewing Courts Ensure that EIRs Are Sufficient as Informational Documents.

NCRA and CBD present a caricature of Real Party's arguments when they suggest that Real Party advocates a position by which the courts would have to uphold EIRs that state only bare conclusions without any facts and analyses supporting those conclusions. (See e.g., Amicus Curiae Brief of North Coast River Alliance filed in Support of Plaintiffs and Appellants et al. [hereafter, "NCRA Brief"], p. 20; Amicus Brief of Center for Biological Diversity [hereafter, "CBD Brief"], p. 9.) Like these amici, Real Party readily agrees that CEQA requires an EIR to include facts and analysis, not bare conclusions. (*Laurel Heights I, supra*, 47 Cal.3d at p. 404.) In doing so, moreover, the EIR must set forth the "analytic route" the agency traveled from evidence to action. (*Ibid.*, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*).)

What NCRA and CBD ignore is that these requirements are *implicit* in the *substantial evidence standard of review*, not the "failure to proceed" standard, as discussed below. (*Topanga*, *supra*, 11 Cal.3d at pp. 514–516; see also *North Coast Rivers Alliance v. Marin Mun. Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 637, internal quotations omitted ["[u]nder the substantial evidence standard of review, the question is whether [the lead agency] reasonably and in good faith discussed [the environmental impact] in detail sufficient for the public to discern from the EIR the analytic route the agency … traveled from evidence to action"].)

1. Like administrative findings, EIRs must disclose the agency's analytic route from raw evidence to action.

This Court has long recognized that EIRs serve a function similar to that of administrative findings. In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270 (*Friends of Mammoth*), the Court explained that an EIR functions as the practical equivalent of an extended set of administrative findings:

> In light of the statewide concern expressed by the Legislature for written findings in the field of ecology, as evidence by [CEQA's environmental] impact *report*, the proper construction of the words "findings" or "found" requires a written statement of the supportive facts on which the agency has made its decision. Since this report involves the assessment of a myriad of elements (see § 21100) it obviously includes all those facts which would be contained in written findings if such findings were required by ordinance. Accordingly, the written report affords plaintiffs the same

> benefits that would be achieved by written findings pursuant to the ordinance[.]

(*Ibid.*, italics original.)

In its seminal decision in *Topanga*, this Court held that implicit in the substantial evidence standard of review under Code of Civil Procedure section 1094.5 is a requirement that an agency rendering a quasi-adjudicatory decision "set forth findings to bridge the analytic gap between raw evidence and the ultimate decision and order." (*Topanga*, *supra*, 11 Cal.3d at p. 515; see also *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1161 [explaining the same].)[3] The *Topanga* Court emphasized that these findings serve several functions:

> A findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will

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[3] The implicit requirement for express findings also applies in administrative mandamus actions in which a court exercises its independent judgment on an agency's decision, such as in cases involving fundamental vested rights. (*Hadley v. City of Ontario* (1974) 43 Cal.App.3d 121, 129.) Notably, even in such cases, the courts do not review the agency's findings de novo. Rather, in applying the independent judgment test under Code of Civil Procedure section 1094.5, subdivision (c), a court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 809, 810–824; see also *Eureka Teachers Assn. v. Bd. of Ed.* (1988) 199 Cal.App.3d 353, 366 ["[t]o allow the parties to challenge every administrative decision with another trial de novo would be a waste of both administrative and judicial resources, and the administrative hearings would be nothing more than perfunctory gestures"].)

> randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] [¶] Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

(11 Cal.3d at pp. 516–517.)

As indicated, EIRs provide similar benefits. (*Friends of Mammoth*, *supra*, 8 Cal.3d at p. 270, citing § 21100.) Like findings, EIRs must contain road signs linking evidence to action, so as to allow reviewing courts and the public to "fulfill their proper roles in the CEQA process." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 404.) Also like findings, EIRs serve a public relations function by helping foster informed decisionmaking and informed public participation. (*Ibid.*; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 445 (*Vineyard*) [because the EIR did not disclose the agency's analytic route, the EIR was not "sufficient to allow informed decisionmaking"].) By requiring agencies to "show their work" in EIRs, the substantial evidence standard of review helps ensure satisfaction of CEQA's goals of informed decisionmaking and informed public participation.

In *Laurel Heights I*, the Court explicitly drew a connection between the necessity of express findings under *Topanga* and the standard of review for EIRs under CEQA.[4] The *Laurel Heights I* Court explained that under Public Resources Code section 21168.5:

> "[a]buse of discretion is established if the agency has not proceeded in the manner required by law or if the determination or decision is not supported by substantial evidence." As a result of this standard, "[t]he Court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." [Ciation.]
>
> *This standard of review is consistent with the requirement that the agency's approval of an EIR "shall be supported by substantial evidence in the record."* (Guidelines, § 15091, subd. (b).) In applying the substantial evidence standard, "the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." ([*Topanga*, *supra*, 11 Cal.3d at p. 514.].)

(*Id.* at p. 392, italics added.)[5]

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[4] Although *Laurel Heights I* involved review under Public Resources Code section 21168.5, which applies to quasi-legislative decisions brought in traditional mandamus (Code Civ. Proc., § 1085), while *Topanga* addressed review under administrative mandamus (Code Civ. Proc., § 1094.5), the *Laurel Heights I* Court explained that, for purposes of CEQA, the difference between traditional mandamus (§ 21168.5) and administrative mandamus (§ 21168) "is mostly academic because the standard of review is essentially the same under either section, i.e., whether substantial evidence supports the agency's determination." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 392, fn. 5; see also *Vineyard*, *supra*, 40 Cal.4th at p. 427, fn. 4 [same].)

[5] CBD cites the first paragraph quoted above and insists, without cogent argument, that in passing upon the sufficiency of an EIR as an informative document, the courts review the EIR de novo. (See e.g. CBD Brief pp. 4–7) CBD is mistaken. As is made clear by the very next paragraph in *Laurel Heights I* (quoted above): "[*t*]*his* standard of review" – i.e., the standard of

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This deferential standard is appropriate because the administrative agency has technical expertise to aid it in arriving at its decisions. Because of this expertise, courts should not interfere lightly with the technical judgments made by the agency. (See *Laurel Heights I*, *supra*, 47 Cal.3d at p. 393.) The courts "have neither the resources nor scientific expertise" to weigh conflicting evidence. (*Ibid.*)

Based on *Topanga*, the Court in *Laurel Heights I* made clear that, like administrative findings, EIRs must include road signs linking the evidence supporting the EIRs to their analyses and conclusions. An EIR must disclose the "'analytic route the ... agency traveled from evidence to action.'" (*Laurel Heights I*, 47 Cal.3d at p. 404, quoting *Topanga*, *supra*, 11 Cal.3d at p. 515.) Stated more broadly, "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and consider meaningfully the issues raised by the proposed project." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 404; compare *Topanga*, *supra*, 11 Cal.3d. at p. 516 [explaining purposes of findings requirement].) To establish the agency's analytic route from evidence to action, the EIR "'must contain facts and analysis, not just the agency's bare conclusions[.]'

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review under which the courts are only to pass upon the EIR's sufficiency as an "informational document" – "is consistent with the requirement that the agency's approval of an EIR 'shall be supported by substantial evidence in the record.'" (*Laurel Heights I*, *supra*, 47 Cal.3d at pp. 392–393, italics added.)

[Citations]." (*Laurel Heights I, supra*, 47 Cal.3d at p. 404; see also *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 249–250 [same]; *Environmental Protection & Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 516–517 [under the *Topanga* rule, "mere conclusory findings without reference to the record are inadequate"]; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171 ["[m]ere conclusions simply provide no vehicle for judicial review"].)

If the EIR does not satisfy these requirements implicit in the substantial evidence standard, the court should hold that the agency abused its discretion under that standard. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392–393.) If the abuse of discretion deprived decisionmakers or the public "substantial information relevant to approving the project," the court should hold the agency prejudicially abused its discretion under section 21005. (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 465 (*Neighbors*) [plur. opn.].) The existence of these analytic requirements implicit in the substantial evidence standard of review does not suggest, as NCRA and CBD would have this Court believe, that all claims challenging the sufficiency of an EIR's discussion must be reviewed de novo. Rather, as discussed below, such claims must be

reviewed under the substantial evidence standard, in light of the record as a whole.

2. In reviewing the sufficiency of an EIR's discussion of a required topic, the court should review the discussion in light of the whole record.

In determining what amount of detail and analysis is "sufficient" in an EIR to allow those who did not participate in the EIR's preparation to understand and evaluate the evidence, the court should review the record *as a whole* in order to assess the complexity of the issues and thus the extent of explanation necessary to support the EIR's factual conclusions. For very complex issues, as revealed in the administrative record, extensive explanation could be necessary to convey to the public, decisionmakers, and the courts the bases on which the EIR reaches the conclusions that it does. For relatively simple issues, in contrast, less extensive discussions could suffice. The amount of analysis and explanation that is required necessarily depends on the nature of the underlying issues and the facts and circumstances surrounding a proposed project.

In reviewing an administrative record to determine how much information is sufficient for a particular EIR's discussion of a particular required topic, a reviewing court should pay special attention both to the input submitted to the lead agency and to the lead agency's responses to such input. Input from other agencies and the public comes both during the

"scoping"[6] process and in comments on the draft EIR, while the lead agency's responses to such input takes the form of draft EIR text and responses to comments in a final EIR. (§§ 21168, 21068.5; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 569–570 (*Goleta II*).)

As ably discussed in the amicus brief of the League of California Cities et al., (collectively "League"), CEQA's public- and agency-consultation requirements act as a safeguard to ensure that lead agencies address agencies' and the public's concerns about the sufficiency of an EIR. (Amicus Curiae Brief of League of California Cities et al. [hereafter, "League Brief"], § IV.F, pp. 38–40.) If members of agencies or public are confused or require more information in order to be able to meaningfully understand the environmental impacts of a proposed project, such persons should let the lead agency know of such concerns in their comments on a draft EIR. (§ 21091, subd. (d); Guidelines, § 15088.) In its final EIR, the lead agency must then provide a good-faith, reasoned analysis in response to such comments. (Guidelines, § 15088, subd. (c); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1124 (*Laurel Heights II*).) If the new information added to the final EIR in

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[6] See Guidelines, §§ 15082 (Notice of Preparation requirement), 15083 (early public consultation); and Pub. Resources Code, § 21083.9 (statutory requirement for "scoping meetings").

response to comments is "significant," the agency must recirculate all or a portion of the EIR for another round of public and agency consultation. (§ 21092.1; Guidelines § 15088.5; *Laurel Heights II, supra*, 6 Cal.4th at pp. 1126-1130.)

This comment-and-response requirement not only provides a mechanism to ensure that lead agencies, in good faith, address in writing environmental concerns raised by other agencies and the public, the requirement also provides reviewing courts with insights into whether those who did not participate in the EIR's preparation believed themselves to be adequately informed. In determining whether an EIR provides sufficient information on a required topic, therefore, a court should review the public and agency comments on the draft EIR and the lead agency's responses. Such review will allow the court to determine whether substantial evidence—in light of the whole record—supports the agency's factual conclusions notwithstanding any complexities raised through input from the public and other agencies.

Finally, if substantial evidence, in light of the whole record, supports the agency's conclusion that the amount of information presented in the EIR is "sufficient," the court should uphold the EIR even if the court believes that additional information would have been helpful or informative. It is not for the courts to "design the EIR." (*Laurel Heights I, supra*, 47 Cal.3d at p. 415.)

3. NCRA and CBD mischaracterize this Court's holdings, which demonstrate that reviewing courts must apply the substantial evidence standard to questions concerning the sufficiency of an EIR's analysis of a required topic.

a. In *Laurel Heights I*, the EIR's alternatives analysis failed to satisfy the *Topanga* requirement, so the Court refused to uphold the agency's conclusion that there are no feasible off-site alternatives under the substantial evidence test.

NCRA and CBD argue that the Court in *Laurel Heights I* must have applied its independent judgment to the sufficiency of the respondent university's EIR as an informational document because the EIR failed to "'include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (NCRA Brief, p. 10, quoting *Laurel Heights I*, *supra*, 47 Cal.3d at p. 405; see also CBD Brief, pp. 4–5.)[7] As discussed

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[7] NCRA states that the respondent agency's position in *Laurel Heights I* that there were no feasible alternative sites is "conceptually indistinguishable" from Real Party's position in this case. (NCRA Brief, p. 9.) Specifically, NCRA characterizes the "essence" of Real Party's argument to be that "because [the County] had already determined *internally* that it would be infeasible to determine the magnitude of the project's human health impacts, there was reason to include such an analysis in the EIR." (*Ibid.*, fn. 1, italics original.) NCRA's argument is untenable. First, the County did not "internally" determine that it would be infeasible to provide more specific information about the Project's air quality health effects; the County explained the rationale for its conclusion in the Final EIR's responses to comments. (Administrative Record ["AR"] 4602; see also Amicus Curiae Brief of the San Joaquin Valley Unified Air Pollution Control District [hereafter, "SJVUAPCD Brief"] pp. 11–15 [explaining the same].) Although the County did not explain why a regional health correlation analysis is infeasible, this is because the Court of Appeal

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above, however, the requirement for an agency to include enough information to allow those who did not participate in its preparation to understand and meaningfully consider the conclusions made therein is implicit in the *substantial evidence standard of review*, as the Court made clear in *Laurel Heights I.* (47 Cal.3d at p. 404, quoting *Topanga, supra*, 11 Cal.3d at p. 515.) As a result of this standard, the *Laurel Heights I* Court refused to uphold the EIR's analysis of off-site alternatives, which stated only that no other sites had "space available of sufficient size to accommodate" the project. (*Laurel Heights I, supra*, 47 Cal.3d at p. 403.) [8]

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raised this issue *sua sponte* based on the court's misunderstanding of the City of Fresno's comment on the Draft EIR. (See *ibid.*) Furthermore, unlike CEQA's requirements for an EIR's alternatives analysis, which require the EIR to briefly discuss the alternatives rejected as infeasible during the EIR's scoping process (see Guidelines, § 15126.6, subd. (c)), CEQA does not require an EIR to list all of the theoretically available methodologies that were *not* undertaken or to explain why all such methodologies were infeasible or unnecessary. (See Real Party's Answer Brief to the Amicus Curiae Brief of the South Coast Air Quality Management District, § II.B; see also *Laurel Heights I, supra*, 47 Cal.3d at p. 415 [that additional analysis might be helpful does not make it necessary].)

[8] The alternatives analysis at issue in *Laurel Heights I* can be characterized as both procedurally and factually deficient. Procedurally, the EIR failed to include any discussion expressly required by CEQA (a discussion of alternatives, rather than a mere "identification" of alternatives). Factually, the EIR failed to provide more than just the bare conclusion that alternative locations were infeasible; as such, the conclusion could not be upheld under the substantial evidence test because it failed to satisfy the *Topanga* rule. (*Id.* at pp. 400–407; see also Real Party's Opening Brief on the Merits [hereafter, "Opening Brief"], p. 24.) From a practical standpoint, there is likely little meaningful difference between the two standards of review with respect to EIRs that only state bare conclusions without *any* facts or

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Because the EIR contained no actual analysis of any alternatives *whatsoever*, the Court was unwilling to take on "blind trust" the respondent agency's promise that it had actually considered off-site alternatives and rejected them as infeasible. (*Laurel Heights I, supra*, 47 Cal.3d at p. 404; see also *Goleta II*, 52 Cal.3d at p. 569 [explaining the same].) As the Court explained: "[w]ithout meaningful analysis of alternatives in the EIR, *neither the courts nor the public can fulfill their proper rolls in the CEQA process*." (*Laurel Heights I, supra*, 47 Cal.3d at p. 404, italics added.) Accordingly, the Court held the EIR was legally inadequate. (*Id.* at p. 406.)[9]

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analysis supporting those conclusions. In such a case, the agency has likely violated an express procedural requirement (such as the requirement to include a "detailed statement" setting forth all significant effects of the proposed project). (§ 21100, subd. (b)(1).) The EIR would also not satisfy the *Topanga* rule and therefore the EIR's conclusions could not be upheld under the substantial evidence standard. This is not the case with the Friant Ranch EIR, however, which includes a detailed discussion of the project's air quality impacts, and the question is how much detail is "sufficient." Because the question of how much detail to put into an EIR necessarily requires the lead agency to exercise its informed judgment, the courts must review the agency's decisions about the level of detail under the substantial evidence standard of review, rather than the de novo standard. (See Opening Brief, § IV. A. pp. 9–36; League Brief, § III, pp. 20–31, Amicus Curiae Brief of the California Building Industry et al. [hereafter, "CBIA Brief"], § II.A, pp. 5–20.)

[9] A great deal of confusion has arisen in the briefings against Real Party in this case based on the term "legal" (as used in phrases such as "legally insufficient" and "legally inadequate"). A "legal" deficiency must be distinguished from a "procedural" deficiency. As explained in Real Party's Reply Brief on the Merits (pp. 16–17), both the "substantial evidence" standard of review and the "failure to proceed" standard involve "legal issues" in that an abuse of discretion under either standard is a legal failure.
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b. In *Goleta II*, the EIR's alternatives analysis included more than just bare conclusions, and the Court appropriately examined the whole administrative record in determining the sufficiency of the EIR's discussion.

Goleta II illustrates the appropriateness of applying the substantial evidence standard of review to questions of the sufficiency of an EIR's discussion of a required topic. In contrast to the EIR at issue in *Laurel Heights I*, in the EIR at issue in *Goleta II* "discussed a full range of alternatives, including an in-depth discussion of one off-site alternative." (*Goleta II*, *supra*, 52 Cal.3d at p. 569, distinguishing *Laurel Heights I*, *supra*, 47 Cal.3d 376.) The Court in *Goleta II* rejected the petitioner's challenge to the sufficiency of the EIR's alternatives discussion. The Court explained that, although a reviewing court will not uphold an EIR that sets forth only bare conclusions, courts may, where warranted by circumstances, examine the whole administrative record in assessing the adequacy of an EIR. (*Id.* at pp. 568–570.)

Reviewing the administrative record as a whole, the Court in *Goleta II* held that substantial evidence supported the respondent county's findings

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(*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 573 (*WSPA*) [whether an agency's findings and decisions are supported by substantial evidence is a "question of law"].) This does not mean, however, that any time a court determines an analysis to be "legally inadequate," the court must have applied the de novo standard of review. (Compare NCRA Brief, pp. 9–10 [stressing that the Court in *Laurel Heights I* held that the alternative discussion was "legally inadequate"].)

rejecting alternatives that had been proffered by the petitioners after the close of public comment on the draft EIR. (*Goleta II*, *supra*, 47 Cal.3 at pp. 570–575.) In rejecting the petitioner's challenge to the sufficiency of the EIR's alternatives discussion, the Court was also persuaded by the fact that the petitioners had not submitted their suggested alternatives early enough in the process for the county to consider them in the text of the EIR. (*Id.* at pp. 569–570.) Under such circumstances, it was appropriate for the Court to reject those alternatives via administrative findings, rather than in an EIR. (*Id.* at p. 570.) Had the Court in *Goleta II* reviewed the sufficiency of the EIR's discussion of alternatives de novo—as NCRA and CBD urge should be the standard—the Court would have had to ignore record evidence beyond the EIR text itself in assessing the sufficiency of the EIR's alternative analysis.

c. In *Vineyard*, the Court clearly characterized the EIR's failure to satisfy the *Topanga* rule as part of the Court's inquiry into the factual adequacy of the EIR, and not the EIR's compliance with CEQA's procedural requirements.

In *Vineyard*, the Court found the EIR at issue to be both factually and procedurally deficient. (*Vineyard*, *supra*, 40 Cal.4th at p. 447 [summarizing the EIR's factual and procedural errors].) Contrary to NCRA and CBD's suggestions, the *Vineyard* Court considered the EIR's failure to set forth the agency's "analytic route" from evidence to action to violate CEQA under the *substantial evidence* standard. (*Id.* at pp. 439, 445, 447.)

The Court explained: "[f]actual inconsistencies and lack of clarity in the FEIR leave the reader—and the decision makers—*without substantial evidence* for concluding that sufficient water is, in fact, likely to be available" for the project. (*Id.* at p. 439, italics added; see also *id.* at p. 445 [explaining that the EIR is factually deficient for failing to disclose the analytic route the agency traveled from evidence to action].)

In other words, due to the EIR's lack of a coherent and consistent explanation concerning the evidence on which its long-term water conclusions were based, the Court could not uphold the EIR under the substantial evidence test. (*Id.* at p. 439; see also p. 447 ["[f]actually, the FEIR's use of inconsistent supply and demand figures, and its failure to explain how those figure match up, results in a lack of substantial evidence that new surface water diversions are likely to supply the project's long-term needs"].) Because of this factual failing, the EIR "[did] not serve the purpose of sounding an environmental alarm bell." (*Id.* at p. 441, internal quotations omitted; see also *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 714, 721–724 [holding that the respondent agency's approval of an EIR was not supported by substantial evidence because the EIR failed to disclose uncertainties inherent in the proposed water supply].)

In contrast, the procedural errors identified by the Court in *Vineyard* consisted of violations of ascertainable procedural requirements set forth in

the Act and the Guidelines. Procedurally, the EIR violated CEQA for attempting to tier from a future environmental document. (*Vineyard, supra*, 40 Cal.4th at p. 440; see *id.* at p. 429, fn. 6, citing §§ 21068.5, 21093, 21094; Guidelines, § 15152; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 197–201 (*Stanislaus*) [same].) The EIR also failed to follow CEQA's procedures for incorporation by reference. (*Vineyard, supra*, 40 Cal.4th at pp. 443–444, citing Guidelines, § 15150, subd. (c).) And the EIR failed to analyze the foreseeable effects of implementing the project's water supply mitigation measure, in violation of CEQA's procedural requirement to analyze the reasonably foreseeable effects of the project as a whole. (*Vineyard, supra*, 40 Cal.4th at pp. 444, 447; see also *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (*Santiago*) [EIR failed to analyze the whole of the project by failing to consider the effects of the new water infrastructure that would be required to serve the project]; *Stanislaus, supra*, 48 Cal.App.4th 182 [EIR failed to discuss water supply beyond initial five years of the project and thus failed to address the reasonably foreseeable significant effects of the project].) Under CEQA, an agency has no discretion to analyze only a portion of the project it is reviewing, so such a failure is appropriately reviewed de novo.[10]

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[10] See e.g., Guidelines, § 15378 ("'Project' means the whole of an action,
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In its brief, NCRA accuses Real Party of mischaracterizing *Vineyard*, but it is NCRA that has done so by piecing together fragments of sentences in that decision in a misleading way in order to support its position. (See NCRA Brief, pp. 7–8.) NRCA states that the *Vineyard* Court found that the EIR's failure to analyze the effects of implementing the water supply mitigation measure "prevented the EIR from 'adequately … inform[ing] decision makers and the public' and *therefore* 'the County erred procedurally.'" (NCRA Brief, p. 11, quoting *Vineyard*, *supra*, 40 Cal.4th at p. 444, italics added by Real Party.) What the Court actually stated, however, was that a "curtailment" mitigation measure, by which development could be halted if water supplies ran out part way through project buildout,

> could serve to supplement an EIR's discussion of the impacts of exploiting the intended water sources; in that case, however, the EIR, in order adequately to inform decision makers and the public, would then need to discuss the probability that the intended water sources for later phases of development will not eventuate, the environmental impacts of curtailing the project before completion, and mitigation

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which has the potential for resulting in [an environmental change]"); *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381–383 (same); *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283 (CEQA prohibits an agency from "chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences"); see also *Santiago*, *supra*, 118 Cal.3d at p. 829 ["'[a]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR' [Citation.]"].)

measures planned to minimize any such significant impacts. *The Sunrise Douglas FEIR did not attempt such an analysis. In this respect as well, the County erred procedurally.*

(*Vineyard*, *supra*, 40 Cal.4th at p. 444, italics added.)

While both CEQA's procedural requirements and CEQA's requirement for agencies to support their EIRs' factual conclusions with substantial evidence serve to adequately inform decisionmakers and the public, the procedural violation identified by the *Vineyard* Court was not that the EIR precluded informed decisionmaking. Rather, the procedural violation was that the EIR failed to discuss the environmental impacts of implementing the mitigation measure,[11] and therefore failed to analyze the reasonably foreseeable effects of the project as proposed. (*Vineyard*, *supra*, 40 Cal.4th at p. 444.) The better interpretation of the above-quoted paragraph from *Vineyard* is that the Court determined that the failure to follow CEQA's procedural requirement to analyze the consequences of the respondent county's curtailment measure was prejudicial under section 21005 because it precluded informed decisionmaking and informed public participation. (See *Neighbors*, *supra*, 57 Cal.4th at pp. 463-465 [plur. opn.], explaining that only informational omissions that deprive agency decision

[11] Guidelines section 15126.4, subdivision (a)(1)(D), creates a procedural obligation by stating that, "[i]f a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed."

makers or the public of substantial information relevant to approving the project are prejudicial under section 21005].) The Court should therefore reject NCRA's mischaracterization of its opinion in *Vineyard*.

d. NCRA misconstrues statements in *Ebbetts Pass* to claim that the Court held that the adequacy of an EIR's scope of analysis is reviewed de novo; on the contrary, the Court held that whether an EIR includes a sufficient level of detail regarding a required topic is a factual question reviewed only for substantial evidence.

In addition to misrepresenting the Court's opinion in *Vineyard*, NCRA cherry-picks snippets of the Court's statements in *Ebbetts Pass* to claim that the Court "held that the proper 'scope of analysis' of impacts from herbicides presented a legal question, but that the 'predicate' 'factual finding' of whether a certain analysis is in fact feasible is a substantial evidence question." (NCRA Brief, p. 19, citing *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry* (2008) 43 Cal.4th 936, 954–956 (*Ebbetts Pass*).) When read in context, however, it is clear that by the phrase "scope of analysis," the Court did not mean the *breadth* or *amount* of information the agency must include in the timber harvesting plans (THPs). Rather, by "scope of analysis," the Court simply meant the general topics CEQA procedurally requires THPs (and EIRs) to address—in that case, the reasonably foreseeable future activities contemplated by the project. (*Ebbetts Pass*, *supra*, 43 Cal.4th at p. 954, citing *Vineyard*, *supra*, 40 Cal.4th at p. 428, *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 396, 398–399.)

As this Court's decisions make quite clear, lead agencies, in preparing EIRs, have a procedural obligation to analyze the whole of the project, including reasonably foreseeable future phases; as noted, CEQA gives agencies no discretion to deviate from this procedural requirement. (See *Vineyard*, *supra*, 40 Cal.4th at p. 428; *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 396, 398–399.) It is therefore not remarkable that the Court in *Ebbetts Pass* noted that whether a THP must include such a discussion within the scope of its analysis is a procedural question.

On the other hand, the Court in *Ebbetts Pass* understood that the substantial evidence standard applies to agency decisions about *how much* information must be provided in order to fulfill CEQA's procedural requirements. (*Ebbetts Pass*, *supra*, 43 Cal.4th at p. 955 ["the correctness of factual findings predicate to the [procedural] standard's application … is a predominantly factual matter we review only for substantial evidence"].) Thus, the *Ebbetts Pass* Court applied the substantial evidence standard to the plaintiff's argument that the challenged THPs "should have included more detailed site-specific discussions of potential future herbicide use." (*Ibid.*) Applying this standard, the Court held that the respondent agency had not abused its discretion by "failing to demand" that the applicant provide "a more detailed, site-specific analysis of impacts [of herbicide use] and mitigation measures." (*Ibid.*)

The Court should therefore reject NCRA's claim that the Court, in *Ebbetts Pass*, held that decisions concerning the "scope of analysis" to include in an EIR are reviewed under the "failure to proceed" standard. The *Ebbett Pass* Court plainly comprehended that challenges to the scopes of EIRs' discussions of procedurally required topics are reviewed only for substantial evidence.

4. Contrary to the claims of AIR and NCRA, substantial evidence demonstrates the Friant Ranch EIR sufficiently discusses the magnitude of the Project's air quality impacts.

As even the Court of Appeal implicitly agreed, this is not a case in which an EIR presents only bare conclusions, such as occurred in *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 403–405, or in which the challenged EIR's discussion is facially inconsistent and incoherent, as was the EIR at issue in *Vineyard*, *supra*, 40 Cal.4th at p. 439. (See Slip Op. ["Opn."], pp. 47–48.) Rather, the Friant Ranch EIR includes facts and analysis and sufficiently discloses the County's analytic route between the EIR's air quality evidence and its air quality conclusions. Because the level of detail provided demonstrates that substantial evidence supports the County's discussion of air quality effects, the Court should uphold the EIR's discussion under the substantial evidence standard. (See Opening Brief, § IV.B.2, pp. 39–44; Reply Brief, § III.B.2, pp. 24–27; SJVUAPCD Brief, §II.B, pp. 11–15.)

Despite the extensive discussion included in the Friant Ranch EIR, amicus AIR claims that it is unable to discern the magnitude of the Project's air quality impacts on health.[12] (See AIR Brief, pp. 4–8.) AIR does not provide citations to the administrative record to support this contention. In fact, there is no indication in its brief that AIR has even read the Friant Ranch EIRs air quality analysis. Instead, AIR cites only to the Court of Appeal's characterizations of the EIR. (See e.g., AIR Brief, p. 4, citing Opn. pp. 45–46; *id.* at p. 5, citing Opn. pp. 49–50.)[13] NCRA similarly

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[12] Like Appellants, AIR claims that the Court of Appeal did not actually hold that a health correlation analysis is required. Rather, AIR claims the Court of Appeal was merely requiring discussion of the magnitude of the impact. (Amicus Curiae Brief of Assn. of Irritated Residents et al. [hereafter, "AIR Brief"], pp. 5, 8.) AIR is mistaken. The Court of Appeal held, in no uncertain terms, that "the EIR was inadequate because it failed to include an analysis that correlated the project's emission of air pollutants to its impact on human health." (Opn. p. 5; see also p. 48 ["[t]he Friant Ranch EIR was short on analysis. It did not correlate the additional tons per year of emissions that would be generated by the project (i.e., the adverse air quality impacts) to adverse health impacts that could be expected to result from those emissions"].) Although, as AIR notes, the appellate court acknowledged that the County has discretion to determine exactly how to carry out the court's holding, the court stated that in doing so "there must be some analysis of the correlation between the project's emissions and human health impacts. [Citation.] In other words, we agree with plaintiffs that it is not possible to translate the bare numbers provided into adverse health impacts *resulting from this project.*" (*Id.* at pp. 49–50, italics original.) The question of whether the EIR sufficiently discloses the *magnitude* of health impacts—a different issue—was not exhausted administratively, and is not on review before this Court. (§ 21177, subd. (a).)

[13] AIR also claims that it is "greatly concerned about projects in the San Joaquin Valley that would worsen existing air quality conditions" and that AIR relies "on the EIRs prepared for proposed projects to obtain

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states that the EIR "ignor[ed]" the "magnitude" of the impact, thereby making the analysis incoherent. (NCRA Brief, p. 22.) As with AIR, though, it does not appear that NCRA has read the EIR's air quality analysis. Furthermore, whether the EIR sufficiently discloses the magnitude of the air quality impacts was not exhausted administratively, so the Court should refuse to consider the issue. (§ 21177, subd. (a).)

In any event, AIR and NCRA are wrong. The EIR sufficiently discloses the magnitude of the Project's air quality impact on health by quantifying the Project's air emissions, explaining that those emissions exceeded the standards set by the local air district to maintain public health, and generally describing the health effects associated with the air pollutants. (AR 793–826; see also AR 1556–1622 [Draft EIR Appendix C, documenting the URBMIS 2007 model results].) For this reason, the EIR at issue *Santiago*, *supra*, 118 Cal.App.3d at p. 831, cited by NCRA (NCRA Brief, p. 22), is completely unlike the Friant Ranch EIR, in that the latter document contains much more than just bare conclusions.

Although AIR, LCJA, and the court below believe additional information was required for the County Board of Supervisors to weigh the

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information regarding the impacts new projects would have on air quality and public health." (AIR Brief, p. 2.) If, however, AIR is as concerned about the Friant Ranch's air quality impacts as it claims to be, AIR could have raised its concerns in comments on the Draft EIR, and the County would have provided a response. AIR did not do so.

merits of the project against its environmental impacts, it is not for them to independently decide this issue. (AIR Brief, p. 6, citing Opn. p. 49, fn. 23; Amicus Curiae Brief of Leadership Counsel for Justice and Accountability in Support of Plaintiff and Appellant, Sierra Club, et al. [hereafter, "LCJA Brief"], p. 6) Rather, the County, as lead agency, determines whether it has sufficient information to weigh the benefits of the project against its environmental consequences; and a reviewing court should uphold that determination if it is supported by substantial evidence. As this Court has noted in a related context, the courts are not in the position to "determine whether a particular 'factor,' i.e., a specific item of evidence, was 'relevant,' i.e., important enough that the administrative agency should have considered it." (*WSPA*, *supra*, 9 Cal.4th at p. 577.) If the courts were to undertake such analysis, the "issue would often become not whether the administrative decision was a prejudicial abuse of discretion, but whether the decision was wise or scientifically sound" in light of evidence not before the agency. (*Ibid.*; see also *Laurel Heights I*, *supra*, 47 Cal.3d at p. 415 [it is not for project opponents or the reviewing courts to "design the EIR"].)

Lastly, AIR argues that the EIR is insufficient as an informational document because the EIR uses parts per million in its discussion of health consequences and tons per year in its discussion of the Project's emissions. (AIR Brief, p. 4; see also Opn. pp. 45–46 [quoting EIR's discussion of

health based on parts per million exposure and the discussion of the Project's emissions based on tons per year].) This issue was not preserved for judicial review because it was not exhausted administratively. (§ 21177, subd. (a).) Nor was it raised by Appellants in the proceedings below, so the Court should decline to consider it. (*Ernst v. Searle* (1933) 218 Cal. 233, 240–241 [a party may not raise new issues on appeal not presented in the trial court].)

In any event, as explained in the amicus brief of the San Joaquin Valley Unified Air Pollution Control District, regional air quality impacts are evaluated based on tonnage, whereas localized impacts are evaluated based on concentrations. (SJVUAPCD Brief, § II.A, pp. 4–10.) As that expert agency also explained, it would not be possible to determine the ultimate concentration of the location of ozone or particulate matter generated by the project. (*Ibid.*) As noted by the air district, these complexities demonstrate the dangers of reviewing courts conducting independent review of the scientific bases behind an EIR's discussion. (*Id.* at § II.B, pp. 11–15.)

B. The Court Should Reject CBD's Attempts to Conflate the Question of Whether an Agency Has Abused Its Discretion with the Question of Whether the Agency Failed to Proceed in the Manner Required by Law.

It is no surprise that CBD "strongly disagrees" that the question of whether an EIR precludes informed decisionmaking and informed public

participation goes to the question of prejudice, rather than the question of whether the agency failed to proceed in the manner required by law in the first instance. (CBD Brief, p. 16.) Both of CBD's arguments against this analytic framework fail, however.

First, CBD argues that the courts have the ability "to assess whether an EIR is adequate as an informational document" and nothing about section 21005 changes this. (CBD Brief, p. 17.) As discussed above, Real Party agrees that the courts can assess the adequacy of an EIR as an informational document. Such an assessment can be performed under either the failure to proceed standard or the substantial evidence standard, depending on the nature of the underlying claim. If the EIR is insufficient as an informational document, it is either because the EIR omits a discussion required by CEQA or because the agency's decisions about such things as the amount and type of analysis to include EIR are not supported by substantial evidence. If the court finds either of these types of omissions, the court should next consider, as a separate analytical step, whether the omission precluded informed decisionmaking and informed public participation (e.g., because a significant impact has gone undisclosed as a result of the agency's abuse of discretion). If it did, then the court should hold that the agency prejudicially abused its discretion under section 21005.

Second, CBD argues that *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215 (*Sierra Club*) correctly held that all failures to

comply with CEQA's procedures are presumptively prejudicial. (CBD Brief, p. 18.) Public Resources Code section 21005, subdivision (b), however, unambiguously states that the courts "shall continue to follow established principle that there is no presumption that error is prejudicial." Thus, to the extent that this Court suggested, in *Sierra Club*, that all procedural violations are presumptively prejudicial under CEQA, Real Party respectfully submits that the Court was mistaken, and should use this case as an opportunity to say otherwise.

It is worth noting that the Court in *Sierra Club* did *not* hold that *all* "procedural failures" are prejudicial. Rather, the Court applied the very two-part analysis advocated by Real Party in concluding that the respondent forestry board prejudicially abused its discretion. (See Reply Brief, § III.A.1, pp. 10–16.) The Court first held that the board abused its discretion by failing to collect any information regarding old-growth-dependent species on site. The Court next held that such an abuse of discretion "made any meaningful assessment of the potentially significant environmental impacts of timber harvesting and the development of site-specific mitigation measures impossible. *In these circumstances* prejudice is assumed." (*Sierra Club*, *supra*, 7 Cal.4th at pp. 1236–1237, italics added.) In other words, the Court assumed the error was prejudicial not because the agency violated CEQA's procedures, but because the agency's procedural violation precluded informed decisionmaking and informed public

participation regarding a potentially significant impact of the proposed project. (Accord *Neighbors*, *supra*, 57 Cal.4th at p. 465 [plurality of the court applying the same two-part analysis].)

C. The Court Should Reject LCJA's Arguments that CEQA's Procedural Requirements Mandate a Health Correlation Analysis.

Throughout its brief, amicus LCJA misquotes CEQA Guidelines section 15126.2, subdivision (a), as stating "'[t]he discussion [in an EIR] *shall* include relevant specifics of the area, the resources involved, physical changes [...and] health and safety problems caused by the physical changes.'" (LCJA Brief, pp. 1, 5, italics added by Real Party.) As discussed in Real Party's Reply Brief and in the amicus brief of the California Building Industry et al. (collectively "CBIA"), however, CEQA Guidelines section 15126.2, subdivision (a), uses the advisory term "should," not "shall." (See Guidelines, § 15005, subd. (b) [distinguishing "should" from "shall"].) For the reasons presented in Real Party's opening and reply briefs on the merits, the Friant Ranch EIR readily fulfills the advisory directive of Guidelines section 15126.2, subdivision (a), to discuss "relevant specifics" regarding the potential health consequences of the project's significant air quality impacts. (Opening Brief, § IV.B.2, pp. 39–44; Reply Brief, § III.B, pp. 22–27.)

LCJA also argues that were the Court to hold that CEQA does not require a health correlation analysis, such a result would translate into a

disproportionate impact on low income communities.[14] (LCJA Brief, § I.B, pp. 2–5, § I.C., p. 7.) While the social inequities described by LCJA are real and of concern for California, nothing in the administrative record suggests that air pollution from Friant Ranch would have disproportionate effects on any low income or minority communities; and the prospect of such an outcome was not an issue raised before the County administratively. As with AIR, there is no indication that LCJA has actually read the Friant Ranch EIR, and its brief makes no attempt to address the actual facts of this case. Instead, LCJA speaks in generalities that have little or nothing to do with the administrative record before the court.

Continuing in this vein, LCJA notes that there are screening tools that help the California Environmental Protection Agency (CalEPA) identify California communities that are disproportionately burdened by pollution. But CalEPA is required to do so under Public Resources Code section 71110, and not under CEQA. By its own terms,[15] section 71110

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[14] LCJA's brief is largely aimed at environmental justice concerns. While avoiding disproportionate environmental impacts to minority and low-income populations is unquestionably an important matter of public policy, CEQA does not require an analysis of environmental justice. In this respect, CEQA differs from the federal National Environmental Quality Act (NEPA) (42 U.S.C. § 4321 et seq.), which, through United States Executive Order 12898, requires federal agencies to address environmental justice effects in their NEPA documents.

[15] Section 71110 provides as follows:
The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following:

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applies only to CalEPA, and not to local agencies such as the County. To the extent that LCJA is arguing that the County was required, as a matter of law, to use CalEnviroScreen in its EIR, the Court should reject this argument, which has no basis whatsoever in the language of CEQA. Section 71110 creates no such duty and, in any event, the courts lack sufficient scientific expertise to determine which modeling methodologies lead agencies should use in assessing environmental impacts. (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.)

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(a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
(b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.
(c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.
(d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
(e) Coordinate its efforts and share information with the United States Environmental Protection Agency.
(f) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency.
(g) Consult with and review any information received from the Working Group on Environmental Justice established to assist the California Environmental Protection Agency in developing an agencywide strategy pursuant to Section 71113 that meets the requirements of this section.

D. The Court Should Reject AIR's Argument that Public Resources Code Section 21083.1 Does Not Limit the Court's Ability to Impose New Procedural Requirements under CEQA.

Amici AIR argues that the Court of Appeal did not impose a new substantive requirement in violation of Public Resources Code section 21083.1 because CEQA requires all significant impacts of the project to be analyzed in an EIR. (AIR Brief, p. 9.) Like the other arguments from AIR mentioned above, this one also lacks merit.

The Friant Ranch EIR analyzes all significant impacts of the Project, including air quality impacts. (AR 793–826.) The question before the Court is whether, in analyzing the Project's regional air quality impacts, the EIR was required to include an additional analysis *correlating* the Project's air emissions to specific health consequences. Nowhere in the Act or in the Guidelines does CEQA state that EIRs shall include health correlation analyses; yet the Court of Appeal held that the County violated CEQA's procedures by failing to include one. In doing so, the court imposed a new procedural requirement—to include in an EIR an analysis correlating a project's regional air emissions to specific health consequences—in violation of Public Resource Code section 21083.1.

As this Court recently explained, the Legislature, in enacting section 21083.1, intended to "'limit judicial expansion of CEQA requirements' and to "'"reduce the uncertainty and litigation risks facing local governments and project applicants by providing a 'safe harbor' to local entities and

developers who comply with the explicit requirements of the law.'"" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107 (*Berkeley Hillside*), quoting Assem. Com. on Natural Resources, Analysis of Sen. Bill No. 722 (1993–1994 Reg. Sess.) for hearing on July 12, 1993, p. 2.)

This case illustrates the uncertainties and risks that occur when an appellate court fails to follow the Legislature's explicit direction, in that Real Party and the County had no way to predict that the Court of Appeal would hold that CEQA requires EIRs to include health correlation analyses of the kind invented by that court. Here, in preparing the Friant Ranch EIR, the County followed all of CEQA's known procedural and evidentiary requirements, at considerable time and expense. The County responded, in good faith, to all the comments received on the Draft EIR, even to the comments received on the Final EIR. During that whole process, no one ever suggested that a health correlation analysis of regional air emissions should be conducted, let alone that such an analysis is required under CEQA's procedures. Yet, if this Court upholds the opinion below, the County would have to recommence the environmental review process to include in the EIR an analysis that is probably infeasible and that would not yield meaningful information. (See Amicus Curiae Brief in Support of Friant Ranch L.P. on Behalf of California Association of Environmental

Professionals and American Planning Association California Chapter, § IV.B, pp. 10–15, SJVUAPCD Brief, § II.A. pp. 3–10.)

That sort of outcome is precisely what the Legislature intended to prevent in enacting section 21083.1. This Court should therefore reject AIR's argument that Public Resources Code section 21083.1 does not impose limits upon the judiciary's ability to impose new analytic requirements for EIRs' discussions of significant impacts.

E. Friant Ranch's Operational Air Quality Mitigation Measure Complies with CEQA.

1. The EIR provides sufficient detail regarding the effectiveness of Mitigation Measure #3.3.2.

Amici AIR argues that the EIR violates CEQA by not discussing the amount by which Mitigation Measure 3.3.2 ("MM #3.3.2") would reduce emissions. (AIR Brief, § III.A, pp. 10–11.) As with its other claims, AIR offers no citations to the administrative record in support of this contention, and it does not appear that AIR has even read the Friant Ranch EIR. That document discloses the effectiveness of MM #3.3.2 by explaining that the measure would "reduce project air quality impacts, but not below the [SJVUAPCD's] thresholds of significance." (AR 826.) The air district's thresholds are identified earlier in the chapter. (AR 807, 4942 [errata].) Thus, the EIR sufficiently discloses the effectiveness of MM #3.3.2.

Although MM #3.3.2 is prefaced with the statement that the measures it imposes "will substantially reduce air quality impacts,"

ultimately the EIR discloses that this reduction will not be so substantial as to mitigate the impact to below the thresholds of significance set forth in the EIR. CEQA does not require perfection, and the Court should refuse to hold, as the Court of Appeal did, that the County prejudicially abused its discretion simply by using the word "substantial" in the introductory paragraph of MM #3.3.2. (Guidelines, § 15151; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073–1074 [EIR's mistaken conclusion in classifying the severity of an impact was not prejudicial error because the report set forth all the pertinent data and followed all the procedures]; *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 226 [discrepancy in EIR understating the project's water demand did not constitute prejudicial error because the mistake did not affect the conclusion that the impact was less than significant].) The Court of Appeal therefore erred in holding that MM #3.3.2 violates CEQA because it includes words stating that the measure would "substantially" reduce the Project's air quality impact. (Opn. pp. 58–59.)[16]

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[16] The Court of Appeal should never even have addressed this issue because no one raised it during the administrative process. (§ 21177; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535; see also AR 4620–4621 [the only comment submitted to the County regarding the adequacy of MM # 3.3.2 does not object to the EIR's use of the word "substantial"].)

Furthermore, as discussed by amici CBIA, the Project, through compliance with Rule 9510 (Indirect Source Rule), must mitigate its operational emissions for NO_x by 33 percent over a period of ten years and reduce its PM_{10} emissions by 50 percent over the Project's operational baseline. (CBIA Brief, pp. 24–25.) Through compliance with the Indirect Source Rule, emissions will be reduced to the levels required by Rule 9510. (*Ibid.*; see also AR 4620–4621 [explaining MM #3.3.2 and the need to comply with Rule 9510]; see also AR 795–797, 824–825, 4556–4457, 4790, 18812–18831.)

For these reasons, and those set forth in Real Party's briefs on the merits and in the amicus brief of CBIA, AIR is mistaken in stating that the EIR lacks insufficient detail regarding the effectiveness of MM #3.3.2.

2. Mitigation Measure #3.3.2 is fully enforceable.

AIR next argues that MM #3.3.2 is unenforceable based on the same reasoning used by the Court of Appeal. AIR makes no attempt to rebut the arguments made by Real Party in its briefs before this Court. Like the Court of Appeal, AIR ignores the fact that the County adopted a Mitigation Reporting Program (MMP) when it approved the Project, and will enforce MM #3.3.2 through compliance with the MMP. (AR 166; see also AR 634–635 [EIR explaining enforcement of the MMP], 9899 [Friant Ranch Specific Plan, explaining administration and enforcement of the mitigation measures]; see also § 21081.6, subd. (a)(1).) Also like the Court of Appeal,

AIR ignores the fact that, because the Project is a plan-level project, not every item listed in MM #3.3.2 will be feasible and appropriate for every project-level entitlement ultimately proposed under the Specific Plan and Community Plan Update. For the reasons presented in Real Party's opening and reply briefs, substantial evidence demonstrates that MM #3.3.2 is fully enforceable, and the Court should reject AIR's arguments. (Opening Brief, § IV.C.2, pp. 54–58, Reply Brief, § III.C.1, pp. 27–32; see also CBIA Brief, § II.A.3., pp. 14–17 [explaining programmatic nature of EIR], 23.)

3. Mitigation Measure #3.3.2 is not impermissibly deferred.

AIR concurs with the Court of Appeal that MM #3.3.2 is impermissibly deferred because it provides that the County and the Air District may substitute equally or more effective mitigation measures during the review of future entitlements under the Specific Plan and Community Plan by the County and the Air District. (AIR Brief, § III.C, pp. 12–13.) Once again, AIR does not address the arguments made by Real Party before this Court. Instead, like the Court of Appeal below, AIR ignores the fact that established legal principles under CEQA allow a lead agency to substitute equally or more effective mitigation measures for the ones adopted, provided that there are "legitimate reasons" for the changes. Where the changes would give rise to the grounds for preparing a subsequent or supplemental EIR, such documentation may be a necessary first step in that process. (*Napa Citizens for Honest Gov. v. Napa County*

Bd. of Supervisors (2001) 91 Cal.App.4th 342, 357–360.) The mere fact that MM #3.3.2 (like all mitigation measures) is potentially subject to change does not mean that it is impermissibly deferred. (Opening Brief, § IV.C.1, pp. 48–54, Reply Brief, § III.C.2, pp. 32–36; see also CBIA Brief, §§ II.2.A.3, pp. 14–17, II.B, pp. 20–25.) For the reasons presented in Real Party's briefs and in the amicus brief of CBIA, therefore, the Court should reject AIR's contention that MM #3.3.2 is impermissibly deferred.

Amicus CBD argues that CEQA requires all deferred mitigation measures to include specific performance standards. (CBD Brief, § III.B, pp. 22–23.) In support of this contention, CBD cites CEQA Guidelines section 15126.4, subdivision (a)(1)(B). That section states, however, that if the formulation of mitigation is deferred, the "measures *may* specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." (Guidelines, § 15126.4, subd. (a)(1)(B), italics added.) The word "may," as opposed to "shall," in Guidelines section 15126.4, subdivision (a)(1)(B), strongly suggests that the Resources Agency recognizes that it may not be necessary or even possible to provide specific performance standards for

every mitigation measure.[17] Such is the case here. (Reply Brief, pp. 34–36; see also CBIA Brief, pp. 15–17.)

Lastly, CBD misunderstands some of Real Party's arguments, suggesting that Real Party contends that CEQA's requirements for mitigation measures simply do not apply when an impact is significant and unavoidable. (CBD Brief, pp. 23–24.) CBD is mistaken. Real Party in no way disputes that CEQA requires an agency to adopt feasible mitigation measures to minimize significant impacts regardless of the level of significance ultimately achieved. (Reply Brief, p. 33, citing § 21002, 21081, subd. (a), Guidelines, § 15370.) Real Party's point is only that performance standards are one type of evidence that an agency can use to demonstrate that deferred mitigation measures will actually reduce impacts to less-than-significant levels. (Opening Brief, pp. 48–49 [explaining the development of case law concerning deferred mitigation and how performance standards were developed as a means to justify less-than-significant conclusions, and citing *Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1020–1023, 2030, and *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306–308].) Where mitigation measures cannot be formulated at the time the EIR is

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[17] See Guidelines, § 15005, subd. (c) ("'[m]ay' identifies a permissive element which is left fully to the discretion of the public agencies involved").

prepared, but it is also not possible to identify performance standards that will ensure the impacts are reduced to less-than-significant levels, an agency should conclude that the impact is significant and unavoidable because it lacks substantial evidence to support the conclusion that the impact would be mitigated to less-than-significant levels. (*Fairview Neighbors v. County of Ventura* (1 999) 70 Cal.App.4th 238, 244–245.)

For these reasons, and those presented in Real Party's briefs on the merits and CBIA's brief, this Court should hold that the Court of Appeal erred in holding that the MM #3.3.2 is impermissibly deferred under CEQA.

III.
CONCLUSION

The Court should reject the arguments of NCRA, CBD, AIR, and LCJA in support of Appellants, and hold that the Court of Appeal erred in concluding that the courts review de novo the sufficiency of EIRs' discussions of required topics. Instead, the substantial evidence standard of review applies to such claims. The Court should also reverse the Court of Appeal's holding that the Friant Ranch EIR's air quality analysis violates CEQA. The analysis complies with all of CEQA's procedural requirements and is supported by substantial evidence. Finally, the Court should reverse the appellate court's holding that MM #3.3.2 violates CEQA, and should

uphold that mitigation measure because it is enforceable, is not impermissibly deferred, and otherwise complies with CEQA.

Respectfully submitted,

Dated: June 10, 2015

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this ANSWER TO *AMICI CURIAE* BRIEFS OF ASSOCIATION OF IRRITATED RESIDENTS ET AL., CENTER FOR BIOLOGICAL DIVERSITY, LEADERSHIP COUNSEL FOR JUSTICE AND ACCOUNTABILITY, AND NORTH COAST RIVERS ALLIANCE contains 11,252 words, according to the word counting function of the word processing program used to prepare this brief.

Executed on this 10th day of June 2015, at Sacramento, California.

JAMES G. MOOSE

Sierra Club et al. v. County of Fresno et al.
Supreme Court of California Case No. S219783
(Fifth District Court of Appeal Case No. F066798;
Fresno County Superior Court Case No. 11CECG00726)

PROOF OF SERVICE

I, Bonnie Thorne, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814 and email address is bthorne@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

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☒ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as listed below

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 10th day of June, 2015, at Sacramento, California.

_____
Bonnie Thorne

Sierra Club et al. v. County of Fresno et al.
Supreme Court of California Case No. S219783
(Fifth District Court of Appeal Case No. F066798;
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