**No. S219783**

# IN THE SUPREME COURT OF CALIFORNIA

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

v.

**COUNTY OF FRESNO and FRESNO COUNTY BOARD OF SUPERVISORS**
Defendants and Respondents

**FRIANT RANCH, L.P.**
Real Party in Interest and Respondent



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

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

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## Appellants' Consolidated Answer to Amici Curiae

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## Treatise

## Introduction and Summary of Answer to Amici

The Friant Ranch EIR does not comply with the statutory and regulatory requirements of CEQA — *as a matter of law* — because it omits analysis of significant project-generated air quality impacts and fails to comply with substantive standards to mitigate them.

Amici curiae supporting Friant Ranch see things differently. They argue that it was within the discretion of the County to limit the scope of EIR analysis. Above all, they contend that absent this discretion, project applicants cannot be assured of 'certainty and predictability' in the environmental review process. Therefore, they insist that an agency that certifies an EIR as the basis of approving a project is the final judge of its compliance with CEQA.

But CEQA does not support such a reading. The Legislature streamlines timelines to balance the unavoidable project delay attending environmental review. Pub. Resources Code, § 21167. But mandated environmental analysis is not trumped by any guarantee of 'certainty and predictability' to agencies and applicants.

Our unique California environment would lose fundamental protections, and the policies of CEQA could not be fulfilled if agency compliance were to be adjudicated under a highly deferential standard of review. While the Legislature grants agencies substantial powers to administer CEQA, the Friant Ranch amici cannot point to

any authority that allows agencies to judge their own compliance with the mandates of the statewide Act.

All public agencies of course contend that their efforts to comply with CEQA are sufficient. And because their environmental consultants are experts, agencies always find that substantial evidence supports EIR certification. Yet this Court and the California Courts of Appeal and Superior Courts have cogently ruled in scores of important cases over four decades — to the great benefit of our California environment— that lead agencies at times *fail to follow the mandates of CEQA in preparing and certifying their EIRs.*

Interpretation of mandates of the Public Resources Code and Guidelines presents issues of law that require statutory construction and judicial consideration of the intent of the California Legislature and the Resources Agency. *Friends of Sierra Madre v. City of Sierra Madre* (2001) 24 Cal.4th 165, pp. 188-190. The opinions of an agency's environmental consultants regarding compliance with CEQA are not entitled to the same deference as their opinions regarding factual matters, such as significance of a project's impacts.

## Discussion

To the extent that arguments presented by the amici for Friant Ranch are addressed in the Answer Brief on the Merits, in the amicus briefs filed in support of appellants by the Association of Irritated Residents, Center for Biological Diversity, Coalition for Clean Air, Leadership Council for Justice and Accountability, Medical Advocates for Healthy Air, and the North Coast River Alliance, and in the neutral brief submitted by amicus South Coast Air Quality Management District (South Coast AQMD), including review of relevant case law, those discussions are not repeated here.

Further, this brief will not respond to inflammatory arguments by Friant Ranch amici that are unsupported by citation to authority. Appellants also will not discuss the full extent to which appellate decisions conflict with one another regarding the standard of review for EIR adequacy, *both before and after* this Court's explication of CEQA's dual standards of review in *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

The Slip Opinion was correctly decided, consistent with this Court's ruling in *Vineyard*. The judgment should be affirmed.

### A. To Decide *Issues of Law* as to EIR Adequacy, Courts Review the *Facts* in the Record

Amici for the Friant Ranch have focused on what they mischaracterize as 'factual' determinations that are best left to the County rather than being reviewed as questions of law by a court.

For example, the League of Cities, *et al.*, contend that the adequacy of an EIR's analysis of environmental impacts "must be reviewed under the substantial evidence test because [it] necessarily turn[s] on underlying facts and matters of judgment and informed opinion." Amicus Brief of League of Cities, p. 17. The League worries that otherwise courts will be "thrust into roles of factfinders, expert witnesses, and policymakers." *Id.*, p. 31. Similarly, the Association of Environmental Professionals (AEP), *et al.*, contends that *aside from* a "wholesale omission of any information on a topic, all issues dealing with factual determinations" must be deferentially reviewed for substantial evidence. Amicus Brief of AEP, pp. 5-10.

That is not what this Court held in *Vineyard.* While all CEQA issues are resolved by reference to facts in the record, not all issues thereby morph into 'questions of fact' or 'factual determinations.' Reviewing courts never resolve questions of fact, but must determine CEQA compliance based on the facts in the administrative record.

For example, in this case the Court resolved the legal issue of whether the EIR omitted a required analysis based upon undisputed facts: that project-generated air pollution emissions from Friant Ranch will far exceed air district thresholds of significance and that air pollution causes health problems. Based upon these undisputed facts, the legal question is whether the EIR must analyze the potential adverse health effects associated with this project's significant air pollution emissions. Resolution of the issue does not require the Court to make a factual determination. It requires the Court to interpret the law and apply it to the undisputed facts.

Every alleged CEQA violation presents an issue of law based on the certified record. That is why appellate review is de novo. *Vineyard, supra*, 49 Cal.4th 412, p. 427. The question is "whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements." *Vineyard, supra,* 49 Cal.4th 412, p. 722, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.553, p. 564. While an "agency's substantive conclusions" are deferentially reviewed for substantial evidence, *id.*, p. 723, whether an EIR's analysis complies with mandated CEQA requirements is not a 'substantive' factual matter. It is a matter of law.

In *Vineyard*, this Court found that the scope and content of an EIR's water supply analysis was inadequate *as a matter of law*. *Vineyard, supra*, 49 Cal.4th 412, pp. 442-444. The Court's approach logically applies to parallel questions regarding the adequacy of any CEQA process or EIR. CEQA provides no authority that could give an agency the discretion to determine the adequacy of its own CEQA document or process simply as a matter of law.

The administrative record — the evidence — must always be reviewed to decide both (1) whether an agency has complied with mandated CEQA procedures and also (2) whether its substantive factual conclusions are supported by substantial evidence. Both inquiries are resolved via review of those facts in the record. Yet the standards of review for issues (1) and (2) differ as they are issues of law versus issues of fact.

Complicating discussion of the standard of review (even for cases post-dating *Vineyard*) is that some cases, such as *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, [incorrectly] recite the substantial evidence standard as if applicable to the scope of EIR analysis — and then [correctly] treat and decide the issue as one of law by applying the facts to CEQA's requirements. *Id.*, pp. 1546–1562. Others, like *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th 214, treat

the issue of EIR adequacy as one of law without specifically saying so although reciting *Vineyard*'s explication of the dual standards of CEQA review. *Id.*, pp. 232, 237.

Once an agency prepares an EIR that complies with CEQA's information disclosure requirements, its findings as to significance of environmental impacts and the feasibility of mitigation and alternatives are appropriately reviewed for substantial evidence. *Vineyard, supra,* 49 Cal.4th 412, pp. 722-723. This makes sense: by the time an agency makes decisions as to project approval and CEQA findings, its discretion is informed via objective environmental analysis within a prescribed public process. Agencies may then choose how to resolve any dispute among the environmental experts; that is the prerogative of decisionmakers empowered by the electorate to make informed land use decisions.

### B. Public Policy Supports Adjudicating the Adequacy of EIR Analysis as a Question of Law

Throughout the briefs of the amici supporting Friant Ranch, various matters of public policy are presented as if codified by statute. They are not. These include whether reviewing EIR adequacy for 'failure to proceed in the manner required by law' will burden courts with technical environmental decisions or will prevent desired 'certainty and predictability' for agencies and project sponsors.

### 1. Whether the EIR Analysis is Adequate is Appropriate for Independent Judicial Review

Some amici contend that agencies "undertake a myriad of subordinate decisions about the scope, analytical methods, and ultimate content of the EIR," and that their decisions should be deferentially reviewed for substantial evidence because they are most well-equipped to deal with technical issues. *E,g*, Amicus Brief of League of Cities, p. 1 and *passim*.

This characterization mixes up different questions. While some subsets of EIR analysis are necessarily based upon the nature of a project — a factual matter —within the discretion of an agency, such as the choice of appropriate analytical methodology, the legal standard for determining the scope of analysis is *not* a factual matter, because it is prescribed by statute. Thus, when determining whether an agency employed the correct legal standard in choosing the scope of analysis or methodology, etc., a reviewing court must exercise its independent judgment. *Ebbetts Pass Forest Watch v. California Department of Forestry* (2008) 43 Cal.4th 936, p. 954.

The claim by amicus League of Cities that a finding of failure to proceed in the manner required by law should be "rare" and is most appropriate when discussion of a required topic in an EIR is "hopelessly conclusory and devoid of substantive information" is

unsupported. Amicus Brief of League of Cities, p. 2. Nor does a finding of EIR inadequacy require that an agency have egregiously misrepresented or omitted significant information. *Ibid.* This argument undervalues the importance of an EIR as both an informational document and one of accountability.

CEQA unambiguously provides that public agencies should not approve projects with significant impacts if there are feasible alternatives and mitigations that can reduce impacts. Pub. Resources Code, § 21002. In considering the adequacy of an EIR, courts look for "adequacy, completeness, and a good faith effort at full disclosure." Guidelines, § 15151. That "good faith effort" is influenced by what is "reasonably feasible" in terms of obtaining environmental information. (*Ibid.*)[1] In preparing an EIR, "an agency must use its best efforts to find out and disclose all that it reasonably can." Guidelines, § 15144. Courts review evidence in the certified record to decide whether agencies have complied with those directives.

Among the cases relied upon by Friant Ranch amici to limit legal challenges to the adequacy of EIR analysis by urging application of the substantial evidence standard is *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th

889. That case reiterates an oft-repeated quote from a pre-*Vineyard* case, *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184:

> We apply the substantial evidence test to conclusions, findings, and determinations, and to challenges to *the scope of an EIR's analysis of a topic*, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions.

*Id.*, p. 898, italics added, citing *Bakersfield, supra*, p. 1198.

This sentence from *Bakersfield* misapplies CEQA through its inclusion of "challenges to the scope of an EIR's analysis of a topic" as if a "factual question." A review of *Bakersfield* shows that this problematic phrase and holding was a quote from an earlier case, *Federation of Hillside Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, p. 1259, which in turn quotes the sentence from an even earlier case, *Barthelemy v. Chino Municipal Water Basin District* (1995) 13 Cal.App.4th 1609, p. 1620. *Barthelemy* quotes the same sentence, which it turns out was not written by any court but is a line from a CEB treatise: 1 Kostka & Zischke, *Practice Under the*

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[1] The Guideline does not state that agencies can refuse to conduct analysis based on expediency. Amicus Brief of League of Cities, pp. 7-8.

*Cal. Environmental Quality Act.* (Cont.Ed.Bar 1995) § 12.5, at pp. 464-465. And it appears in many more cases. *See* Amicus Brief of the California Building Industry Association, p. 9.[2]

Regardless, most of the cases cited by amici predate this Court's opinion in *Ebbetts Pass, supra,* 43 Cal.4th 936, p. 954, which, based on *Vineyard,* has clarified the standard of review:

> Whether the preparer of [an EIR] and [the lead agency] applied the correct legal standard to determine the scope of analysis is a predominantly procedural question we review independently, but the correctness of factual findings predicate to the standard's application (for example, delineation of the circumstances under which a future action is likely to occur) is a predominantly factual matter we review only for substantial evidence.

In short, an agency's conclusions, findings, determinations, methodology, and the accuracy of EIR data are indeed fact-based.

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[2] Although the California Building Industry Association contends that this Court held that "lead agencies, not the judiciary, have the resources and expertise to determine" the scope of analysis in EIRs, *Laurel Heights Improvement Association v. UC Regents* (*Laurel Heights 1*) (1988) 47 Cal.3d. 376, p. 393 does not say so but instead references the substantial evidence standard applied by Public Resources Code section 21091 to support agency *findings* of CEQA compliance. And the citation to *Laurel Heights Improvement Association v. UC Regents* (*Laurel Heights 2*) (1993) 6 Cal.4th 1112, p. 1135, as if applying the substantial evidence standard to "the scope of an EIR's analysis of a topic" is also unsupported. Amicus Brief of Building Industry Association, pp. 9, 12.

When deciding environmental issues with technical elements, *courts reviewing CEQA cases do not resolve scientific disputes.* "Scientific and expert work" will not be "subjected to second-guessing by judges." Amicus Brief of AEP, p. 4. However, the question of whether the discussion and consideration of scientific and expert work are adequate to inform both the public and the discretion of the decisionmakers is answered by reference to the legal standards set forth in the statute and the CEQA Guidelines. Amicus Brief of North Coast Rivers Alliance, pp. 8-10.

Cases like *Vineyard* that find EIR analysis to be insufficient recognize that a gap in information prevents the consideration and mitigation of environmental impacts — as a matter of law. As held in *Laurel Heights 1, supra,* 47 Cal.3d 376, pp. 392-393, "The court does not pass on the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." Amicus Brief of South Coast AQMD, p. 19.

The South Coast AQMD agrees that the substantial evidence standard does not apply to some issues of EIR analysis:

> ... CEQA's requirements are stated broadly, and courts must interpret the law to determine what level of analysis satisfies CEQA's mandate for providing meaningful information, even though the EIR discusses the issue to some extent.

Amicus Brief of South Coast AQMD, p. 23. The AQMD references some inadequate EIR analyses that have been treated as issues of law, including *Vineyard*'s EIR analysis of water supply and the water level baselines found deficient in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, pp. 954-955. *Id.*, pp. 23-24, *see* p. 25, also citing *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, p. 1123 [inadequate noise impact analysis].

Appellants disagree with the South Coast AQMD to the extent that it suggests that the feasibility of conducting EIR analysis is a purely factual question. Amicus Brief of South Coast AQMD, p. 20. Whether a requested analysis is feasible must be determined according to what CEQA requires based upon the predicate facts and not on agency preference or policy.

Neither CEQA nor public policy supports granting deference to agencies to decide whether the scope of environmental analysis in their own EIRs complies with CEQA's informational requirements.

**2. CEQA does not Guarantee Certainty or Predictability**

Amici for Friant Ranch argue under the guise of 'practical consequences' that recognizing courts' independent judgment to determine whether an agency's EIR adequately analyzes environmental impacts will mean that agencies and developers "can

seldom be certain that an EIR will be found legally adequate ..." Amicus Brief of League of Cities, p. 5. Appellants appreciate that agencies and developers prefer certainty in the legal arena, like all litigants, but nothing in CEQA compromises environmental protection for such certainty. The point of CEQA is to benefit all Californians by mitigating the significant environmental impacts of proposed development when and to the extent it is feasible to do so. *E.g.*, Pub. Resources Code, §§ 21000-21002.

In adopting CEQA, the Legislature provided for expedited litigation timelines and also specifically directed that the mandates of the law not be interpreted beyond the explicit provisions in the statute and the CEQA Guidelines. Pub. Resources Code, §§ 21083.1, 21167. But this Court should not expand the scope of agency discretion and the reach of the substantial evidence standard.

Amicus League of Cities asks the Court to restrict the judicial consideration of agency compliance with CEQA in order to provide "certainty and predictability" to agencies and project applicants and dissuade citizens from challenging agencies' compliance with CEQA. Amicus Brief of League of Cities, p. 41. The League offensively implies that many petitioners that "initiate and pursue CEQA claims" seek to "use CEQA litigation as a tool" for the oppression and delay of projects. *Ibid.* This Court knows better, as the CEQA cases that it

has reviewed and is now reviewing demonstrate that petitioners like appellants Sierra Club, Revive the San Joaquin, and League of Women Voters in Fresno are private attorney general advocates for CEQA and environmental protection in the public interest — concerned about the serious impacts to public health accompanying the significant air pollution impacts of the Friant Ranch project.

This case has nothing to do with encouraging or dissuading litigation. CEQA provides many protections for agencies and real parties, but its primary goal is environmental disclosure and protection, not 'certainty and predictability' for the County of Fresno and Friant Ranch. *After* a lead agency complies with CEQA by preparing an adequate EIR and adopting feasible mitigations and alternatives, it can exercise its informed discretion and make land use decisions that balance environmental impacts and project benefits — supported by substantial evidence. That did not happen here, just as in *Vineyard* and other landmark decisions of this Court.

Ironically, as pointed out by amicus North Coast Rivers Alliance (at p. 22), it not at all surprising that in "acknowledging the presence of an issue while ignoring its magnitude," the Friant Ranch EIR did not comply with CEQA. There was in fact a fair amount of certainty and predictability.

The equities in this appeal favor appellants.

### C. The EIR Omitted Required Analysis

Appellants agree with the South Coast AQMD and the amici for Friant Ranch that a reviewing court should defer to a lead agency's decision regarding feasibility of providing *additional* requested information or analysis. Amicus Brief of South Coast AQMD, p. 2; Amicus Brief of League of Cities, p. 28; Amicus Brief of AEP, p.10. But this is true only if the agency has already provided the base analysis required by law. Here, the issue is whether the County failed to proceed in the manner required by law when the EIR omitted required analysis, not whether it was feasible to provide 'additional' information or analysis.

The City's EIR comment letter cited Guidelines section 15126.2, subdivision (a), and pointed out that the EIR's impact analysis failed to disclose "the human health related effects of the Project's air pollution impacts." AR 4602. The City did not request 'additional' information or studies; it contended that the EIR omitted material analysis relevant to the significance of the project's air quality impacts. In fact, the EIR's analysis of air quality impacts covers about 20 pages and never mentions potential health impacts relating to the project's emissions. AR 807-826. The comment letter advised the County that it was not proceeding in the manner required by law because the EIR omitted a required analysis.

The amici for Friant Ranch concur that the question of whether an EIR omitted a required analysis is reviewed de novo because it involves a determination of whether an agency proceeded as required by law. Amicus Brief of California Building Industry Association, p. 12; Amicus Brief of AEP, p. 9; Amicus Brief for League of Cities, p. 3. The Slip Opinion concluded that the EIR was defective "because it does not analyze the adverse human health impacts that are likely to result from the air quality impacts identified in the EIR" as required by Guidelines section 15126.2 subdivision (a). Opinion, p. 50.

Friant Ranch cannot dispute that the analysis is missing. Instead, its argument focuses upon the Slip Opinion's use of the term "correlation analysis" when describing omitted analysis of human health impacts. Admittedly, Guidelines section 15126.2 subdivision (a) does not explicitly require "correlation analysis." However, the problem with the EIR is the omission of any analysis of health problems associated with significant project air quality impacts.

Appellants also disagree with amicus California Business Industry Association's argument that the County had discretion to omit an analysis of the potential health problems associated with the project's significant air pollution emissions because the discussion is not a 'mandatory element' of an EIR. Amicus Brief of California

Business Industry Association, p. 13.

According to Guidelines section 15005 subdivision (a), the words "must" or "shall" identify "a mandatory element which all public agencies are required to follow." Guidelines section 15126.2 subdivision (a) mandates that an EIR "shall identify and focus on the significant environmental effects of the proposed project." Thus, in addition to mandatory elements that every EIR "must" include, a particular EIR "shall" also analyze impacts of the proposed project.

Here, even though the Guidelines do not mandate that every EIR must include analysis of significant air quality impacts, in this case the County could not reasonably omit that analysis. Since it is undisputed that the Friant Ranch project would have significant air pollution impacts and that its emissions contain pollutants that pose a threat to human health, the EIR was required to analyze potential adverse health impacts associated with this project's emissions.

Notably, Friant Ranch amici AEP *et al.* have no quarrel with the Slip Opinion's conclusion that "there must be some analysis of the correlation between the Project's emissions and human health impacts." Amicus Brief of AEP, p. 11. Nor do amici argue with the Court's use of the term "correlation analysis." *Ibid.* The problem, they argue, is that the Court should not have insisted that the analysis "should have correlated the magnitude of the air quality

impacts to health effect outcomes." *Id.*, pp. 11-12. But this is not what the Slip Opinion says.

Although the Court references "the lack of information about the potential magnitude of the impact on human health" and the inability of "the public and decision makers [to] have some idea of the magnitude of the air pollutant impact on human health," the Court did not require a correlation between the magnitude of air quality impacts and health effect outcomes. Opinion, p. 49.

Nor does the Opinion say that the EIR must include "an analysis attempting to take 'tons per year' regional mass emissions data and directly translate that into precise pollutant concentrations, and hence project-specific health effects," which AEP contends would not be practical or meaningful. Amicus Brief of AEP, p. 14. To the contrary, the Court explained that it is not possible to glean an understanding of the project's potential adverse health effects from data regarding its air pollution emissions because there is no analysis. Opinion, pp. 48-49. The Court did not require a particular type of analysis:

> The foregoing references to the data provided in the EIR should not be interpreted to mean that County must connect the project's levels of emissions to the standards involving days of nonattainment or parts per million. County has discretion in choosing what type of analysis to provide and we

> will not direct County on how to exercise that discretion. (§ 21168.5.) Nonetheless, there must be some analysis of the correlation between the project's emissions and human health impacts. (*Bakersfield Citizens, supra*, 124 Cal.App.4th at pp. 1219-1220.) 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.

*Ibid.* This conclusion is entirely consistent with this Court's holdings in *Ebbetts Pass* and *Vineyard.*

Amicus San Joaquin Valley Unified Air Pollution Control District (San Joaquin Valley APCD) 's concern is that the Court's holding "requiring correlation between the project's criteria pollutants and local health impacts, departs from the Air District's Guidance and approved methodology for assessing criteria pollutants." Amicus Brief of San Joaquin Valley APCD, pp. 4-5. This is an understandable concern since the Air District's methodology is not designed to analyze health problems associated with a project's impacts on air quality.

Unlike a lead agency charged with preparing an EIR, an air district is not responsible for analyzing adverse health impacts associated with a project's significant air pollution emissions. *Id.*, pp. 7-9; Amicus Brief of South Coast AQMD pp. 2-8. Further, the fact that an air district may not have the tools or framework for the

analysis cannot excuse the lead agency — the County — from its duty to provide meaningful analysis of the potential health impacts associated with significant project-generated air pollution.

Amicus San Joaquin Valley APCD's explanation as to why it is not possible to use currently-available scientific data to explain the project's potential to adversely impact human health is both confirming and disturbing. It confirms that the numbers say nothing about the cause-and-effect relationship between project-generated air pollution and potential adverse impacts to human health.[3] At least for purposes of these proceedings, everyone agrees that it is not possible to extrapolate a correlation between potential adverse health problems associated with project-generated air pollution and data regarding the tons per year of criteria air

[3] This refutes Friant Ranch's suggestion that the public can infer the significance of adverse health impacts associated with the project from the fact that project-generated emissions exceed Air District thresholds of significance.

pollution emissions this project will generate.[4]

However, the San Joaquin Valley APCD's suggestion that it is not possible to explain the potential adverse health impacts associated with pollution emissions from a sprawl development

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[4] This is consistent with appellants' argument in the Court of Appeal:

> There is no meaningful analysis of the adverse health effects from what the numbers would suggest are so far above the threshold that it begs for further explanation. 'CEQA's fundamental goal [is] that the public be fully informed as to the environmental consequences of action by their public officials.' (*Laurel Heights, supra*, 47 Cal.3d at p. 404.) 'To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions.' (*Id.* at pp. 404-05.) After reading the Friant Ranch EIR, the public has no understanding of the difference between a project that exceeds the Air District thresholds by 20 tons and one that exceeds the threshold by 100 tons. Nor is it possible to understand how the bare numbers translate into adverse health impacts.

Appellants' Opening Brief, p. 44.

> Here, the EIR identifies the amounts by which this project will exceed Air District thresholds, but fails to provide a reasoned analysis or explanation of what the numbers mean in terms of how the Project will *change* the environment and what health impacts can be expected from these changes. (Guidelines, § 15126.2, subd. (a); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 662 [EIR lacked reasoned analysis to support conclusion].) The County merely concludes, based upon the numbers, that the impact is significant and unavoidable.

Appellants' Reply Brief, p. 54.

project of this size in the San Joaquin Valley is disturbing.[5] Fortunately, the South Coast AQMD acknowledges that "there may be a less exacting, but still meaningful analysis of health impacts that can feasibly be performed." Amicus Brief of South Coast AQMD, p. 2.

Appellants agree that "how" the correlation between the project's significant air quality impacts and human health impacts can "most realistically" be analyzed and explained to the public and the Board of Supervisors may be tackled by the lead agency's environmental experts. See *Communities For A Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, p. 328. But there must be actual analysis or a meaningful explanation for the lack of analysis. Both are missing from this EIR.

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[5] Appellants urge this Court not to decide this case based upon San Joaquin Valley APCD's proffered opinion that it is not feasible to analyze the correlation between the project's significant air quality impacts and adverse health effects. Aside from being counter-intuitive, this information was not presented to the public or to the Fresno County Board of Supervisors during the EIR process. This is new information. As this Court recognized in *Vineyard*, it is irrelevant that the Air District can "explain or supplement matters that are obscure or incomplete in the EIR ... because the public and decision makers did not have the briefs available at the time the project was reviewed and approved." 40 Cal.4th 412, p.443. There has been no opportunity for the public or other agencies to challenge the Air District's opinion nor debate the public policy implications of approving sprawl development without an understanding of associated impacts on human health.

### D. The Final EIR Failed to Explain its Failure to Provide Required Analysis in Response to Comments

Appellants agree with the South Coast AQMD that this Court should hold that "lead agencies must explain the basis of any determination that a particular analysis is infeasible in the EIR itself." Amicus Brief of South Coast AQMD, p. 20.[6] The County's response to the City's EIR comment does not reflect that it considered whether the omitted analysis was feasible. Its contention that it was not feasible to perform a Health Risk Assessment was not responsive. AR 4602.

CEQA Guideline section 15126.2 subdivision (a) requires analysis of potential health problems caused by a project's significant air quality impacts. That is not the same as a Health Risk

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[6] Appellants also agree that this Court should affirm that lead agencies should consult with air districts for help in determining how to explain the correlation between project-generated air pollution and potential health problems. Amicus Brief of South Coast AQMD, pp. 26-28.

Assessment.[7] *Ibid.* The County should have known that Guideline section 15126.2 subdivision (a) has been interpreted as requiring that "the health impacts resulting from the adverse air quality impacts must be identified and analyzed." *Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th 1184, p. 1220.

If, as Friant Ranch claims, it was not feasible for the County to identify and analyze the health impacts resulting from the project's adverse air quality impacts, as required by Guideline section 15126.2 subdivision (a), the EIR's response to comments should have said so and provided a meaningful explanation of the infeasibility. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, p. 722 (*Santa Clarita*).

That explanation should have included some indication that the County made a good faith effort to find or develop an acceptable methodology or analytical framework for helping the public and the

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[7] Is it possible that the City was confused regarding the difference between toxic air contaminants and criteria air pollutants or between the type of analysis required by the Health & Safety Code (Health Risk Assessment) and the type of analysis required by section 15126.2 subdivision (a)? Yes. But it does not matter. The County was on notice that there was a problem with its analysis and should have taken a second look at whether the analysis included what the Guideline says it should be. Although the Guideline does not require a Health Risk Assessment, it requires analysis of the potential for a project's significant air pollution emissions to cause health problems.

Board of Supervisors understand the magnitude of the issue.[8] Since it is clear that the methodology used for determining whether a project exceeds the Air District's thresholds of significance did not provide the needed information, the requested analysis could not be "merely cumulative, redundant or inconsequential." See Amicus Brief of League of Cities, p. 25.

Similarly, the amicus brief of the California Building Industry Association (at p.11) implies that the County has discretion to decide that the potential adverse health effects of a project's significant air pollution emissions are not relevant to an EIR's analysis of the significance of air quality impacts.

First, the notion that the correlation between a project's air pollution emissions and health problems is not relevant to the determination of the significance of its air quality impacts is unfounded. Second, as with the determination of feasibility, if the County decided that potential adverse health effects were not relevant to the air quality impacts analysis, the EIR should have said so and explained why. *Santa Clarita, supra*, 106 Cal.App.4th at 722.

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[8] The analysis of the potential health impacts associated with the endocrine disrupting chemicals associated with the wastewater treatment plant provides an example of a good-faith attempt to provide meaningful analysis of available information regarding adverse impacts when science has not kept up with the need for understanding. AR 3760-3763.

### E. Analysis of Adverse Health Impacts Relating to Significant Air Quality Impacts Cannot Be Deferred

Amicus California Business Industry Association argues that the County had discretion to defer analysis of the potential adverse health impacts from significant project-generated air pollution to future project-level approvals. The Association claims that the project was analyzed at a program level and that project-level review will include the missing analysis. Amicus Brief of California Business Industry Association, pp. 14-15. This is untrue.

The EIR purported to analyze air quality impacts of the Friant Ranch Specific Plan *at a project level.* AR 627-628. The EIR states:

> Thus for the Friant Ranch Specific Plan and Depot Parcel actions this EIR *is intended to provide project specific analysis* such that a subsequent or supplemental EIR would only be required if certain circumstances arise as outlined in Public Resources Code section 21166 and CEQA Guidelines section 15162 and 15163. Residential projects in conformity with the approved Specific Plan would also be exempt from further CEQA review if the project meets the requirements of CEQA Guidelines section 15182 a through e.

*Ibid,* italics added.

### F. Prejudice is Established Because the County's Failure to Comply With CEQA's Information Disclosure Requirements Precluded Informed Public Participation and Decisionmaking

In *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (Neighbors)* (2013) 57 Cal.4th 439, this Court confirmed that an agency commits a prejudicial abuse of discretion "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." *Id.*, p. 463, internal quotations and cite omitted.

In *Neighbors*, error occurred via the EIR's use of a future baseline instead of the existing baseline for traffic and air quality. The EIR's traffic impact analysis using the future baseline was very detailed, and concluded that the project would have a favorable impact on traffic congestion. *Neighbors, supra*, 57 Cal.4th 439, p. 463. There was no basis for concluding that analysis of adverse impacts would be significantly different if applied to existing rather than future conditions. *Ibid.* Under those factual circumstances, the EIR's baseline error was not prejudicial. *Ibid.* Similarly, since the EIR concluded that project impacts on air quality would be "beneficial throughout the operation," the use of a future baseline, although error, was "an insubstantial, technical error that cannot be

considered prejudicial." *Id.*, p. 464. The Court concluded:

> To comply fully with CEQA's informational mandate, the Expo Authority should have analyzed the project's effects on existing traffic congestion and air quality conditions. Under the specific circumstances of this case, however, its failure to do so did not deprive agency decision makers or the public of substantial information relevant to approving the project, and is therefore not a ground for setting that decision aside.

*Id.*, pp. 464-65.

Amicus California Business Industry Association places emphasis on the Court's use of the word "substantial" in the foregoing quote and argues that in this case the EIR's failure to include an analysis of potential health problems associated with significant air quality impacts was not prejudicial because it did not deprive the public or decision makers of "substantial relevant information about the project's likely adverse impacts." Amicus Brief of the Association, p. 20. According to the Association, it is enough that the public knows that ozone and particulate matter cause health problems. Nonsense.

Obviously, the public and the Board of Supervisors did not need this EIR to tell them that air pollution causes health problems. They needed analysis explaining the significance and import of the air pollution emissions generated by this project. To the extent that

the California Business Industry Association contends that *Neighbors* may have modified the standard for determining prejudice, appellants disagree, and urge this Court to confirm its important holding that when an EIR omits the analysis required by CEQA, prejudice is presumed, and the lead agency has the burden of establishing that the omitted analysis is "on its face, demonstrably repetitive of material already considered, or so patently irrelevant that no reasonable person could suppose the failure to consider the material was prejudicial, or [that] the omitted material supports the agency action that was taken." *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, p. 487.

### G. Compliance With Rule 9510 Is Insufficient, Unenforceable Mitigation

There is no merit to the California Building Industry Association's assertion that future compliance with the requirements of the San Joaquin Valley APCD's Independent Source Review (ISR) and Rule 9510 constitutes enforceable mitigation for purposes of CEQA. To the contrary, San Joaquin Valley APCD's Supervising Air Quality Specialist objected to the County's failure to consider and require specific mitigation measures to reduce project-related impacts, as previously recommended by the Air District; its failure to

adopt recommended design features that would reduce impacts; the lack of specificity for implementing mitigation measures; and the absence of any mechanism to trigger actual enforcement of mitigation measures. AR 8862-8867. Appellants also note that San Joaquin Valley APCD's amicus brief does not support the California Building Industry Association's interpretation of the purpose of air district regulations.

The following statement in South Coast AQMD's amicus brief underscores the problem with the Association's attempt to rely upon air district regulations to satisfy CEQA mitigation requirements:

> [South Coast] AQMD expects that courts will continue to hold lead agencies to their obligations to consult with, and not to ignore or misrepresent, the views of sister agencies having special expertise in the area of air quality.

Amicus Brief of South Coast AQMD, p. 21.

## Conclusion

Appellants seek this Court's ruling that judicial review of a challenge to an agency's EIR — *as measured by statutory and regulatory mandates* — must consider whether the lead agency proceeded in the manner required by law. Deferential review of an agency's project approval findings occurs only *after* an EIR informs the discretion of the agency decision-makers.

The EIR is the heart of CEQA, and provides information that enables elected officials to make informed decisions to "develop and maintain a high-quality environment ... and *take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.*" Pub. Resources Code, § 21001, subd.(a), italics added. Here, the inadequate Friant Ranch EIR omitted analysis of significant project-generated air quality impacts and failed to identify and implement mitigation. These very real environmental concerns affect thousands of families in the Central Valley.

While amici curiae supporting the Friant Ranch propose a major change in the standard of review governing challenges to EIR adequacy, the decisions of this Court and the supporting statutory

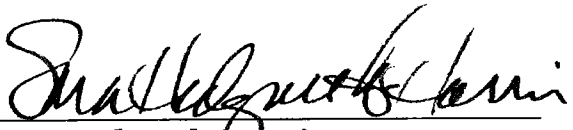
and regulatory framework must stand to achieve the goals of CEQA.

Counsel's Certificate of Word Count per **Word**:mac2011: 6138

June 30, 2015

Respectfully submitted,

LAW OFFICE OF
SARA HEDGPETH-HARRIS



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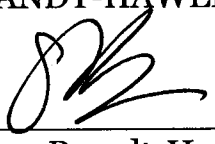

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*Sierra Club, et al. v. County of Fresno, et al.*
Supreme Court No. S219783

# PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, CA 95442.

On June 30, 2015, I served one true copy of:

## Appellants' Consolidated Answer to Amici Curiae

by placing a true copy enclosed in a sealed envelope with prepaid postage in the United States mail in Glen Ellen, California, to addresses listed below.

**See attached Service List**

I declare under penalty of perjury that the foregoing is true and correct and is executed on June 30, 2015, at Glen Ellen, California.

Jeanie Stapleton

*Sierra Club, et al. v. County of Fresno, et al.*
Supreme Court No. S219783

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*Sierra Club, et al. v. County of Fresno, et al.*
Supreme Court No. S219783

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