SUPREME COURT
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SEP 14 2015

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No. S223603

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CLEVELAND NATIONAL FOREST FOUNDATION, et al.,

Plaintiffs and Respondents,

v.

SAN DIEGO ASSOCIATION OF GOVERNMENTS, et al.,

Defendants and Appellants.

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division One, Case No. D063288

Appeal from the Superior Court of California, County of San Diego
Case Nos. 37-2011-00101593-CU-TT-CTL (Lead Case)
[Consolidated with Case No. 37-2011-00101660-CU-TT-CTL]
Honorable Timothy B. Taylor, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF *AMICUS CURIAE* BACKCOUNTRY AGAINST THE DUMP, INC. IN SUPPORT OF PLAINTIFFS AND RESPONDENTS CLEVELAND NATIONAL FOREST FOUNDATION, ET AL.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Backcountry Against the Dump, Inc. ("Backcountry") requests leave to file the attached *Amicus Curiae* Brief in support of plaintiffs and respondents Cleveland National Forest Foundation, et al. Backcountry's proposed brief addresses the scope of the failure-to-proceed prong of the abuse of discretion standard of review applicable to claims arising under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*[1]

Proposed *amicus* Backcountry is a California non-profit public benefit corporation engaged in the submission of comments and expert testimony addressing land, water and other environmental resource management issues. Backcountry seeks compliance by local, state and federal agencies and private industry with state and federal environmental laws. Backcountry's members are committed to protecting the rural, pastoral and open space character of their community from ill-considered planning decisions and projects.

Backcountry is not affiliated with any party to this action, and writes solely to offer an environmental perspective on the significant issues of

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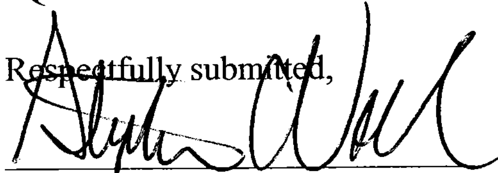
[1] Undesignated references are to the Public Resources Code.

public welfare at stake in this dispute. No party has provided any financial, research, editorial or any other assistance of any kind to Backcountry and its counsel.

Counsel for *amicus* Backcountry are familiar with the questions involved in the case and the scope of their presentation. Counsel for *amicus* successfully represented plaintiffs and appellants Vineyard Area Citizens for Responsible Growth, Inc., et al., before this Court in *Vineyard Area Citizens for Responsible Growth, Inc., et al. v. City of Rancho Cordova* ("*Vineyard*") (2007) 40 Cal.4th 412, the preeminent case regarding the standard of review applicable to CEQA claims.

Dated: September 8, 2015

Respectfully submitted,



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INTRODUCTION

This case involves the adequacy of the greenhouse gas emissions analysis of an environmental impact report ("EIR") for a regional transportation plan. This Court asked whether such an analysis must include a determination as to whether the plan is consistent with Executive Order S-3-05, which establishes a state policy to reduce greenhouse gas emissions 80 percent below 1990 levels by 2050.

Defendant and appellant San Diego Association of Governments ("SANDAG") postulates that the substantial evidence standard of review applies to this question because the text of CEQA and its implementing regulations does not directly address it. SANDAG would limit *de novo* review to the few circumstances directly addressed by the text of CEQA and the CEQA Guidelines [14 C.C.R.; "Guidelines"]. Its illogical argument defies this Court's precedent, including *Vineyard, supra,* 40 Cal.4th at 428-432, and *Laurel Heights Improvement Association v. Regents of University of California* ("*Laurel Heights*") (1988) 47 Cal.3d 376, 403-407, and would eviscerate CEQA.

STATEMENT OF FACTS

Backcountry adopts and incorporates the Statement of Facts submitted by plaintiffs and respondents Cleveland National Forest

Foundation, *et. al.*

SUMMARY OF ARGUMENT

SANDAG contends that the scope of *de novo* review in CEQA cases is limited to ensuring compliance with the "explicitly stated requirement[s] for . . . analysis in CEQA or the Guidelines." SANDAG Opening Brief ("OB") 21-22; SANDAG Reply Brief ("RB") 12-13. It argues that because there are no "CEQA or CEQA Guidelines provisions" explicitly requiring it to analyze its project's consistency with Executive Order S-3-05, the substantial evidence standard applies. RB 12-13 (citations omitted); *see id.* at 14-16.

SANDAG's argument is fundamentally at odds with this Court's precedent. In *Vineyard,* 40 Cal.4th at 428-432, this Court reviewed *de novo* the adequacy of an EIR's analysis of future water supplies despite the fact that "neither CEQA itself, nor the CEQA Guidelines" addressed that question. Similarly, in *Laurel Heights, supra,* 47 Cal.3d at 403-407, this Court rejected an EIR's alternatives requirement as informationally inadequate despite the fact that, as shown below, at the time no CEQA provision required the particular information this Court demanded. SANDAG's argument that *de novo* review is limited to ensuring compliance with the "explicitly stated requirement[s]" in "CEQA or CEQA

Guidelines provisions" cannot be reconciled with either case, and must be rejected. OB 22; RB 12-13.

SANDAG posits that under *Berkeley Hillside Preservation v. City of Berkeley* ("*Berkeley Hillside*") (2015) 60 Cal.4th 1086, 1107, and section 21083.1, its EIR is entitled to a "safe harbor" because it complies with the bare text of CEQA's express requirements for analysis of greenhouse gas emissions. OB 22, 28-29; RB 40. But even assuming the EIR is so compliant, *Berkeley Hillside* merely states that section 21083.1 makes it unlawful to expand the coverage of CEQA to additional *projects* not covered by the existing statutory and regulatory text, not that an EIR's *analysis* is necessarily lawful so long as it minimally comports with CEQA's textual mandates. 60 Cal.4th at 1107.

More fundamentally, SANDAG's argument would, if taken to its logical conclusion, eviscerate CEQA. CEQA and the Guidelines contain sparse guidance about the necessary depth and form of analysis of most EIR topics. If this Court were to hold that section 21083.1 limits *de novo* review of an EIR to merely enforcing compliance with CEQA's express text, with everything else reviewed for substantial evidentiary support in the administrative record, judicial examination of the informational adequacy of an EIR would be strait-jacketed in reflexive obeisance to mindless

literalism. The focus of court review would shift to the existence of factual support for the EIR's *conclusions*, rather than the thoroughness of its *analysis*. SANDAG would have courts uphold an EIR full of conclusory statements complying with CEQA's bare minimum textual requirements, even though such abbreviated discussions plainly do not satisfy CEQA's goal of promoting and ensuring informed decision-making and public participation.

ARGUMENT

I. SANDAG'S ARGUMENT IS CONTRARY TO THIS COURT'S PRECEDENT

SANDAG claims that the scope of *de novo* CEQA review is limited to ensuring compliance with the explicit textual requirements of CEQA and the CEQA Guidelines. OB 22; RB 12-16. SANDAG's argument is at odds with this Court's precedent, which makes clear that, *regardless* of whether CEQA's text explicitly addresses a precise issue, all claims that an EIR lacks the "information required by CEQA" – specifically, information "sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project" – are reviewed *de novo*. *Vineyard,* 40 Cal.4th at 435; *Laurel Heights,* 47 Cal.3d at 405.

SANDAG's argument is directly contrary to Vineyard. *Vineyard*

involved a challenge to the discussion of water supplies in an EIR for a large residential and commercial development. 40 Cal.4th at 422-423, 427. Because "[n]either CEQA itself, nor the CEQA Guidelines . . . address[ed]" the topic, this Court distilled four "principles of analytical adequacy under CEQA" that govern an EIR's "analysis of future water supplies" from four Court of Appeal decisions.[2] *Id.* at 429-430. This Court then held that the County's failure to comply with one of these requirements was a "*procedural* . . . flaw" reviewed *de novo*, not a "factual flaw" reviewed under the substantial evidence standard. *Id.* at 447 (emphasis added). More specifically, this Court found that the EIR's "substitut[ion of] a provision precluding further development for identification and analysis of the project's intended and likely water sources" prevented the EIR from "adequately . . . inform[ing] decision makers and the public" and therefore

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[2] These principles of "analytical adequacy under CEQA" governing a project's water supply impacts require (1) a discussion of the benefits and costs of supplying water; (2) an analysis that accounts for "the impacts of providing water to the entire proposed project"; (3) a disclosure of "*likely* future water sources, and . . . a reasoned analysis of the circumstances affecting the likelihood of the water's availability"; and (4) in circumstances where "it is impossible to confidently determine that anticipated future water sources will be available," an additional "discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies." *Vineyard*, 40 Cal.4th at 430-433 (emphasis added).

"the County erred *procedurally*." *Id.* at 444 (emphasis added).[3]

SANDAG's argument that *de novo* review is limited to ensuring compliance with the "explicit provision[s] of CEQA [and] the Guidelines" (RB at 14) cannot be reconciled with *Vineyard*. This Court rejected the EIR in *Vineyard* under *de novo* review because the EIR failed to comply with one of four "principles for analytical adequacy" this Court distilled from case law, about a topic that "[n]either CEQA itself, nor the CEQA Guidelines . . . address . . . specifically." 40 Cal.4th at 428-430. SANDAG's argument would have required this Court to instead apply substantial evidence review because "neither CEQA itself, nor the CEQA Guidelines" addressed the topic of what constitutes an adequate analysis of future water supplies. *Id.*

SANDAG's argument is also contrary to *Laurel Heights,* 47 Cal.3d at 403-407, where, despite the absence of an explicit textual command,[4] this

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[3] *See also id.* at 445 ("The reader attempting to understand the County's plan for providing water to the entire . . . development is left to rely on inference and speculation. In this respect, the FEIR water supply discussion fails to disclose 'the analytic route the agency traveled from evidence to action' and is thus not 'sufficient to allow informed decision making'") (quoting *Laurel Heights*, 47 Cal.3d at 404).

[4] The language in what is now Guidelines section 15126.6(c) that requires a brief explanation of why infeasible alternatives were rejected was added to what was then Guidelines section 15126(d)(2) in 1994, six years after *Laurel Heights* was decided. 1994 California Notice Register, No. 33.

Court nonetheless determined that agencies must provide a brief statement of reasons for rejecting infeasible alternatives in the text of the EIR, rather than internally dismiss alternatives without ever publicly explaining why.

Laurel Heights involved an EIR for a biomedical research facility. 47 Cal.3d at 403. The alternatives analysis was cursory; it stated that "no alternative sites" on campus were considered and that existing off-campus space was not of "sufficient size to accommodate" the project. *Id.* The respondent Regents "argue[d] that alternatives had already been considered and found to be infeasible during the University's various *internal* planning processes and that an EIR need not discuss a clearly infeasible project alternative. The Regents apparently believe[d] that, because *they* . . . were already fully informed as to the alleged infeasibility of alternatives, there was no need to discuss them in the EIR." *Id.* at 404 (emphasis added).

This Court rejected the Regents' argument, explaining that the "*Regents miss the critical point that the public must be equally informed.*" *Id.* (emphasis in original). This Court held that "the discussion in the EIR of project alternatives [wa]s *legally* inadequate under CEQA" because an "EIR must contain facts and analysis, not just the agency's bare conclusions or opinions," and also "must 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." *Id.* at 404-405 (emphasis added).

But if SANDAG's argument were the law, this Court would not have conducted *de novo* review in *Laurel Heights*. At the time the case was decided, no CEQA provision required agencies to explain their rationale for rejecting infeasible alternatives.[5] Under SANDAG's proffered argument, that would have meant that this Court should have only reviewed the Regents' vague statements of infeasibility for substantial evidentiary support in the administrative record.

This Court rejected the Regents' request for such a holding, because it would improperly "countenance a result that would require blind trust by the public" in the agency's conclusions, a result directly at odds with "CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials." *Laurel Heights,* 47 Cal.3d at 404-405. Indeed, this Court expressly held that "[e]ven if the Regents are correct in their conclusion that there are no feasible alternatives to the Laurel Heights site, the EIR is nonetheless defective under CEQA" because it did not "contain analysis sufficient to promote informed decision making." *Id.* at 404.

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[5] *See supra* n. 4.

This Court's precedent thus makes clear that all aspects of an EIR must be analytically complete regardless of whether CEQA's text provides specific guidance on each particular issue. SANDAG's argument that *de novo* review is limited to situations where explicit provisions of CEQA or the CEQA Guidelines address particular issues cannot be reconciled with this longstanding CEQA principle. Accordingly, it should be rejected.

II. SECTION 21083.1 DOES NOT EXCUSE AN EIR'S INFORMATIONAL DEFICIENCIES

SANDAG asserts that *Berkeley Hillside, supra,* 60 Cal.4th at 1107, and section 21083.1 mandate that its EIR be given a "safe harbor" if the EIR complies with the text of the explicit statutory requirements applicable to an analysis of greenhouse gas emissions. OB 22, 28-29; RB 40. Not so. *Berkeley Hillside* stands for the quite different proposition that "interpreting the unusual circumstances exception to require environmental review *absent unusual circumstances*" would expand the scope of CEQA to encompass actions that were explicitly excluded. 60 Cal.4th at 1107 (emphasis added). It does not suggest that an EIR's analysis must be deemed adequate and lawful simply because it purports to cover a minimum "punch list" of express tasks set forth in CEQA or the Guidelines.

Requiring an EIR to include a full and complete discussion of the project and its impacts is not an expansion of CEQA's requirements beyond

the statutory or regulatory text. CEQA's broad informational requirements do not itemize the specific components of the detailed analysis each agency must undertake for each impact. Instead, an EIR must contain a "sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences." Guidelines § 15151; *see also* § 21061 (EIR's purpose is to "provide public agencies and the public in general with detailed information" about the project and its impacts); Guidelines § 15003(b)-(e), (*i*) (emphasizing CEQA's informational requirements).

Section 21083.1's express – and limited – purpose is to assure that courts do not interpret CEQA "in a manner which imposes procedural or substantive requirements *beyond* those explicitly stated." *Id.* (emphasis added). Hence, implementation of this section requires examination of CEQA's "explicit" requirements. Such an examination reveals and confirms that, contrary to SANDAG's mistaken premise, CEQA's explicit requirements are broad, in keeping with their expansive purpose. As noted, section 21061 already requires EIRs to "provide . . . detailed information" about the project and its impacts. *Id.* And, Guidelines section 15151 already mandates that EIRs contain a "sufficient degree of analysis" to enable decisionmakers and the public to "intelligently take[] account of

environmental consequences." *Id.* These are far-reaching commands. Because section 21083.1 is intended to enforce – rather than repeal – these mandates, it does not excuse an agency from examining and discussing a project's significant impacts in a manner "sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Laurel Heights,* 47 Cal.3d at 405.

Because CEQA and its Guidelines set forth broad and far-reaching "explicit" requirements, section 21083.1 does not avail SANDAG. To the contrary, this section merely restates the obvious: CEQA is to be construed and enforced to achieve its plenary objectives of ensuring that EIRs contain "detailed information" and a "sufficient degree of analysis" to enable decisionmakers and the public to "make a decision which intelligently takes account of environmental consequences." § 21061; Guidelines § 15151.

III. SANDAG'S ARGUMENT WOULD LEAD TO ABSURD RESULTS

SANDAG's argument has no logical endpoint. As noted, the statutory and regulatory text of CEQA does not include a detailed explication of precisely how to conduct an analysis of each type of environmental impact. For example, there are no "explicit provision[s]" governing the particular form and depth of discussion of aesthetic impacts.

RB 14; *see* Guidelines §§ 15360, 15382, 15126.2(a) (requiring a discussion of aesthetics but not specifying the depth or form of analysis). If *de novo* review of claims about aesthetic impacts were limited to ensuring compliance with CEQA's statutory and regulatory text, an EIR stating merely that "the Project will have no significant aesthetic impacts" would only be reviewed by a court for factual support under the substantial evidence standard.

Courts would be required to simply *ignore* the legal question of whether such a truncated analysis promotes the informed decisionmaking CEQA requires. In this way, SANDAG's argument would change the focus of court review from the adequacy of an EIR's *discussion* to the correctness of its *conclusions*. But it is widely recognized that "the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the *information disclosure* provisions of CEQA." *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 (emphasis added); *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (same); *see also* § 21005(a) (prejudicial error from a violation of CEQA's informational requirements does not depend upon whether compliance would have changed the outcome). SANDAG's

extreme position that an EIR's discussion of a topic is necessarily adequate so long as the EIR complies with bare minimum statutory requirements disregards – and therefore violates – CEQA's paramount goal of ensuring informational adequacy. Consequently, SANDAG's argument is in fundamental conflict with CEQA, and must be rejected.

CONCLUSION

SANDAG's arguments lack merit for the reasons set forth above. Therefore, and for the additional reasons stated by plaintiffs and intervenors State of California and plaintiffs and respondents Cleveland National Forest Foundation, *et al.*, this Court should affirm the decision below and hold that SANDAG's EIR must discuss the Regional Plan's consistency with the State's 2050 greenhouse gas emission reduction goals.

Dated: September 8, 2015

Respectfully submitted,

By:____________________
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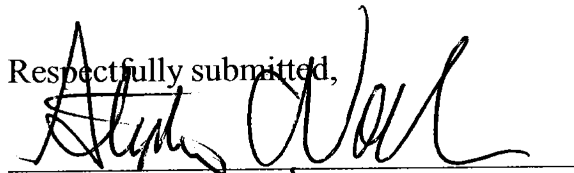
Backcountry Against the Dump, Inc.

CERTIFICATE OF COMPLIANCE

In accordance with Rules 8.520 subdivision (b)(1) and 8.204 subdivisions (b)(4) and (c)(1), California Rules of Court, I certify that the *Amicus Curiae* Brief of Backcountry Against the Dump, Inc., together with its application for leave to file this brief, is in at least 13-point proportional type and contains 2926 words.

Dated: September 8, 2015

Respectfully submitted,



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PROOF OF SERVICE BY UNITED STATES POSTAL SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to within entitled action; my business address is 436 14th Street, Suite 1300, Oakland, CA 94612.

On September 8, 2015, I served the below-named document:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF *AMICUS CURIAE* BACKCOUNTRY AGAINST THE DUMP, INC. IN SUPPORT OF PLAINTIFFS AND RESPONDENTS CLEVELAND NATIONAL FOREST FOUNDATION, ET AL

by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as set forth below (CCP §1012, 1013, and 1013(a)).

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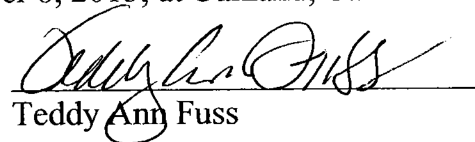
I declare under penalty of perjury that the foregoing is true and correct and that it was executed September 8, 2015, at Oakland, California.



Teddy Ann Fuss