CASE NO. S219783

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, Jr.

SUPPLEMENTAL BRIEF PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520(d)

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Pursuant to California Rules of Court, rule 8.520(d)(1), Real Party in Interest and Respondent Friant Ranch, L.P. ("Real Party") submits this supplemental brief addressing authorities that post-date the parties' briefing, which concluded on July 7, 2015.

This brief addresses the application to this case of this Court's decisions in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497 ("*Cleveland I*"); *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 ("*Banning Ranch*"); and *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, as modified on denial of rehearing (Feb. 17, 2016) ("*CBD*"); and the Court of Appeal decisions in *Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, as modified (Nov. 2, 2015) ("*BHUSD*"), and *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413 ("*Cleveland II*").

This brief also addresses recent California legislation aimed at addressing California's housing shortage.

I. SUMMARY OF NEW AUTHORITIES

At issue in *Cleveland I* was whether the environmental impact report ("EIR") prepared by the San Diego Association of Governments ("SANDAG") for a regional transportation plan/sustainable communities

strategy ("RTP/SCS") must include an analysis of the plan's consistency with the greenhouse gas ("GHG") emission reduction goals set forth in Executive Order No. S-03-05 ("Executive Order"). (*Cleveland I*, *supra*, 3 Cal.5th at p. 510.) The Court and the parties acknowledged that the executive authority was not a legal mandate binding on the agency in preparation of the EIR. (See *id.* at p. 513.) Finding that the EIR sufficiently apprised readers of the RTP/SCS's conflict with the Executive Order's targets, the Court upheld the EIR's analysis. (*Id.* at pp. 516–518.)

Banning Ranch examined de novo whether a city complied with CEQA's statutory requirement to integrate CEQA review with related environmental review to the fullest extent possible. (*Banning Ranch*, *supra*, 2 Cal.5th at pp. 935–936.) The Court held that the city failed to comply with this mandatory requirement. (*Id.* at p. 941.)

CBD concerned a challenge to the significance threshold used to assess GHG emissions impacts of a large real estate development. (*CBD*, *supra*, 62 Cal.4th at p. 218.) Applying de novo review, the Court held that the agency's significance threshold complied with CEQA's statutory and regulatory requirements. (*Id.* at pp. 218–22.) The Court then considered whether substantial evidence supported the agency's choice of the thresholds as to the project at issue. (*Id.* at pp. 222–224.) Finding no such substantial evidence, the Court held the agency's use of the threshold was an abuse of discretion. (*Id.* at p. 225.)

Both *BHUSD* and *Cleveland II* involved claims that the respective respondent agencies abused their discretion by certifying EIRs that failed to "correlate" air quality impacts to health impacts. (*BHUSD*, *supra*, 241 Cal.App.4th at pp. 666–667; *Cleveland II*, *supra*, 17 Cal.App.5th at p. 443.) In *BHUSD*, the Second District Court of Appeal held that CEQA does not require an analysis showing how actual construction emissions would specifically impact public health. (241 Cal.App.4th at p. 667.) In contrast, in *Cleveland II*, Division One of the Fourth District Court of Appeal held that SANDAG abused its discretion in not conducting an analysis correlating the regional air quality impacts of the RTP/SCS with specific adverse health impacts. (17 Cal.App.5th at pp. 440–441.)

In 2017, the Legislature passed a series of bills intended to help facilitate the creation of more housing units to meet a vast unmet demand. Although these bills did not amend CEQA, factual findings added to Government Code section 65589.5 discuss the depth of the state's housing problem. If the Court were to hold that the de novo standard of review applies to claims challenging the sufficiency of an EIR's analysis of a required topic, such a conclusion would introduce significant additional complexity and uncertainty into the environmental review process at a time when predictability is needed to help housing projects, such as Friant Ranch, proceed to construction.

II. APPLICATION TO THIS CASE

A. This Court's recent CEQA decisions are consistent with the rule that the substantial evidence standard applies to claims that an EIR lacks sufficient information on a required topic.

A primary issue before the Court in this case is what standard of review applies to claims that an EIR, although addressing all topics required by CEQA, failed to *sufficiently* address one or more of those required topics. *Cleveland I*, *Banning Ranch*, and *CBD* are consistent with the rule applied by this Court in its previous CEQA decisions, and advocated for by Real Party herein, that, while the court reviews an agency's failure to address a required topic de novo, challenges to the sufficiency of the EIR's evaluation of the required topic are reviewed for substantial evidence. As part of the substantial evidence standard, agencies must "show their work" by including sufficient discussion to enable the reader to understand the "analytic route" the agency traveled from evidence to action. (*Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 404 citing *Topanga Assn. for a Scenic Community v. County of Los Angele*s (1974) 11 Cal.3d 506, 515.) In applying the substantial evidence standard, a reviewing court must uphold the agency's determination that its EIR sufficiently evaluated the required topic if substantial evidence, in light of the whole record, supports that determination.

In *Cleveland I*, the Court did not specify which standard of review applied, but the Court warned that "courts must proceed with caution the when determining the adequacy of an EIR" because "'"CEQA gives lead agencies discretion to design an EIR … ."'" (*Cleveland I*, *supra*, 3 Cal.5th at pp. 511–512.) Although not directly stated, a careful reading of the decision strongly suggests that the Court applied the substantial evidence standard of review to the question of whether SANDAG abused its discretion in failing to explicitly analyze the RTP/SCS's consistency with the Executive Order's targets. In particular, the Court first noted that there is no explicit requirement to use the executive order as a threshold of significance. (*Id.* at 515.) In the absence of an express (i.e., "procedural" requirement), the Court examined the record, as a whole, including comments submitted on the draft EIR and the scientific evidence supporting the Executive Order's targets, to determine whether SANDAG should have included a discussion of the RTP/SCS's consistency with the Executive Order in the EIR. (*Id.* at pp. 515–517.) The Court determined, at least implicitly, that substantial evidence would not support SANDAG's decision to omit a discussion of the plan's consistency with the Executive Order. The Court then considered whether the EIR sufficiently included such a discussion of the plan's consistency with the Executive Order's targets. The Court held that, although the EIR could have been clearer, the EIR complied with CEQA because it presented information about the

RTP/SCS's inconsistency with the Executive Order "'in a manner calculated to adequately inform the public and decision makers, who may not be familiar with the details of the project.' [Citations.]". (*Id.* at p. 517.)

As noted above, the duty for agencies to provide in their EIRs the "analytic route" from evidence to action is inherent to the substantial evidence standard of review. (See Real Party's 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, § II.A, pp. 5–12.) By examining the whole of the record to determine whether SANDAG lacked substantial evidence to omit from the EIR a discussion of the RTP/SCS's consistency with the Executive Order, and upholding the EIR's discussion because it reasonably apprised readers of the RTP/SCS's inconsistency with the Executive Order, the Court followed the analytic framework advocated by Real Party. The Court's analysis is also consistent with the standard of review discussed by this Court in *Laurel Heights I, Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559 (*WSPA*), and *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordov*a (2007) 40 Cal.4th 412 (*Vineyard*).

Banning Ranch is also consistent with, and does not disturb, the Court's earlier reasoning in *Laurel Heights I, WSPA*, and *Vineyard.* In *Banning Ranch*, the Court came up with what appears to be a shorthand for

prior holdings regarding what is meant where an agency has "not proceeded in a manner required by law." The Court restated the distinction in *Vineyard* between factual and procedural issues but stated that "[w]hether an EIR has omitted essential information is a procedural question subject to de novo review." (*Banning Ranch*, *supra*, 2 Cal.5th at p. 935.) This statement is consistent with the notion that a "procedural" error occurs where the Legislature or the Natural Resources Agency has directed agencies to take particular actions (e.g., give notice of public review) or has completely omitted any discussion of topics that must be addressed in CEQA documents (e.g., GHGs or historical resources). The statement does not suggest that what a court regards as insufficient analysis of a required topic is somehow "procedural." Such a reading is inconsistent with the plain, well-understood concept of "procedure." Because *Banning Ranch* raised a predominantly legal question—whether the City of Newport Beach had violated CEQA's requirements to integrate its environmental review with the Coastal Commission's decisionmaking process under the Coastal Act (Pub. Resources Code, § 30000 et seq.)—the Court applied the de novo standard and did not reach the question of whether substantial evidence supported the City's determinations.

In *CBD*, in keeping with the Court's prior rulings, the Court applied de novo review to the legal question of whether the EIR applied a legally permissible significance threshold, but applied the substantial evidence

standard to the agency's choice and application of that threshold to the project at issue. (*CBD*, *supra*, 62 Cal.4th at pp. 219, 225–226.) The Court's analysis in *CBD* is consistent with the principles that lead agencies enjoy the discretion to employ the (legally permissible) analytic methodologies that they determine are appropriate to evaluate the environmental effects of their projects, and that the courts will review such determinations under the substantial evidence standard. Under *CBD*, the courts should overturn a lead agency's use of a legally permissible threshold if the agency's determination to use that threshold is not supported by substantial evidence.

B. The Court should overrule *Cleveland II* to the extent that it holds an agency must perform a health-correlation analysis unless the agency affirmatively demonstrates, and explains in the record, why such analysis is infeasible; the Court in *BHUSD* correctly held that CEQA does not require a health correlation analysis.

In *Cleveland II*, the Fourth District Court of Appeal reached a result very similar to that of the Fifth District Court of Appeal in this case with respect to the question of whether the lead agency abused its discretion in failing to conduct an analysis correlating a project's regional air quality emissions to specific health impacts. In *Cleveland II*, the court held that although "the EIR identified in a general manner the adverse health impacts that might result from the [RTP/SCS's] air quality impacts[,] … the EIR failed to correlate the additional tons of annual transportation-plan-related emissions to anticipated adverse health impacts from the emissions."

(*Cleveland II, supra*, 17 Cal.App.5th at p. 441.) Although the court in *Cleveland II* purported to apply the substantial evidence standard of review to the adequacy of the EIR's air quality analysis, the court inappropriately placed the burden on SANDAG to demonstrate that it would be infeasible to provide a health correlation analysis. (*Ibid.*)

As discussed in Real Party's Answer to *Amicus Curiae* Brief filed by the South Coast Air Quality Management District ("Answer to SCAQMD"), CEQA does not require agencies to conduct all reasonably feasible studies, or to explain in their EIRs why it has not conducted all conceivable studies. (Answer to SCAQMD, § II.B, pp. 7–11.) Real Parties respectfully urge that this Court should clarify that where, as here, a petitioner claims an EIR failed to sufficiently discuss a required topic, the burden is on the petitioner to demonstrate that the agency *lacked* substantial evidence to support its conclusion that the EIR's discussion was sufficient. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 475 (conc. & disc. Opn. of Baxter, J. ["a certified EIR is presumed adequate and … 'the party challenging the EIR has the burden of showing otherwise'"]; Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"]; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 [the burden is on the challenger in CEQA cases to show that a categorical exemption does not apply].) The burden should not be on the agency to affirmatively

show that it considered and rejected all conceivable studies that were not included in the EIR. (See Answer to SCAQMD, § II.B, pp. 7–11.)

In *BHUSD*, the Second District Court of Appeal correctly rejected the petitioner's claim that the EIR for a subway project was "legally inadequate" because it failed to analyze public health impacts from construction of the Project. (*BHUSD*, *supra*, 241 Cal.App.4th at p. 666.) The court explained that the petitioner did "not cite to any case, statute, or Guideline to support its assertion that the [EIR] was required to include an analysis showing how the actual construction emissions will specifically impact public health." (*Id.* at p. 667.) The EIR in that case was circulated with an air quality technical report that generally explained the types of health impacts associated with exposure to each of the identified pollutants. This was all that CEQA required. (*Ibid.*, citing CEQA Guidelines, § 15126.2, subd. (a).)

Consistent with *BHUSD*, this Court should hold that the Friant Ranch EIR sufficiently analyzed air quality impacts by applying the significance standards adopted by the local air district and discussing, in a general manner, the adverse health impacts associated with the air emissions evaluated in the EIR. CEQA requires nothing more. (See *BHUSD*, *supra*, 241 Cal.App.4th at p. 666 [noting that the EIR at issue relied on the regional air quality thresholds adopted by the local air district].)

C. The state's housing shortage highlights the need for certainty and predictability in the CEQA process.

The 2017 Legislative "Housing Package" has renewed focus on the need to construct more homes in California to address the State's severe housing shortage. The Legislative factual findings added to Government Code section 65589.5 explain, among other things, "[t]he lack of housing ... is a critical problem that threatens the economic, environmental, and social quality of life in California." (Gov. Code, § 65589.5, subd. (a)(1)(A).) The statute proclaims that

> California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.

(Gov. Code, § 65589.6, subd. (a)(2)(A).)

As discussed in Real Party's opening and reply on the merits, policies favoring certainty in the CEQA process support application of the substantial evidence standard of review to claims that an EIR insufficiently analyzes a required topic. The need for certainty and predictability in the environmental review process is arguably even more important than ever given the State's compelling need to improve the housing supply through the construction of new housing development projects, such as Friant Ranch.

III. CONCLUSION

This Court's decisions in *Cleveland I*, *Banning Ranch*, and *CBD* support the conclusion that de novo review applies to claims that an EIR failed to follow CEQA's procedures or omitted a discussion of a required topic, but that the substantial evidence standard of review applies to claims challenging the sufficiency of an EIR's discussion of a required topic. The Court should clarify that the court's analysis in *Cleveland II* incorrectly shifted the burden to respondent to show that an analysis it had not performed was infeasible. The Court in this case should reach a result similar to that reached in *BHUSD* and hold that the Friant Ranch EIR sufficiently analyzed air quality impacts and that a health correlation analysis was not required. Lastly, the State's policies supporting the creation of new housing militate against application of the de novo standard of review to claims challenging the sufficiency of an EIR's analysis of a required topic because the de novo standard would introduce additional uncertainty into the already challenging and complex CEQA process.

Respectfully submitted,

REMY MOOSE MANLEY, LLP

Dated: September 19, 2018

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(d) of the California Rules of Court, I hereby certify that this **SUPPLEMENTAL BRIEF** contains 2,760 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on this 19th day of September 2018, at Sacramento, California.

JAMES G. MOOSE

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

PROOF OF SERVICE

I, Bonnie Thorne, am employed in the County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, CA 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.

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