No. S219783

IN THE SUPREME COURT OF CALIFORNIA

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

Plaintiffs-Appellants,

v.

COUNTY OF FRESNO and FRESNO COUNTY BOARD OF SUPERVISORS,
Defendants-Respondents,

FRIANT RANCH LP, et al.,
Real Parties in Interest-Respondents.

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

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

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Review is not necessary to settle any important questions of law or to secure uniformity in decisional law regarding any of the issues that the petition claims the Fifth District wrongly decided in this case.

II. STATEMENT OF THE FACTS AND ISSUES

Appellants adopt the Court of Appeal opinion's statement of the facts and issues. Cal. Rules of Court, rule 8.500 (c)(2).

III. ANSWERS TO ISSUES PRESENTED BY THE PETITION

ISSUE No.1: Does the substantial evidence standard of review apply to a court's review of whether an environmental impact report ("EIR") provides sufficient information on a topic required by CEQA, or is this a question of law subject to independent review by the court?

ANSWER: There is no lack of uniformity of decision or unsettled question of law regarding the standard of review that applies to a claim that an EIR fails to comply with CEQA's information disclosure requirements; the court reviews such claims *de novo*. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*"Vineyard"*). The opinion in this case complies with *Vineyard's* instructions.

The material facts are undisputed. The project is located in the San Joaquin Valley Air Basin, which ranks among the worst for the prevalence of criteria air pollutants that are "known to be deleterious to human health." Opinion, p. 43. The operational emissions from the project are 7 to 10 times greater than the thresholds of significance established by the Air District to protect the public health. Opinion, p. 45. Based upon these facts, the EIR concluded the project would have significant and unavoidable adverse impacts on air quality. *Ibid.* Appellants do not challenge these

factual conclusions.

As reflected in the Fifth District's opinion, appellants claim that the EIR is defective because it does not analyze or explain the adverse health impacts that residents in the area affected by the project's pollution emissions are likely to experience. Opinion pp. 46-47, 50. This is precisely the nature of the claim that *Vineyard* identified as presenting a claim of improper procedure. *Id.* at 435 ["For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency 'failed to proceed in the manner prescribed by CEQA.'"] With regard to the standard of review in this case, the Fifth District's opinion explains:

> "Conceptually, this type of claim involves reviewing courts drawing a line that divides sufficient discussions from those that are insufficient. Drawing this line and determining whether the EIR complies with CEQA's information disclosure requirements presents a question of law subject to independent review by the courts." Opinion p. 23.

The Opinion also explains that "plaintiffs claiming the information in an EIR was insufficient must demonstrate that the failure to include relevant information precluded informed decisionmaking by the lead agency or informed participation by the public." Opinion p. 24. The Opinion cites the Fifth District's Opinion in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48[1] in which the court explained:

> "When the inquiry into legal error involves an EIR, the question can be phrased generally as 'whether the EIR is sufficient as an information document.' (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391, 133 Cal.Rptr.2d 718.) When the specific claim of legal error concerns an omission of required information from the EIR, the plaintiff must demonstrate that

[1] Disapproved on other grounds by *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439.

> (1) the EIR did not contain information required by law and (2) the omission precluded informed decisionmaking by the lead agency or informed participation by the public. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987, 99 Cal.Rptr.3d 572.) These two elements constitute an abuse of discretion and prejudice, respectively, and together form reversible error. (See § 21005, subd. (a); *Association of Irritated Residents, supra,* at p. 1391, 133 Cal.Rptr.2d 718 [noncompliance with CEQA's information disclosure requirements not per se reversible; prejudice must be shown].)" Id. at 76-77.

All of the post-*Vineyard* cases cited in the petition apply the same standard of review to claims that the EIR failed to provide information required by CEQA. The difference between this case and those cases is in where those courts drew the line after determining whether the EIR was sufficient as an information document.

For example, in *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957 ("*CNPS*"), appellants claimed that the EIR violated "CEQA's informational mandates... by the absence of an alternative with an ADA-compliant trail connection." Id. 990. The Opinion explains,

> "The omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decision-making by the agency or informed participation by the public. (*Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th at p. 1236, 32 Cal.Rptr.2d 19, 876 P.2d 505.) We review such procedural violations de novo. (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.)"*CNPS,* 177 Cal.App.4th at 990.

In that case, the court concluded that the EIR did not omit information required by CEQA.

Likewise, in *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, appellants claimed the EIR's discussion of groundwater impacts was inadequate because it failed to analyze potential groundwater

quality impacts of discharging effluent for irrigation. Id. at 1556. The court concluded that the analysis the appellant claimed was missing was not required by CEQA and was not necessary to informed decision-making. *Id.* at 1559.

Similarly, in *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, the claim was that the EIR did not contain an adequate discussion of the "frequency of the shock-chlorination treatments" to clean piping for a desalination plant adjacent to the Bay. Id. at 637. The court concluded CEQA did not require the level of detailed analysis that the appellant claimed was missing from the EIR because the District determined the water would not be discharged into the Bay and would therefore not have a significant effect. Citing CEQA Guidelines § 15128, the Opinion explains, "[w]here, as here, 'the agency determines that a project impact is insignificant, an EIR need only contain a brief statement addressing the reasons for that conclusion.' [Citations.]." *Id.* at 637.

In *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437 ("*SRCA*"), the court found that the EIR failed to provide information required by CEQA with respect to the analysis of alternatives and that the defect was prejudicial because "it effectively ' "preclude[d] informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process." [Citations.]' " *Id.* at 1465, quoting *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391. On the other hand, the court concluded the EIR did not fail to provide information or analysis required by CEQA that was necessary for informed decision-making and informed public participation with regard to the project description or impacts on biological resources and visual resources. 157 Cal.App.4th at 1448-1454, 1465-1469.

In *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, the appellant asserted the FEIR was inadequate because it "fail[ed] to discuss any 'additional' mitigation measures in 'meaningful detail.' Id. at 15. The appellant concluded the EIR was sufficient because "CEQA does not require analysis of every *imaginable* alternative or mitigation measure; its concern is with *feasible* means of reducing environmental effects." *Id.* at 16.

There simply is no lack of uniformity of decision or unsettled question of law regarding the standard of review applied by the court in this case. The cases cited in the peition reflect no debate or disagreement regarding the question of whether a claim of failure to comply with CEQA's disclosure requirements is reviewed *de novo*.

> **QUESTION NO. 2:** Is an EIR adequate when it identifies the health impacts of air pollution and quantifies a project's expected emissions, or does CEQA further require the EIR to correlate a project's air quality emissions to specific health impacts?

ANSWER: The petition misstates and misconstrues the holding in this case. The court concluded 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." Opinion, p. 2. More specifically:

> "[T]he EIR is inadequate under CEQA "because it does not analyze the adverse human health impacts that are likely to result from the air quality impacts identified in the EIR. The simple statement in an EIR that the significant adverse air quality impacts will have an adverse impact on human health fails to comply with the CEQA standards we discussed in [*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184 ("*Bakersfield Citizens*")] at pages 1219 through 1220." Slip Opinion, p. 50.

The standards to which the court refers are (1) Guidelines § 15126.2 which "requires an EIR to discuss, inter alia, 'health and safety problems

caused by the physical changes' that the proposed project will precipitate" (*Bakersfield Citizens, supra,* 124 Cal.App.4th 1219)[2], and (2) the standard for assessing prejudice: "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law.'" [Citation.] If the deficiencies in an EIR 'preclude informed decision making and public participation, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred.' [Citation.] *Id. at* 1220.

Respondents obviously disagree with the Fifth District's determination that the EIR failed to provide the public with the information needed to understand the significance of criteria air pollution emission levels that are 7 to 10 time greater than significance thresholds. However, the opinion does not impose an obligation to provide a "health correlation analysis." Very simply, it is beyond dispute that there is a causal connection or correlation between criteria air pollution emissions and adverse health effects. The petition reflects no disagreement among the courts regarding whether CEQA requires an EIR to explain how the levels of emissions from a project will affect human health in the area.

> **QUESTION NO. 3**: Does a lead agency impermissibly defer formulation of mitigation measures when it retains discretion to substitute the adopted measures with equally or more effective measures in the future as better technology becomes

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[2] CEQA requires that an EIR provide public agencies and the public with "detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." Pub. Resources Code, § 21061. The EIR must include a "detailed statement" of "[a]ll significant effects on the environment of the proposed project." Pub. Resources Code, § 21100. "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." Guidelines § 15126.2. The discussion should include relevant specifics of ... health and safety problems caused by the physical changes." *Ibid.*

> available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness?

ANSWER: The petition fails to demonstrate disagreement among the court on the question whether mitigation measures must include specific performance criteria. The court in this case applied well-settled law to the question of whether an EIR improperly defers mitigation.

> "Generally, it is improper to defer the formulation of mitigation measures. (Guidelines § 15126.4, subd. (a)(1)(B); *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 735 (*POET*).) An exception to this general rule applies when the agency has committed itself to specific performance criteria for evaluating the efficacy of the measures to be implemented in the future, and the future mitigation measures are formulated and operational before the project activity that they regulate begins. (*POET, supra,* at p. 738.)" Opinion, p. 60.

According to the petition, review is necessary because "[t]he lower courts are all over the map regarding what constitutes adequate mitigation under CEQA." Petition p. 4. However, the petition fails to back up this assertion. The cases cited in the petition reflect no unsettled question of law; the opinions reflect the application of settled law to differing facts and circumstances to determine whether the agency has committed to sufficiently specific performance standards for mitigation. As discussed below, the only lack of uniformity is in the factual scenarios.

In *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899 ("*Rialto Citizens*"), the court concluded that the applicant and city committed to specific performance criteria to reduce impacts to burrowing owls. The mitigation measure at issue required the project applicant to conduct an initial survey to "identify 'suitable burrow(s) and the location(s) of occupied burrow(s),' generally following USFWS and

CDFG 'officially approved' protocol. Next, four additional surveys that 'focus on owls' must be conducted during the breeding season. If any burrowing owls are observed during any of the surveys, the applicant must consult with the City 'to determine the appropriate mitigation, based on conditions at the project site.' Though the EIR did not specify exactly what will be done if any burrowing owls are found, it commits the applicant and the City to find a way to render any impact insignificant before a grading permit is issued." Id. at 946-947.

Similarly in *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, "[t]he mitigation measure meant to address the impact on the blunt-nosed leopard lizard specifically required that upon completion of the survey, a set buffer zone, no less than 22 acres, would be set aside for each blunt-nosed leopard lizard. Other mitigation measures are set forth with similar particularity." Id. at 525.

In *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, the mitigation measure that was intended to avoid the "adverse hydraulic impact" required the mining operator to: (1) conduct a semi-annual survey of river bottom elevations in three locations (in the middle of the Diamond Rock mine pit, at 1,000 feet upstream and at 1,000 feet downstream of the mine); (2) submit this data for review by the State's Office of Mine Reclamation ("OMR"), the County's Planning and Development Department, and the County's Flood Control District as part of the OMR's annual Surface Mining and Reclamation Act ("SMARA") compliance review; and (3) should "adverse hydraulic conditions [be] evident, or appear to be developing, which could result in off-site impacts, confer with the County agencies to modify the mining pit layout, width and/or depth to avoid these impacts." Id. at 1065. The appellant claimed the foregoing mitigation measure was inadequate because it did not "spell

out the criteria by which its effectiveness will be evaluated." Id. at 1071. The court concluded that the "specific and mandatory performance standard" by which the effectiveness of this mitigation measure would be evaluated was whether the mining operator avoided the off-site impacts of adverse hydraulic impact, which the court concluded were "sufficiently definite." *Ibid.*

In *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, the issue was whether the District committed itself to specific standards for determining whether the adverse visual impact of a water tank would be mitigated. "The EIR stated '[t]he plan would include monitoring and maintenance to ensure that the landscaping would provide an effective visual screen.' The District has committed itself to work with the cities of San Rafael and Larkspur to 'reduce the visual contrast of the tanks on the ridge top.' In furtherance of the goal of reducing the visual impact of the tanks, the District said it will 'implement the landscaping plan during [the] project construction[,]' which 'will identify the location and types of plantings ... that will soften the visual intrusion....' The District also obliged itself to 'identify success metrics such as survival and growth rates for the plantings.'" Id. at 630.

Respondents reference to *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238 *Fairview* is puzzling. In that case, the EIR concluded that impacts were unmitigable. *Ibid.* In this case, Mitigation Measure #3.3.2 states that "implementation of the measures would *substantially* reduce air quality impacts." Opinion, p. 53. The Fifth District concluded this was a bare conclusion and "is not supported by facts or analysis." Opinion, pp. 58-59.

Respondents do not explain the factual or legal basis for their assertion that the mitigation measure at issue in this case was held to a

higher or different standard than the cases discussed above. Frankly, it is unclear exactly what legal question Respondents claim is unsettled. It is clear, however, that Respondents believe the Fifth District wrongly decided the issue which is not grounds for review. Cal. Rules of Court, Rule 8.500 (b)(1).

> **QUESTION No. 4**. Do mitigation measure adopted by a lead agency to reduce a project's significant and unavoidable impacts comply with CEQA when substantial evidence demonstrates that, on the whole, the measures will be at least partially effective at mitigating the impact, or must such measures meet the same (or even heightened) standards of adequacy as those adopted to reduce an impact to a less-than-significant level?

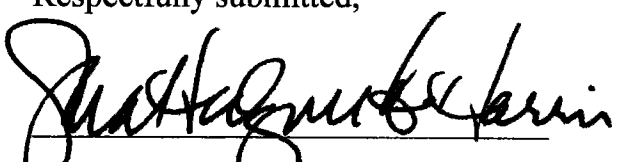
ANSWER: The petition fails to demonstrate that there is a lack of uniformity among decisions regarding this issue and fails to explain how the law is unsettled as required by Rule 8.500(b)(1). The court did not establish a new or higher standard or a "vagueness doctrine" for determining the adequacy of mitigation.[3] The court merely applied settled law and concluded the measures were too vague to enforce, i.e., MM #3.3.2 failed to reflect an enforceable commitment to specific performance criteria to substantially reduce air quality impacts.

IV. CONCLUSION

None of these issues warrants review under Rule 8.500(b)(1) of the California rules of Court.

Dated: August 6, 2014

Respectfully submitted,



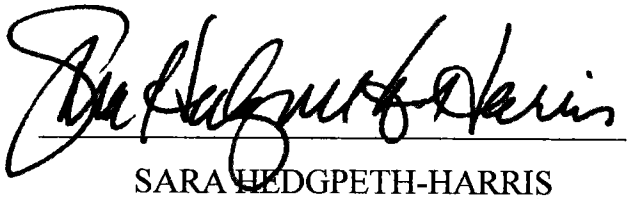
SARA HEDGRETH-HARRIS
Attorney for Plaintiffs and Appellants

[3] The petition creates this so-called "vagueness doctrine" based upon dicta in a footnote

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d) of the California Rules of Court, I hereby certify that this ANSWER TO PETITION FOR REVIEW contains 3,325 words, according to the word counting function of the word processing program used to prepare this petition.

Executed on this 6th day of August 2014, at Fresno, California.



SARA HEDGPETH-HARRIS

Sierra Club, et al. v. County of Fresno, et al.
Supreme Court of California Case No. S_____
(Fifth District Court of Appeal Case No. F066798;
Fresno County Superior Court Case No. 11C

PROOF OF SERVICE

I, Sara Hedgpeth-Harris, am a citizen of the United States, employed in the City and County of Fresno. My business address is 2125 Kern Street, Fresno, California 93721 and my email address is sara.hedpethharris@shh-law.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Law Office of Sara Hedgpeth-Harris'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.

On August 6, 2014, I served the following:

ANSWER TO PETITION FOR REVIEW

X 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 follows; or

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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 6th day of August 2014, at Fresno, California.

Mary C. Brown

Sierra Club, et al. v. County of Fresno, et al.
Supreme Court of California Case No. S_____
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