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.

OPENING BRIEF ON THE MERITS

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*James G. Moose, SBN 119374
Tiffany K. Wright, SBN 210060
Laura M. Harris, SBN 246064
REMY MOOSE MANLEY, LLP
555 Capitol Mall, Suite 800
Sacramento, CA 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
Email: jmoose@rmmenvirolaw.com
twright@rmmenvirolaw.com

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

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REMY MOOSE MANLEY, LLP
555 Capitol Mall, Suite 800
Sacramento, CA 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
Email: jmoose@rmmenvirolaw.com
twright@rmmenvirolaw.com

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

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I.
ISSUES PRESENTED

This Court granted review of the following issues that arise under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.):

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 judicial review?
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?
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 available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness?
4. Do mitigation measures 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?

II.
INTRODUCTION

Judicial review of an agency's action under CEQA extends only to whether the agency prejudicially abused its discretion. Under this standard, the court independently reviews an agency's compliance with CEQA's procedural requirements, but defers to the agency's factual decisions if they are supported by substantial evidence. (Pub. Resources Code, §§ 21168, 21168.5[1]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*).) This deferential standard of review reflects constitutional separation of powers principles and an allocation of responsibility between the agencies charged with administering CEQA and the courts that is integral to the statutory scheme. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572–573 (*WSPA*).)

The first issue presented concerns the standard of review that applies to claims that an EIR lacks sufficient relevant information. Such claims are most properly thought of as raising mixed questions of fact and law. CEQA

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

and the CEQA Guidelines[2] set forth general subjects that all EIRs must address (in this case, the project's significant air quality impacts). If an agency fails to discuss one or more of these subjects in its EIR, the agency has failed to proceed in the manner required by CEQA.

Within CEQA's broad categories of required information, however, CEQA leaves to the discretion of lead agencies the determination of how best to fulfill CEQA's informational mandates on a project-by-project basis. Such determinations, which include decisions about the type, scope, and amount of analysis to include in EIRs, are inherently factual, so they should be reviewed under the substantial evidence standard.

The second issue presented concerns whether the EIR prepared for the Friant Community Plan Update and Friant Ranch Specific Plan project ("Friant Ranch") and certified by respondent County of Fresno (the "County") violates CEQA because it does not include an analysis *correlating* the project's increase in regional pollutants to specific health impacts within the air basin. The Court of Appeal impliedly acknowledged that such analysis was not specifically mandated by CEQA, but rather was created by the court's own decision in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.1184, 1219–1220 (*Bakersfield*). (Slip Opinion ["Opn."] 47.)

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

In invalidating the County's EIR based on a "correlation" requirement that the court itself created out of whole cloth, and that finds no support in any language in CEQA or the Guidelines, the Court of Appeal violated Public Resources Code section 21083.1, which prohibits courts from interpreting CEQA or the Guidelines in a manner that imposes new procedural or substantive requirements.

Moreover, if the court had applied the proper substantial evidence standard of review, the court would have upheld the County's air quality analysis, which quantifies the project's air emissions and discloses the general health impacts that exposure to those emissions can cause, but reflects the extreme difficulty (if not impossibility) of linking specific emissions from a single project in a large air basin to specific health effects afflicting particular persons or groups.

The third and fourth issues presented concern standards of adequacy of mitigation measures adopted to lessen a project's significant environmental effects. CEQA requires agencies to adopt feasible mitigation measures for the significant impacts of the projects they approve. In this case, the County acknowledges that there are no feasible mitigation measures to reduce Friant Ranch's operational air quality impact to less-than-significant levels. The County nevertheless adopted a feasible mitigation measure to at least minimize this significant impact. In doing so, the County complied with CEQA. As this Court has made clear, an

agency's mitigation measures must be upheld if substantial evidence supports the conclusion that, on the whole, the measures will minimize the impact. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 408 (*Laurel Heights I*). The mitigation measure at issue in this case meets this standard. The Court of Appeal, therefore, erred in holding the mitigation measure violates CEQA.

III.
FACTUAL AND PROCEDURAL SUMMARY

A. The Friant Ranch Project

In recent years, Fresno County has experienced a dramatic increase in its senior age demographic as baby boomers reach retirement age. (Administrative Record ["AR"] 9773, 9816.) The County views this trend as driving the demand for an age-restricted, well-planned retirement community within the County. (AR 9241, 9816, 162.) In response to this demand, in 2005, after two years of coordinating with County planning staff, Real Party in Interest Friant Ranch, L.P. ("Real Party") submitted an application for the Friant Ranch Specific Plan, which will provide a framework for the development of the County's first "Active Adult" (ages 55+) community. (AR 5365, 160–165.)

The Friant Ranch Specific Plan area is a 942-acre site directly adjacent to the existing unincorporated community of Friant. (AR 736–739.) The plan is designed to accommodate the unique preferences of the

County's aging population, providing a "stay-in-place" retirement community that offers a variety of on-site social, health, and wellness activities. (AR 9770–9771.) The land use designations concentrate development near the existing community of Friant and will create a pedestrian-friendly village that connects neighborhoods with retail, medical-office, and recreational uses through trails, bicycle paths, and a Neighborhood Electric Vehicle network. (AR 164–165, 9773–9799.) As approved, the Specific Plan proposes up to 2,500 dwelling units (at least 80 percent of which will be occupied by at least one resident who is 55 years of age or older) and dedicates over half of the plan area to open space, which will be preserved in perpetuity as habitat conservation land. (AR 9772, 9773, 9767.) As a result of the approved land uses and age restrictions, the project will generate fewer automobile trips than a traditional single-family residential development. (AR 4543–4544, 162–165.)

The project also includes the Friant Community Plan Update, which expands the existing Community Plan's boundaries to encompass the Specific Plan area and adds new policies consistent with the Specific Plan and the County's General Plan. (AR 13–14.)

Future required approvals for Friant Ranch include tentative and final maps from the County, as well as approvals from the San Joaquin Valley Air Pollution Control District (the "Air District") to ensure

compliance with the Air District's emission reduction requirements. (AR 14, 747–763, 18282–18349, 18812–18831.)

B. The County's Environmental Review and Project Approval

In October 2009, the County circulated a Draft EIR for a 45-day comment period. (AR 10672–10673, 610–4223.) The EIR's air quality analysis is based on the Air District's "Guide for Assessing and Mitigating Air Quality Impacts." (AR 793–826, 4941–4970.) Additional facts demonstrating the substantial evidence supporting the air quality analysis and mitigation measure are set forth in Sections IV.B and IV.C, below. (See also Opn. 43–46.)

The County received numerous written comments on the Draft EIR and held a public hearing at which it received oral comments. (AR 11079–11107, 4224-4372.) The County prepared responses to each of the comments received and released a Final EIR in August 2010. (AR 4373–5158.)

On February 1, 2011, the Board of Supervisors ("Board") concluded its hearing on Friant Ranch and voted to certify the Final EIR and to approve Alternative 3, the environmentally superior alternative.[3] (AR 9–15.).) In approving Friant Ranch, the Board also made one or more of the

[3] Compared to the project as originally proposed, Alternative 3 reduces the area proposed for development from 667 acres to 482 acres and reduces the number of residential units from 2,996 to 2,500, thereby reducing the project's air quality impacts and other impacts. (AR 1204, 624.)

findings set forth in Public Resources Code section 21081, subdivision (a), for each significant effect identified in the EIR. (See also Guidelines, § 15091.) Because the project will result in significant and unavoidable impacts, including air quality impacts, the Board adopted a Statement of Overriding Considerations. (AR 6, 160–165; § 21081, subd. (b); Guidelines, §§ 15093, 15043, subd. (b).) Finally, the Board adopted a mitigation monitoring and reporting program (MMRP) to ensure that the adopted mitigation measures are implemented and enforced. (AR 166–273; § 21081.6, subd. (a).)

C. The Instant Lawsuit

Three separate challenges to Friant Ranch were filed, including this case. The cases were consolidated for the purposes of briefing and hearing, but not for judgment. On December 14, 2012, the trial court delivered its ruling, denying the Petition for Writ of Mandate of Sierra Club et al. ("Appellants") in full. Appellants appealed.

The Court of Appeal concluded that Appellants' challenges to the sufficiency of the EIR's discussions raised predominantly procedural issues subject to independent judicial review. (Opn. 23.) Applying this standard of review to the EIR's air quality analysis, the court held that the analysis violates CEQA for failing to include an analysis *correlating* the project's air emissions with the specific health impacts that the increase in those emissions in the air basin will cause. (Opn. 48–50.) The court also held that

the mitigation measure adopted to reduce the project's operational air quality impacts, but not to less-than-significant levels, violates CEQA because it is impermissibly deferred, vague, unenforceable, and uses the phrase "substantially reduce" without quantifying the emission reductions. (Opn. 58–63.) The court reversed and remanded the trial court's decision with directions to the trial court to enter a writ commanding the County to vacate its approval of Friant Ranch and not reapprove the project until the County prepares an EIR that complies with the Court of Appeal's decision. (Opn. 65.) For the reasons set forth below, the Court of Appeal incorrectly decided each of these issues, and this Court should reverse.

IV.
ARGUMENT

A. The Deferential Substantial Evidence Standard of Review Applies to Claims Challenging the Sufficiency of an EIR's Discussion of a Required Topic.

An agency's decision to certify an EIR and approve a project is reviewed for prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded as required by law or its determinations are not supported by substantial evidence. (§§ 21168.5, 21168.) As emphasized by this Court in *Vineyard*, "[j]udicial review of these two types of errors differs significantly." (*Vineyard*, 40 Cal.4th at p. 435.)

> While [the courts] determine de novo whether the agency has employed the correct procedures, "scrupulously

> enforc[ing] all legislatively mandated CEQA requirements" [Citation], [the courts] accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, [the court's] task "is not to weigh conflicting evidence and determine who has the better argument." (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.)
>
> In evaluating an EIR for CEQA compliance then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. 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." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; [citation].) In contrast, in a factual dispute over "whether adverse effects have been mitigated or could be better mitigated" (*Laurel Heights I, supra*, 47 Cal.3d at p. 393), the agency's conclusion would be reviewed only for substantial evidence. Thus, in *Laurel Heights I*, [the Court] rejected as a matter of law the agency's contention that the EIR did not need to evaluate the impacts of the project's foreseeable future uses because there had not yet been a formal decision on those uses (*id.* at pp. 393–399), but upheld as supported by substantial evidence the agency's finding that the project impacts described in the EIR were adequately mitigated (*id.* at pp. 407–408).

(*Vineyard*, 40 Cal.4th at p. 435.)

This case involves a claim that frequently arises in CEQA cases: whether an EIR violates CEQA for failing to include sufficient relevant information. (Opn. 23.) The Court of Appeal correctly observed that such claims generally fall into two types:

> The first type involves a situation where the EIR does not discuss a topic that [the statute or Guidelines[4]] says must be discussed. This type of claim is relatively easy to decide—either the required information was in the EIR or it was omitted. ...
>
> The second type of claim, which is presented in this case, is more complex. It involves an EIR that has at least addressed the required topic and a claim by the plaintiff that the information provided about that topic is insufficient.

(Opn. 23.)

The question before this Court is whether this "second type of claim" – a claim that the EIR, while addressing a topic required by CEQA, fails to include sufficient information on that topic – is predominantly a claim of improper procedure, and therefore reviewed de novo, or predominantly a dispute of facts, and therefore reviewed for substantial evidence.

The Court of Appeal incorrectly held that this type of claim is predominantly procedural. (Opn. 23.) According to the court, "[c]onceptually, this type of claim involves the reviewing court's 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

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[4] Here, the court also listed "judicial opinion." (Opn. 23.) In determining whether an agency has complied with CEQA, however, the courts may look to judicial opinion only to the extent that the opinion is consistent with the Act and the Guidelines, and does not impose new substantive or procedural requirements beyond those explicitly stated therein. (§ 21083.1.)

independent review by the courts." (Opn. 23, italics original.) By this statement, the Court of Appeal inappropriately transformed its role from that of the judiciary reviewing the lead agency's work to ensure it complies with CEQA's procedures and is supported by substantial evidence to that of a final arbiter of what must be included in an EIR. In doing so, the Court of Appeal inappropriately substituted its judgment for that of the people and their elected representatives.

Furthermore, if left to stand, the judicial "line drawing" established by the court below would introduce significant and unnecessary uncertainty into the already arduous CEQA review process. Under the de novo standard of review applied by the Court of Appeal, a lead agency and project applicant will have no way of knowing whether their EIR includes sufficient information on a given topic until a reviewing court tells them it does or does not. The lack of predictability inherent in this non-deferential standard of review will lead to needless delay, expense, and waste in government. Agencies and project applicants need to know what is expected of them *when they prepare an EIR*, not years later after the litigation process has ended. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 468, 475–476 (*Neighbors*) (conc. & disc. Opn. of Baxter, J. [recognizing the important policy of predictability in the CEQA review process]).)

Real Party respectfully urges that the Court of Appeal reached the wrong conclusion. As demonstrated below, CEQA's framework, separation of powers principles, policies favoring certainty in the CEQA process, and this Court's decisions concerning EIR adequacy all mandate that claims challenging the sufficiency of an EIR's discussion of a required topic are to be reviewed under the deferential substantial evidence standard.

1. CEQA entrusts public agencies with the discretion to determine how best to implement CEQA's broad informational mandates, and agency decisions in this regard are inherently factual.

CEQA and the Guidelines outline broad categories of information that all EIRs must include. (See Guidelines, §§ 15122–15132; §§ 21100, 21002.1, subd. (a), 21003, subds. (b)–(c), 21061.) In doing so, CEQA and the Guidelines allow lead agencies to ascertain what information *must* go in their EIRs. Specifically, an EIR is an informational document that must (i) provide agencies and the public with detailed information about the environmental effects of a proposed project, including direct, indirect, cumulative, and growth-inducing impacts, (ii) list ways in which the significant effects of the project might be minimized, and (iii) identify alternatives to the project that could meet the project's basic objectives while lessening its environmental effects. (*Laurel Heights I, supra*, 47 Cal.3d at p. 391; §§ 21061, 21100; Guidelines, §§ 15003, subds. (b)–(e), 15126.2; see also *id.* at §§ 15140–15151 [describing additional

considerations for preparing EIRs]; *id.* at Appendix G [setting forth questions lead agencies "should normally address" in initial studies (and therefore EIRs) if they are "relevant to a project's environmental effects"].) As noted earlier, the failure to address in an EIR one or more of CEQA's required topics constitutes a failure to proceed in the manner required by CEQA.[5] If the omitted information is necessary to informed public participation and decisionmaking, the error is prejudicial. (§ 21005, subds. (a)–(b).)

Within CEQA's general categories of required information, however, the statute and the Guidelines leave to the discretion of implementing agencies the determination of *how* the broad statutory mandates and Guidelines commands should be carried out for individual projects. EIRs must be prepared for widely divergent activities, each with a unique environmental setting. The virtually limitless variations in the types of projects, the circumstances under which they may be carried out, and the differing jurisdictional, legal, and policy contexts in which the agencies

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[5] See, e.g., *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236 (*Sierra Club*) (failure to undertake any analysis of timber harvesting impacts on special status species); *Laurel Heights I, supra*, 47 Cal.3d at pp. 399, 406 (failure to undertake any analysis of significant environmental impacts of a reasonably foreseeable future phase of the project and failure to discuss any alternatives to the project); *Vineyard, supra*, 40 Cal.4th at p. 447 (failure to follow CEQA's procedures for tiering of environmental analysis, failure to properly incorporate mitigation measures into EIR, and failure to include any analysis of the significant environmental impacts of mitigation measures).

operate preclude rigid rules regarding the type, scope, and amount of information to include in EIRs. Instead, agencies must tailor the discussions and analyses in EIRs to fit varying conditions, so that the EIRs will be responsive, relevant, and informative. (See §§ 21061, 21003.1; Guidelines, § 15064, subds. (b)–(c).)

Importantly, in making these decisions about the contents of EIRs, lead agencies should be influenced by the interactive public and agency review process that CEQA compels. If, as is often said, the EIR is the heart of CEQA,[6] this interactive review process is the soul. The CEQA review process involves early consultation with the public and other agencies regarding the scope and content of the draft EIR, preparation of the draft EIR, public and other agency review of the draft, and evaluation of and responses to comments received. (§§ 21153, 21080.3, 21080.4; Guidelines, §§ 15081–15088.) The purposes behind this review include sharing expertise, disclosing agency analyses, checking for accuracy, detecting omissions, discovering public concerns, and soliciting counter proposals. (Guidelines, § 15200; see also *id.* at § 15201 ["[p]ublic participation is an essential part of the CEQA process"]; § 21003.1, subs. (a)–(b).)

If the CEQA review process is working as intended, an EIR's discussion and analysis will reflect, and be responsive to, the insights and

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[6] Guidelines, § 15003, subd. (a); *Laurel Heights I*, *supra*, 47 Cal.3d at p. 392.

expertise provided in comments, thereby ensuring the integrity of the process. (See *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 486 (*EPIC*) ["'"public review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources'"].)

Agency decisions about how best to implement in their EIRs CEQA's broad informational mandates are thus not made in a vacuum. *Nor should they be reviewed in one.* When a lead agency's decisionmaking body certifies an EIR and approves a project, the body has before it a wealth of discussion, analysis, public and other agency input, expert responses, and informed staff opinions. Collectively, this information, and more, becomes the certified administrative record. (§ 21167.6, subd. (e).) In considering a claim that an EIR lacks sufficient information on a required topic, a court should not ignore this record, as the Court of Appeal did below (see § IV.B, *post*).

Instead, the court should review the administrative record, as a whole, to determine whether substantial evidence supports the agency's decision that the EIR sufficiently discusses a required subject. In such cases, the burden should be on the challenger to demonstrate two things: first, that, viewing the record as a whole, the evidence supporting the agency's determinations and actions – including the agency's choices

regarding analytical methodologies – is not "substantial"; and second, that any additional information the challenger insists should have been included was necessary for informed decisionmaking and public participation. (§§ 21168, 21168.5, 21005, subds. (a)–(b); *Laurel Heights I, supra*, 47 Cal.3d at pp. 392–393; Guidelines, §§ 15151, 15384.) Absent both of these showings, the court should refuse to hold that the agency prejudicially abused its discretion with respect to the EIR's discussion of a required topic.

Here, as discussed in Section IV.B, *post*, Appellants failed to demonstrate that the County's decisions regarding the methodology and scope of the EIR's air quality analysis lack substantial evidentiary support. Appellants also failed to demonstrate that a health "correlation" analysis is feasible, let alone necessary for informed decisionmaking and public participation. Therefore, the Court of Appeal should have rejected Appellants' claim, and this Court should reverse the decision below.

2. A lead agency's factual determinations, including determinations about the scope, type, and amount of information to include in an EIR on a required topic, are entitled to deference under separation of powers principles and based on the presumed expertise of the public agency.

It is well settled that "the legislative branch is entitled to deference from the courts because of the constitutional separation of powers." (*WSPA*, *supra*, 9 Cal.4th at p. 572.) Thus, under CEQA, the lead agency, not the

reviewing court, is charged with ensuring that decisionmakers and the public are informed about a project's adverse environmental impacts before decisions are made. (*WSPA*, *supra*, 9 Cal.4th at p. 572.) In light of this separation of powers, a reviewing court:

> may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. "[The court's] limited function is consistent with the principle that '[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.'" [Citation.] [The court] may not, in sum, substitute [its] judgment for that of the people and their local representatives.

(*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goleta II*).)

In this Court's landmark decision in *WSPA*, separation of powers principles and other important policy considerations led the Court to hold that extra-record evidence is generally inadmissible in CEQA cases. (9 Cal.4th at p. 565.) The policy rationales articulated by the Court in *WSPA* apply with equal force here, and demonstrate why it is problematic for the courts, rather than the lead agency, to decide the appropriate scope of analysis in an EIR.

First, the Court in *WSPA* reasoned that extra-record evidence is not admissible in a CEQA case because "excessive judicial interference" with an agency's quasi-legislative actions would conflict with the principle that

the legislative branch is entitled to deference from the courts because of constitutional separation of powers. (*WSPA*, *supra*, 9 Cal.4th at p. 572, citing Cal. Const. art. III, § 3.) Similarly here, application of de novo review to agency decisions about the scope, type, and amount of information to include in EIRs on required subjects would excessively interfere with the agencies' legislatively delegated discretion under CEQA.

As discussed above, if an EIR is required for a project, the public agency must (i) undertake scoping to determine the breadth of the EIR, (ii) prepare the draft EIR, (iii) respond to comments on the draft EIR, and (iv) decide whether the final EIR is both legally and practically adequate. By the end of this process, hundreds, if not thousands, of decisions will have been made – most of them minor, but many of them quite important. It is not the court's role to lightly second-guess these decisions. Rather, the judiciary is only a check on legislatively delegated administrative discretion, and should not upset an agency's decision to approve an EIR unless the agency has failed to comply with the procedural requirements explicitly stated in the statute or Guidelines, or unless the agency's decision lacks substantial evidentiary support. (*WSPA*, *supra*, 9 Cal.4th at pp. 572–573.)

Second, the Court in *WSPA* was persuaded that judicial review must be limited to the administrative record because the courts regularly give a high degree of deference to the decisions made by administrative agencies

in recognition of their expertise in specified areas. (*WSPA*, *supra*, 9 Cal.4th at pp. 571–574.) Here, agencies that administer CEQA have substantial expertise on factual questions and policy issues relating to the projects they are reviewing under CEQA. Preparing an EIR requires that large amounts of information, much of it technical, be assembled, organized, and presented in a way that fosters informed public participation and decisionmaking. The staff of public agencies overseeing preparation of EIRs are experienced in evaluating such information and determining, based on the particular environmental circumstances of proposed projects and the input received from the public and other agencies, what information to include in their EIRs on CEQA's required subjects.

Courts, on the other hand, generally do not have the resources or expertise to weigh this information, to make judgments about what information is relevant or important to the public and decisionmakers, or to decide how that information should be analyzed and presented in an EIR to maximize its usefulness. (See *Laurel Heights I*, *supra*, 47 Cal.3d at p. 393 [the courts "have neither the resources nor scientific expertise to" weigh conflicting evidence and determine who has the better argument]; *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 412 [agency staff have expertise in preparing EIRs].)

Third, the Court in *WSPA* was convinced that "if interested parties know they will not be able to introduce extra-record evidence in subsequent

judicial proceedings, [it will motivate them to] present all their evidence to the administrative agency in the first instance." (*WSPA*, *supra*, 9 Cal.4th at p. 575.) Here, if this Court were to decide that a reviewing court, and not the public agency, is the final decisionmaker regarding what information belongs in an EIR, such a conclusion would discourage project opponents from thoroughly vetting their objections to the EIR's analysis before the public agency. Instead, as occurred here (see Section IV.B.2, *post*), project opponents could state a single-sentence objection to the analysis in order to (barely) exhaust their administrative remedies, but avoid making a good-faith effort to alert the lead agency to the need either to fix the EIR or to provide a detailed response to the comment explaining why revisions to the EIR are unnecessary. The challengers could then go to court to have that issue reviewed de novo, with no deference to the lead agency and without reference to the administrative record.

This should not be the law. As this Court has warned: "'[R]ules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement.'" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132 (*Laurel Heights II*), quoting *Goleta II*, *supra*, 52 Cal.3d at p. 576; see also § 21003, subd. (f).)

Finally, in addition to holding that extra-record evidence is generally inadmissible under CEQA, the Court in *WSPA* declined to recognize an exception to the rule against extra-record evidence "to show that an administrative agency has not considered 'all relevant factors' in making its decision." (*WSPA*, *supra*, 9 Cal.4th at p. 576.) The Court reasoned that were it to adopt an "all relevant factors" exception:

> [It] would place an unworkable qualification on the general rule of inadmissibility. In considering whether to admit extra-record evidence courts would be compelled to determine whether a particular "factor," i.e., a specific item of evidence, was "relevant," i.e., important enough that the administrative agency should have considered it. The issue would often become not whether the administrative decision was a prejudicial abuse of discretion, but whether the decision was wise or scientifically sound in light of the extra-record evidence. ... [S]uch questions are not for the courts to answer. ... If parties could introduce such evidence under an exception as vague as the ["all relevant factors" exception], the exception would swallow the rule.

(*Id.* at p. 577.)

Here too, it is not the court's role to decide what information is "relevant" to the agency's decision such that it must be included in an EIR. (Compare Opn. 49, fn. 23 [stating that the health "correlation" analysis is necessary for the Board to weigh the merits of the project].) That decision is properly left to the sound discretion of the agency reviewing the project.

Based on these policy considerations, the Court should reaffirm that a court must uphold a lead agency's decisions regarding the type, scope,

and amount of information and analysis to include in an EIR on a required subject if substantial evidence supports those decisions.

3. This Court has consistently applied the substantial evidence standard to claims that an EIR lacks sufficient information on a required topic.

Over the last quarter-century, this Court has firmly established, in case after case, that the substantial evidence standard of review applies to claims that an EIR lacks sufficient information on a required topic. While a clearly inadequate or unsupported study is owed no deference, once an EIR addresses the topics required by CEQA, the court must review the sufficiency of those discussions under the substantial evidence standard. The discussion that follows will address each of these cases in turn.

a. *Laurel Heights I*

The leading case on EIR adequacy is *Laurel Heights I*, which involved an EIR for a university's proposal to relocate ongoing biomedical research activities into an unoccupied building near a residential area. (47 Cal.3d 376, 389.) In that case, the Court independently reviewed the university's failure to address in its EIR the topics required by CEQA, but reviewed the sufficiency of the EIR's discussion of required topics only for substantial evidence, resolving all reasonable doubts in favor of the university.

Specifically, regarding the EIR's "procedural" violations, the Court concluded that CEQA requires, as a matter of law, an EIR to evaluate the

significant environmental effects of reasonably foreseeable phases of a project and to discuss alternatives to the proposed project, even if the project's significant impacts would be mitigated to less-than-significant levels. (*Id.* at pp. 393–407.) Because the university's EIR failed to include these discussions,[7] and because the omitted information was necessary to informed decisionmaking and public participation, the Court held that the university prejudicially abused its discretion in omitting these discussions. (*Id.* at pp. 393–399, 400–407.)

On the other hand, the Court applied the substantial evidence standard to petitioner's claims that the EIR lacked sufficient evidence and information regarding the potential health and air quality impacts resulting from the project's venting of chemicals and other substances into the air.[8] (*Id.* at pp. 407, 410.)

For instance, petitioner argued that the EIR violated CEQA for failing to include a wind dispersion analysis. (*Id.* at p. 415.) Similar to the Court of Appeal in this case, the appellate court in *Laurel Heights I* agreed,

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[7] Although the EIR contained a "purported" discussion of alternatives, "it defie[d] common sense for the [university] to characterize [the purported discussion] as a *discussion* of any kind; it is barely an *identification* of alternatives, if that." (47 Cal.3d at p. 403, italics original.)

[8] Although the Court characterized petitioner's claim as challenging the university's finding that all impacts would be mitigated to less-than significant-levels, a review of the Court's discussion shows that the argument largely focused on the sufficiency of the EIR's discussion of health impacts from the facility's ventilation system and the evidence in support of the EIR's conclusion that the system would not cause harmful effects. (47 Cal.3d at pp. 410, 413–417, 409–412.)

holding that the EIR was insufficiently specific regarding wind characteristics and mean temperatures. (*Ibid.*) This Court reversed, concluding that substantial evidence supported the EIR's discussion, so further information on wind dispersion was not required. (*Id.* at pp. 415–416; see also *id.* at pp. 412–415 [EIR not required to identify and quantify the precise chemicals that would be released at the facility].) In so holding, the Court cautioned that "[a] project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study ... might be helpful does not make it necessary." (*Id.* at p. 415.) Yet, as discussed Section IV.B, *post*, by applying the independent de novo standard of review to the Friant Ranch EIR's analysis, the Court of Appeal in this case decided to "design the EIR" itself, in conflict with this Court's direction in *Laurel Heights I.*

b. *Goleta II* and *Bay-Delta*

In *Goleta II*, the Court again reviewed the sufficiency of an EIR's discussion of a required topic – the requirement for an EIR to evaluate a reasonable range of project alternatives. Petitioner contended that the EIR for a shore-front resort violated CEQA because it did not consider off-site alternatives proposed by petitioner after public comment closed on the draft EIR. (*Goleta II, supra*, 52 Cal.3d 553, 566.) The Court of Appeal held that the EIR failed to include facts sufficient to explain the respondent county's

rejection of the alternatives sites. (*Id.* at p. 563.) This Court reversed, reasoning that "[t]he record evidence substantially supports the Board's conclusion that none of the additional sites represented a feasible project alternative or merited extended discussion in the EIR." (*Id.* at pp. 566–567.) Therefore, although CEQA requires an EIR to evaluate a reasonable range of alternatives, the county did not abuse its discretion in omitting the off-site alternatives proposed by petitioner because substantial evidence in the administrative record supported the county's decision not to discuss those alternatives in the EIR. (*Id.* at pp. 568–576.)

More recently, in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143 (*Bay-Delta*), this Court again applied the substantial evidence standard to an EIR's discussion of alternatives. In that case, the Court of Appeal held that the programmatic EIR for the CALFED program violated CEQA because it did not examine an alternative requiring reduced water exports from the Bay-Delta. (*Id.* at p. 1161.) This Court reversed. Applying the substantial evidence standard, the Court held that the CALFED agencies did not abuse their discretion in determining that a reduced-export alternative would be infeasible because it would not meet one of the fundamental purposes of the program. (*Id.* at pp. 1164–1167.) Therefore, the Court upheld the EIR's discussion of alternatives. (*Ibid.*)

Although *Goleta II* and *Bay-Delta* involve CEQA's requirement for an EIR to discuss a range of alternatives, there is no conceptual reason to apply the substantial evidence standard to an EIR's discussion of alternatives but not to an EIR's discussion of significant impacts (in this case, air quality impacts). As with the requirement to discuss alternatives, there are no "ironclad rules" governing the nature or scope of impact analyses that must be included in an EIR. While Appendix G of the CEQA Guidelines presents topics that an Initial Study (and thus an EIR) should "normally address," CEQA generally leaves to the discretion of the lead agency decisions about *how* to analyze these topics and present that analysis in the EIR. (Guidelines, §§ 15126–15126.2, 15128, 15140–15151.)

As one leading treatise states: CEQA "leaves it to the lead agency preparing the EIR to decide what impacts merit a detailed investigation, the methods for collecting and synthesizing data, the appropriate scope and depth of analysis, how to frame the EIR's discussion to present a useful and informative evaluation, and what conclusions to draw from the evidence." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2014) § 11.38, p. 11-32.) As a result, "reviewing courts [should] not decide whether the agency correctly resolved disagreements about the validity or appropriateness of the technical analysis in the EIR, but only whether there is any substantial evidence supporting it." (*Ibid.*)

c. *Laurel Heights II*

In *Laurel Heights II*, this Court held that the substantial evidence standard of review applies to a lead agency's decision that new information added to an EIR is not so "significant" as to warrant recirculation of the draft EIR. (*Laurel Heights II, supra*, 6 Cal.4th 1112, 1132–1135; § 21092.1.) Petitioner therein argued that the failure to recirculate an EIR is a procedural error because CEQA requires an agency to recirculate an EIR when it adds new significant information to the EIR. (6 Cal.4th at p. 1134.) This argument is analogous to the argument petitioners frequently make when challenging the sufficiency of an EIR's impact discussion – to wit, CEQA requires an EIR to contain relevant information regarding a project's significant impacts, and therefore the failure to include such relevant information constitutes a procedural error.[9]

The Court rejected this line of thinking in *Laurel Heights II*, and should do so here. In *Laurel Heights II*, the Court explained that a "procedural violation cannot be found ... unless the [university's] decision regarding the significance of the new information fails to pass muster under the applicable [substantial evidence] standard of review." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1134.) Similarly, a procedural violation of an

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[9] See, e.g., *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1045–1046; *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, 1616–1620; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986.

EIR's discussion of a project's significant impacts should not be found unless the discussion is not supported by substantial evidence in the first instance.

Applying the substantial evidence standard, the Court in *Laurel Heights II* upheld the university's decision not to recirculate its draft EIR. In doing so, the Court deferred to the university's decisions about the analysis to include in the draft EIR, the responses to comments, and the conclusion that the new information was not "significant." (6 Cal.4th at pp. 1136–1143.)

For example, the draft EIR did not address night-lighting impacts, but in response to comments the final EIR explained that such impacts would be minor and not significant, and added mitigation to address this less-than-significant impact. Therefore, the university concluded that recirculation was not required on this issue. Reviewing the entire record before it, the Court upheld these determinations because they were supported by substantial evidence. (*Laurel Heights II, supra*, 6 Cal.4th at pp. 1140–1141.)

In contrast, under the standard of review adopted by the Court of Appeal below, the university's decision not to address night-lighting impacts in the draft EIR would have been reviewed de novo, and if the court thought a night-lighting analysis should be included in the draft EIR regardless of what the administrative record showed, the court would have

held the university violated CEQA for failing to include that analysis. Such a result would be inconsistent with this Court's sound interpretation of CEQA, which establishes that a court must defer to the lead agency's factual conclusions if they are supported by substantial evidence.

d. *Vineyard*

In *Vineyard*, this Court reviewed the sufficiency of an EIR's discussion of the short- and long-term water supplies for a large mixed-use development project. (*Vineyard*, *supra*, 40 Cal.4th at pp. 421, 441.) Before reaching the merits of these claims, the Court clarified the standard of review. (*Id.* at p. 435 [quoted in full at Section IV.A, *supra*].)

Since *Vineyard*'s publication, CEQA petitioners have argued that the case establishes that the "failure to proceed" standard of review applies to *all* claims challenging the sufficiency of an EIR's impact discussion. (See e.g., Answer to Petition for Review, p. 3.) The Court of Appeal below appears to agree. (See Opn. 23.) This interpretation, however, is not supported by the *Vineyard* decision. Rather, *Vineyard* merely affirms the long-standing principles that the courts must scrupulously enforce all of CEQA's legislatively required mandates, but must defer to an agency's factual determinations if they are supported by substantial evidence.

The Court in *Vineyard* was careful to distinguish its conclusions regarding the EIR's procedural violations from its conclusions about the respondent county's evidentiary support. The Court held that the EIR's

"long-term water supply discussion suffers from both procedural and factual flaws."[10] (40 Cal.4th at p. 447.) "Procedurally," the EIR "improperly purports to tier from a future environmental document" in support of its water supply analysis. (*Ibid.*; see also *id.* at pp. 429, fn. 6, citing §§, 21093, 21094 and Guidelines, § 15152.) The EIR "also fails to properly incorporate or tier from the impact and mitigation discussion" of a regional water planning proposal "and hence to include in the present project enforceable mitigation measures for the large new surface water diversions proposed." (*Vineyard, supra*, at p. 447; see also *id.* at p. 444.)

In contrast, "[f]actually," the Court held, the final EIR's "use of inconsistent supply and demand figures, and its failure to explain how those figures match up, results in a lack of substantial evidence that new surface water diversions are likely to supply the project's long-term needs." (*Vineyard, supra*, 40 Cal.4th at p. 447; see also *id.* at pp. 439–440.)

In summary, the Court's analysis in *Vineyard* focused on the factual evidence supporting the conclusion that the project therein would not have a significant water supply impact and the agency's compliance with CEQA's procedures regarding tiering and the duty to adopt enforceable mitigation measures. Contrary to the Court of Appeal's implicit

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[10] In contrast, the Court held the EIR's discussion of near-term water supplies was both supported by substantial evidence and in compliance with CEQA's procedural mandates. (*Vineyard, supra*, 40 Cal.4th at pp. 436–437.)

interpretation of the case, *Vineyard* did not hold, or even suggest, that a court must apply its independent judgment to claims that an EIR lacks sufficient information on a required topic.

e. *Ebbetts Pass*

The misinterpretation of *Vineyard* as establishing that all informational claims are reviewed de novo also is not supported by the Court's more recent decisions, including *Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection* (2008) 43 Cal.4th 936 (*Ebbetts Pass*). In that case, the Court reviewed the adequacy of three timber harvesting plans (THPs)[11] under the same standard of review articulated in *Vineyard*. (*Id.* at p. 949, quoting *Vineyard*, 40 Cal.4th at p. 435.) The Court determined that while petitioners' claims that the THPs did not follow the Forest Practice Rules' analytic requirements were predominantly procedural,[12] all of petitioners' claims that the THPs lacked sufficient information raised factual disputes. (*Ebbetts Pass*, *supra*, 43 Cal.4th at pp. 952–958.)

In reaching these conclusions, the Court squarely rejected petitioners' attempt to convert their factual allegations to procedural claims.

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[11] Under CEQA's partial exemption for certified regulatory programs, THPs serve as the functional equivalent of EIRs or negative declarations and the courts review CDF's approval of timber operations under CEQA's standards of judicial review. (*Ebbetts Pass*, *supra*, 43 Cal.4th pp. 943–944.)

[12] *Ebbetts Pass*, *supra*, 43 Cal.4th at p. 949 (treating claim that the THPs' cumulative impact analyses did not follow the requirements of the Forest Practice Rules as a procedural claim).

For instance, petitioners argued that because the THPs used a relatively small cumulative assessment area, the THPs failed to adequately address the cumulative impacts of logging on spotted owl habitat – a CEQA violation petitioners characterized as procedural. (*Ebbetts Pass*, 43 Cal.4th at p. 950.) The Court disagreed that this claim was procedural and, in doing so, distinguished *Sierra Club* (7 Cal.4th 1215),[13] on which petitioners relied. The Court explained that in *Sierra Club*, "the Board of Forestry erred by approving a [THP] despite the applicant's complete refusal to disclose the impacts of its proposed logging on old-growth-dependent species." (*Ibid.*, citing S*ierra Club*, *supra*, 7 Cal.4th at pp. 1221–1232, 1234, 1236–1237.) In contrast, in *Ebbetts Pass*, "the plans discussed the cumulative impact on spotted owl habitat, including habitat needed for population dispersal over a large geographic area; *they only failed to discuss the*

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[13] In *Vineyard*, this Court cited *Sierra Club*, *supra*, 7 Cal.4th 1215 as an example of a case in which the agency failed to proceed in the manner required by CEQA. (*Vineyard*, *supra*, 40 Cal.4th at p. 435.) In *Sierra Club*, the Court held that State Board of Forestry violated CEQA in approving two THPs that included no analysis of the potential impacts of timber harvesting on old-growth-dependent species. The reason the THPs lacked this analysis is that the California Department of Forestry (CDF) erroneously believed that it was legally prohibited from asking the applicant for information about the old-growth-forest habitat. The Court, however, explained that CEQA bestows on CDF the authority to request from the applicant information necessary to determine a project's significant impacts. (*Id.* at p. 1234 [citing § 21160].) Because the proposed timber harvesting of old-growth forest could have a significant impact on wildlife species, CDF violated CEQA's procedural requirements in refusing to gather information on this potential impact and evaluate it. (*Id.* at p. 1236.)

subject at the level of detail plaintiffs believe is needed to scientifically establish the cumulative impact on spotted owl populations." (*Ebbetts Pass*, 43 Cal.4th at p. 950, italics added.) Consequently, explained the Court, the "deficiency is ... at most, one of insufficient evidence to support CDF's findings." (*Id.* at p. 951.)

In other words, unlike *Sierra Club*, *supra,* 7 Cal.4th 1215, in which the agency simply ignored CEQA's procedural requirement to gather information and evaluate a project's potentially significant impacts on special-status wildlife habitat, in *Ebbetts Pass* the THPs did address the topics required by law, so the question became whether substantial evidence supported the THPs' discussions of those topics. (*Ebbetts Pass*, *supra*, 123 Cal.App.4th at p. 951; see also *id.* at pp. 952–958 [upholding EIR's discussion of the impacts of herbicide use under the substantial evidence standard].) Here, similarly, because the Friant Ranch EIR addresses the project's significant air quality impacts, the question should be whether substantial evidence supports that discussion.

f. *Neighbors*

In *Neighbors*, *supra*, 57 Cal.4th 439, 447–448, the issue before the Court was whether, in administering CEQA, an agency ever has discretion to deviate from the "normal" existing conditions baseline established by CEQA Guidelines section 15125, subdivision (a). The plurality[14] concluded that, consistent with the *express* requirement of section 15125, subdivision (a), an EIR must normally include an existing conditions baseline from which to compare the project's environmental impacts. (*Id.* at pp. 451–452, 456–457.) Within this general requirement, however, the Court recognized that the agency may omit an existing conditions baseline when doing so is necessary to prevent misinforming or misleading the public and decisionmakers. (*Id.* at pp. 448, 451–452.) The agency's conclusion that an existing baseline would be misleading or without informational value is reviewed for substantial evidence. (*Id.* at pp. 448, 457.)

Ultimately, the Court concluded that the respondent agency lacked substantial evidence to support its decision to deviate from the normal

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[14] In the concurring and dissenting opinion of Justice Baxter, in which Chief Justice Cantil-Sakauye and Justice Chin joined, the concurring and dissenting justices agreed that the respondent agency complied with CEQA, but disagreed that an agency may only depart from the "normal" existing conditions baseline when an existing baseline would be misleading or without informational value. (57 Cal.4th 467–478.) Justice Liu concurred with the plurality's analysis and holdings except for the portion concluding that the error in the EIR was not prejudicial. (*Id.* at pp. 478–481.) The plurality opinion is thus "law" except with respect to its discussion of prejudice.

baseline. (*Id.* at pp. 460–463.) The plurality concluded, however, that this failure was not prejudicial because it "did not deprive the agency or the public of substantial relevant information" on the project's air quality and traffic impacts. (*Id.* at pp. 446, 460–465.) The Court also upheld the agency's parking mitigation under the substantial evidence standard. (*Id.* at p. 466.)

Neighbors therefore supports the proposition that the agencies charged with administering CEQA must follow CEQA's procedural requirements, but in doing so, the agencies retain discretion as to how to conduct their analyses to meet the goals of informed decisionmaking and informed public participation. These decisions will be upheld if they are supported by substantial evidence in the record. Moreover, under the plurality's opinion, the failure to comply with CEQA's informational requirements is not per se prejudicial. (*Id.* at pp. 451–452.)

In summary, the CEQA framework, the policies limiting judicial review of legislative decisions, and this Court's decisions concerning EIR adequacy all dictate the conclusion that the lower court erred in independently reviewing the sufficiency of the Friant Ranch EIR's air quality analysis. For the reasons stated herein, the Court should reaffirm that the substantial evidence standard applies to such claims and reverse the court's decision below.

B. The Court of Appeal Erred in Holding that the EIR Violates CEQA for Not Including an Analysis Correlating the Project's Air Emissions to Specific Health Impacts.

The Court of Appeal acknowledged that the Friant Ranch EIR's discussion of air quality impacts describes the types of air pollutants that Friant Ranch will produce, explains the thresholds of significance recommended by the Air District, quantifies the tons per year of the pollutants that the project will generate, and provides a general description of each pollutant that acknowledges how it affects human health. (Opn. 48; *id.* at pp. 43–44; AR 802–806, 818, 821, 4962.) Therefore, the Court of Appeal concluded that the "EIR has *identified*, in a general manner, the adverse health impacts that could result from the project's effect on air quality." (Opn. 48, italics added.)

Applying its independent judgment to the sufficiency of the EIR's discussion, however, the court went on to hold that CEQA requires an additional specific study – an analysis *correlating* the project's emissions to the *specific* health impacts that will result. (Opn. 48–50.) Examples of the types of "correlation" analyses the court envisions include information about whether "people with respiratory difficulties [will have to] wear filtering devices when they go outdoors" (Opn. 48) and "an estimate of the project's impacts on the 'days exceeding'" the federal and state air quality attainment standards (Opn. 49). For several important reasons described below, the Court of Appeal reached the wrong conclusion on this issue.

1. The Court of Appeal's decision interprets CEQA in a manner expressly prohibited by the Legislature.

The Court of Appeal exceeded its interpretive discretion. Early on, this Court declared that CEQA is to be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 (*Friends of Mammoth*).) More than 20 years after *Friends of Mammoth*, however, the Legislature made it clear "that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA] or the [Guidelines] in a manner which imposes procedural or substantive requirements beyond those explicitly stated" in the statute or Guidelines. (§ 21083.1, added by Stats. 1993, ch. 1070, § 2.) In the wake of the enactment of this provision, the lower courts have recognized that "'the literal, i.e., explicit, approach to statutory construction is [now] mandatory under CEQA.' [Citation]." (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1417, 1423.)

The Court of Appeal failed to honor this restriction on its interpretive power by imposing a new legal mandate – a requirement to include in an EIR an analysis correlating a project's air emissions with specific health impacts – that is not required by CEQA or the Guidelines. Instead, the court based its conclusion that CEQA requires a health "correlation" analysis on Guidelines section 15126.2, subdivision (a). (Opn.

48, fn. 22.) That Guidelines section, however, states only that an "EIR's 'discussion should include relevant specifics of the ... health and safety problems caused by the physical changes' resulting from the project." (*Ibid.*, quoting Guidelines, § 15126.2 subd. (a).)

Nowhere in this Guidelines section (or anywhere else in CEQA or the Guidelines) does the law state that an EIR must not only quantify a project's air emissions, identify the health impacts that exposure to those pollutants typically causes, and determine whether the project's emissions would exceed significance criteria, but also include an analysis *correlating* the project's emissions to specific health impacts. In reading such a requirement into the Guidelines, the court interpreted the law in a manner prohibited by Public Resources Code section 21083.1. (See also *Laurel Heights II, supra*, 6 Cal.4th at p. 1134, fn. 19 [suggesting a procedural violation will not be found unless it is expressly required by the statute or Guidelines].) In doing so, the court improperly converted a discretionary decision regarding the content of an EIR on a required subject that should be made by the County, as lead agency, into a legal issue to be resolved de novo by the courts.

2. Substantial evidence in the administrative record supports the County's air quality analysis; a health "correlation" analysis is not required.

The County in this case satisfied CEQA's procedural requirements by analyzing the project's air quality impacts, disclosing the general health

impacts of the air pollutants, and adopting feasible mitigation measures for the impacts. (AR 802–826; see Guidelines, § 15126.2, subd. (a).) In fulfilling these requirements, it was within the County's discretion to use the methodology recommended by the Air District. (AR 793; see *Laurel Heights I*, 47 Cal.3d at p. 409 [noting the appellate court overstepped its role when it weighed evidence about the proper methodology for radiation studies].) Beyond that, CEQA does not explicitly require an EIR to include an analysis correlating a project's emissions to specific health impacts. Therefore, the Court of Appeal should have reviewed Appellants' claim that the EIR violates CEQA for failing to include this analysis under the deferential substantial evidence standard. (See Section IV.A, *supra*.)

In applying the substantial evidence standard, a "'reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.' [Citation.]" (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 393; *Vineyard*, *supra*, 40 Cal.4th at p. 435.) "Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a); see also *id.* § 15384, subd. (b).)

"A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Laurel Heights I*, 47 Cal.3d at p. 393.) Nor may a court

independently decide what information must be included in an EIR on a required subject: "[A] project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study ... might be helpful does not make it necessary." (*Id.* at p. 415.)

In this case, if the appellate court had reviewed the sufficiency of the EIR's air quality analysis for substantial evidence in light of the whole administrative record, the court would have concluded that the air quality analysis is sufficient. It would have further understood that the type of "correlation" analysis it envisions is very likely not feasible, or even possible, to conduct. To the contrary, the evidence in the record suggests that it likely is *not* possible to conduct this type of analysis. In other words, the Court of Appeal, though certainly well-intentioned, waded into a complex technical thicket without recognizing that, as a general purpose court, it lacked the "scientific expertise"[15] to instruct lead agencies on how to conduct their air quality analyses.

In particular, the thresholds of significance established by the Air District, and used in the EIR, are designed to achieve federal and state "ambient air quality standards," which relate to regional (basin-wide) air quality, not impacts to particular persons or groups. (AR 793–806, 4942, 1229, 22310–22311; *Bakersfield*, *supra*, 124 Cal.App.4th at p. 1184, 1220;

[15] See *Laurel Heights I*, *supra*, 47 Cal.3d at p. 393.

see also *id.* at p. 1219, fn. 10.) The Central Valley's ambient air quality problems are the aggregate result of hundreds of projects, and cannot be traced back to one particular development project. (See AR 793–806, 1229, 22303–22307.) It is likely for this reason that none of the comments on the EIR requested a "correlation" analysis – this is simply not an analysis that agencies can reasonably perform.

Indeed, of the 32 comment letters on the Draft EIR, only one letter questioned whether the EIR adequately discloses air quality health impacts. (AR 4523–4526, 4602.) That comment came from the City of Fresno (the "City") (a vocal opponent of the project that submitted hostile comments on every chapter of the Draft EIR) and stated, in its entirety: "[U]nder CEQA, the EIR must disclose the human health related effects of the Project's air pollution impacts. (CEQA Guidelines section 15126.2(a).) The EIR fails completely in this area. The EIR should be revised to disclose and determine the significance of [Toxic Air Contaminant] impacts and of human health risks due to exposure to Project-related air emissions." (AR 4602; Opn. 50.)

In response to this comment, the Final EIR explains that:

> Health Risk Assessments are typically prepared for inclusion in development specific project EIRs when certain types of development commonly known to have the potential to result in a human health risk are being proposed (automobile fueling stations ... for example). Due to the broad nature of the planning approvals analyzed in this EIR, it is not possible to conduct a human health risk assessment based on specific

> proposed uses at specific locations within the boundaries of the Project Area because such specific information has not been determined. However, the [Draft EIR] does provide a general discussion of adverse health effects associated with certain development related pollutants[.]

(AR 4602.)

The comment letter of the Air District – a responsible agency for the project with substantial expertise in this field – supports the County's response to the City's comment. The Air District explained:

> Accurate quantification of health risks and operational emissions requires detailed site specific information, e.g., type of emission source, proximity of the source to sensitive receptors, and trip generation information. The required level of detail is typically not available until project specific approvals are being granted. Thus, the District recommends that potential health risks be further reviewed when approving future projects ....

(AR 4553; see also AR 4600.)

The County's response to this comment states that "when considering future discretionary approvals for specific development consistent with the [project's] designations, the County will assess potential health risks." (AR 4553.) This approach is consistent with Guidelines section 15146, which prescribes that "the degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity."

In summary, substantial evidence supports the County's decision not to perform a "correlation" analysis. The operational air quality impact at

issue is regional, not project-specific; the County did not receive comments on the Draft EIR suggesting that the EIR should include an analysis correlating the project's impact to ambient air quality to specific health impacts in the air basin; the County reasonably and in good faith responded to comments regarding air quality impacts and the need for a site-specific, localized, health risk assessment of toxic air contaminants; and the County's responses are supported by substantial evidence. (AR 4553, 4602, 8699.) Under these facts, it cannot be said that the County acted unreasonably or without substantial evidentiary support in failing to include a health "correlation" analysis in the EIR. Instead, based on the administrative record as a whole – including the *lack of comment* on this exact issue[16] – substantial evidence demonstrates the EIR's discussion of the project's air quality impacts is sufficient. Furthermore, as discussed below, even if it were possible to conduct this analysis – which it does not appear to be – the County's failure to do so is not prejudicial.

3. Because a health correlation analysis is not necessary for informed decisionmaking and informed public participation, the County's failure to include such an analysis in the EIR is not prejudicial.

The failure to comply with CEQA's procedural or substantive requirements is not necessarily reversible error; rather, prejudice must be

[16] *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380 (the "lack of comment, like Sherlock Holmes's 'dog in the night-time' which tellingly failed to bark ... was in itself evidence").

shown.[17] (§ 21005, subd. (b); *Neighbors*, *supra*, 57 Cal.4th at p. 463 [plur. opn.]; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 958–960; *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 226; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 925 (*Rialto Citizens*); *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073 (*Cuyama*).)

In this case, even assuming arguendo that CEQA requires the kind of correlation analysis invented by the Court of Appeal, Appellants did not establish that a correlation analysis is necessary for informed decisionmaking and public participation. Based on the information included in the EIR, the reader knows that the project's operational emissions will exceed the thresholds set by the Air District for ozone precursors (ROG and NO_x) and particulate matter, which, in turn, are based on the standard set by the Environmental Protection Agency and the California Air Resources Board to maintain ambient air quality. (AR 821, 4964 [Table 3.3-12], 4942

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[17] To the extent *Sierra Club*, *supra*, 7 Cal.4th 1215, 1236, held or implied that the failure to comply with CEQA's procedures is presumptively prejudicial, Real Party respectfully urges that the Court was mistaken. In that case, the Board's failure to comply with CEQA's procedural requirements was prejudicial because it deprived the agency of *any* information about the project's significant impacts on special status species habitat. (*Ibid.*) The law is clear, however, that under CEQA, there is no presumption of error, regardless of whether an issue is "procedural" or "factual." (§ 21005, subd. (b); *EPIC*, *supra*, 44 Cal.4th 459, 485–486; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 708-710.)

[thresholds], 793–797; see also Opn. 45.) The reader understands that the project's emissions will make it more difficult for the Central Valley to reach attainment status for the emissions, which, in turn means that the health of valley residents may be impacted. (AR 793–797, 800–806.) Further, the reader understands the types of health impacts, including respiratory and cardiovascular diseases, which can occur from the already-unsafe air quality made worse by Friant Ranch. (AR 803–804.) The reader also understands that the County considers this to be a significant and unavoidable consequence of the project. (AR 826.) This is true even with implementation of mitigation, with compliance with the Air District's Indirect Source Rule, and with approval of Alternative 3. (AR 826, 1204, 18812–18831 [Rule 9510].)

This information was sufficient to alert the public and decisionmakers about the health consequences of Friant Ranch's significant operational air quality impact. (See §§ 21102, 21002.1, subd. (a), 21100; Guidelines § 15362.) The Board understood the magnitude of this impact, as reflected by its finding that the operational air quality impact is a significant and unavoidable result of approving the project. (AR 24.) Although the Court of Appeal might disagree with the wisdom of the County's decision to approve the project despite this impact, that decision was not the court's decision to make. (*Goleta II*, *supra*, 52 Cal.3d 553, 576.) For these reasons, even assuming that a correlation analysis is

required under CEQA, the County's failure to undertake such an analysis here was not prejudicial. (§ 21005, subd. (a).)

C. Substantial Evidence Demonstrates that, on the Whole, Mitigation Measure 3.3.2 Will Minimize the Project's Air Quality Impact; the Court of Appeal Erred in Concluding that the Measure Violated CEQA.

The last two issues presented concern the adequacy of Mitigation Measure 3.3.2 ("MM 3.3.2"), which the County adopted to minimize Friant Ranch's significant operational air quality impact. (AR 824–826, 24–26.) The County readily acknowledges that MM 3.3.2 cannot reduce the impact to less-than-significant levels. (AR 24–25.) Appellants do not claim that feasible mitigation measures exist to do so.[18] The County nevertheless adopted MM 3.3.2 to reduce, partially at least, Friant Ranch's significant air quality effect, while adopting a statement of overriding considerations to approve the project because it is overall beneficial to the community. (AR 24–26, 160–165.) Contrary to the Court of Appeal's holding, MM 3.3.2 complies with CEQA.

In *Laurel Heights I*, this Court summarized the court's role in determining the adequacy of mitigation measures adopted under CEQA:

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[18] Appellants challenged the County's responses to comments suggesting off-site emission reduction programs, but the Court of Appeal upheld the County's responses, which noted that the project is required to undergo the Air District's Indirect Source Review, which will include off-site emission reduction requirements. (Opn. 63–65.) Appellants did not seek rehearing of that issue or petition this Court for review of that issue.

> [T]he question is only whether there is substantial evidence to support [the respondent's] conclusion. [¶] In answering that question, the reviewing court must consider the evidence *as a whole.* That an EIR's discussion of mitigation measures might be imperfect in various particulars does not necessarily mean it is inadequate. ...The proper judicial goal ... is not to review each item of evidence in the record with such exactitude that the court loses sight of the rule that the evidence must be considered as a whole.

(*Laurel Heights*, *supra*, 47 Cal.3d at pp. 407–408, italics original.)

Here, substantial evidence shows that MM 3.3.2 will, on the whole, minimize the project's significant-and-unavoidable operational air quality impact. (AR 24–26.) Therefore, under this Court's precedents, the Court of Appeal should have upheld MM 3.3.2. (*Laurel Heights I*, *supra*, 47 Cal.3d at pp. 407–408.)

In the over 25 years since this Court decided *Laurel Heights I*, however, the lower courts have developed numerous and often conflicting rules about mitigation measure adequacy. As discussed below, the Court of Appeal in this case applied especially draconian standards to MM 3.3.2 – standards that are both inconsistent with this Court's holdings and unwise and counterproductive as a matter of public policy.

1. MM 3.3.2 complies with CEQA and is not impermissibly deferred.

CEQA requires an EIR to set forth feasible mitigation measures that decisionmakers can adopt to minimize a project's significant effects. (§§ 21002.1, subd. (a), 21100, subd. (b)(3); Guidelines, §§ 15126.4, 15370,

subds. (a)–(e).) An agency should not rely on mitigation measures of unknown efficacy in concluding that a significant impact will be mitigated to a less-than-significant level. (See Guidelines §§, 15126.4, subd. (a)(1)(B), 15384 [defining substantial evidence].) In 1988, the lower courts began developing various rules regarding the extent to which an agency, in concluding that a significant impact will be fully mitigated, can rely on a mitigation measures that defer some amount of problem-solving until after project approval.[19] Today, the lower courts range widely on what constitutes impermissible "deferral," with some courts upholding more open-ended criteria,[20] and others requiring adherence to rigid and objective standards.[21]

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[19] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306–308 (*Sundstrom*) (overturning mitigated negative declaration for relying on mitigation measure that directed the applicant to prepare a hydrological study evaluating the project's impacts and proposing mitigation measures); *Sacramento Old City Assn. v City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1020–1023, 1030 (sufficient evidence supported conclusion that mitigation measures would reduce impact to less-than-significant level because the measures set forth a menu of options to reduce the impact and specified performance criteria that must be achieved); *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 735–738 (*POET*) (summarizing cases); see also *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261,1275; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 794; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119.

[20] See, e.g., *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 524–525 (upholding mitigation measures that required "a qualified biologist to conduct preconstruction surveys for [listed species], and to relocate any found specimens"); *Rialto Citizens*, *supra*, 208 Cal.App.4th at p. 944 (upholding mitigation for a project's impacts on burrowing owls that required a qualified biologist to survey the site "'to

Recently, some courts have applied these rules even to mitigation measures that the agency concludes will *not* reduce the impacts to less-than-significant levels, as occurred here. (Opn. 60–61; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 193–196; compare *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 244–245 [distinguishing cases holding that mitigation measures are improperly deferred on the basis that, unlike the EIR at issue in the case, the EIRs in those cases concluded that the deferred mitigation measures would reduce impacts to less-than-significant levels].)

In doing so, the lower courts have lost sight of the purpose of mitigation under CEQA – to minimize significant environmental effects. (Guidelines, § 15370, subds. (a)–(e); *Laurel Heights I*, *supra*, 47 Cal.3d at p. 408; *Neighbors*, *supra*, 57 Cal.4th at pp. 465–466.) They have also strayed from the principle that performance standards should be used to provide an evidentiary basis to support agencies' conclusions that impacts will be mitigated to *less-than-significant* levels. (See *Sundstrom*, *supra*, 202

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identify suitable burrow(s) and the location(s) of occupied burrow(s)'" and to "'generally follow'" the recommendations set forth in a habitat conservation plan applicable to a neighboring county); *Cuyama*, *supra*, 213 Cal.App.4th at p. 1071 (requirement to "avoid" any "adverse hydrologic conditions" was sufficiently specific).

[21] See Opn. 51–63; *POET*, *supra*, 218 Cal.App.4th at p. 740 (commitment to ensure no increase in NO_x emissions was not sufficient because it did not establish objective criteria to measure whether that goal will be achieved); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280–282 (rejecting mitigation measure providing for active habitat management that must be approved by wildlife agencies).

Cal.App.3d at pp. 306–308; compare Opn. 60–61.) Here, the Court of Appeal also ignored the deferential substantial evidence standard of review that applies to challenges to the sufficiency of mitigation. Although, as noted above, this Court has held that mitigation measures can be "imperfect" and yet still valid (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 408), the Court of Appeal essentially applied a standard of perfection to MM 3.3.2. In doing so, the court overlooked this Court's direction that the "proper goal" of a court's review of mitigation measures "is not to review each item of evidence in the record with such exactitude that the court loses sight of the rule that the evidence must be considered as a whole." (*Ibid.*)

In particular, the Court of Appeal held that many of the measures proposed under MM 3.3.2 were impermissibly deferred because "the final paragraph [of MM 3.3.2] provides that 'County and [Air District] may substitute different air pollution control measures for individual projects, that are equally effective or superior to those proposed herein[,]'" and therefore the measures may be "subject to change." (Opn. 60.) No other published decision has reached this result.

Significantly, in so holding, the court ignored the fact that it is *always* the case that an agency may in the future substitute equally or more effective mitigation measures for the ones adopted, provided that the changes do not give rise to grounds for preparing a subsequent EIR or supplemental EIR (e.g., because the changes cause a new significant and

unavoidable impact or a substantially more severe significant impact). (See Guidelines, § 15162, subd. (a)(3).) A supplemental or subsequent EIR would not be required by new mitigation unless it was "considerably different" and unacceptable to the applicant. (*Ibid.*; see also *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 357–360 [adopted mitigation measures may even be eliminated altogether, provided that the agency at issue has a "legitimate reason" for doing so].)

Nevertheless, having concluded that MM 3.3.2 defers mitigation, the appellate court picked apart many of the measure's components because they do not include quantitative performance standards. (Opn. 60–63.) Specifically, the court concluded:

- "The first mitigation measure, which concerns the use of trees in nonresidential development, fails to contain any performance standard as to the trees selected and located to protect buildings from energy consuming environmental conditions" and therefore violates CEQA. (Opn. 61.)
- The second mitigation measure, which states: "'[e]quip HVAC units with PremAir or similar catalyst system' does not identify the relevant performance characteristics of the PremAir system and, therefore, fails to set forth specific performance criteria," in violation of CEQA. (Opn. 61–62.)
- "The eighth and ninth provisions are designed to promote bicycle usage by requiring (1) nonresidential projects to have bike lockers or racks and (2) apartment and condominiums to provide 'at least two

Class I bicycle storage spaces per unit.' ... The eighth provision lacks any performance standard. The ninth provision is specific only about the amount of storage required. There is no basis for evaluating the emission reductions achieved by this measure." (Opn. 62.)

- "The tenth through 12th mitigation provisions ... lack the specific performance criteria necessary for the evaluation of a substitute measure." (Opn. 63.)

CEQA does not require this level of exactitude and perfection for mitigation measures, especially for impacts that cannot be reduced to less-than-significant levels.[22] (Guidelines, § 15370.) Rather, as this Court should reaffirm, CEQA requires only that substantial evidence supports the agency's conclusion that the mitigation measure, as a whole, will minimize the significant impact. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 407–408; *Neighbors, supra*, 57 Cal.4th at pp. 465–467.) Taken as a whole, MM 3.3.2 provides substantial evidence that it will minimize Friant Ranch's significant operational air quality impact.

For instance, MM 3.3.2 requires that all non-residential projects provide bicycle lockers and/or racks and that all apartment complexes and

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[22] By requiring such extreme levels of specificity, the Court of Appeal's decision, if left to stand, will create a powerful disincentive for lead agencies and applicants even to attempt to mitigate their projects' significant and unavoidable impacts out of fear that the reviewing courts will find minor faults with the mitigation measures and thus overturn the EIRs and the project approvals (and potentially subject the respondents to a substantial claims for attorneys' fees under Code of Civil Procedure section 1021.5).

condominiums without garages provide at least two Class I bicycle storage spaces per unit. (AR 825.) The measure also requires information to be distributed regarding alternative modes of travel. (AR 825.) These measures will reduce automobile travel by making bicycle travel more convenient. MM 3.3.2 also requires energy consumption reduction, including an overall reduction of 10 to 20 percent in residential energy consumption relative to the requirements of the 2008 State of California Title 24.[23] (AR 825.) It also requires non-residential components of the project to minimize energy consumption, where feasible, through measures such as planting trees to shade 25 percent of the paved area. (AR 824.) Because MM 3.3.2 will promote non-vehicular travel and reduce energy consumption, substantial evidence supports the conclusion that, on the whole, it will minimize the impact. (AR 1557, 1559, 1573 [showing project emission sources].) MM 3.3.2 therefore complies with CEQA. (See Guidelines, § 15370; *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 407–408; *Neighbors*, *supra*, 57 Cal.4th at pp. 465–467.)

2. MM 3.3.2 is sufficiently specific and enforceable.

In addition to setting new standards regarding deferred mitigation, the Court of Appeal announced a new "vagueness doctrine" applicable to

[23] Although the Court of Appeal upheld this component of MM 3.3.2 (Opn. 62), the component helps demonstrate that, on the whole, MM 3.3.2 will minimize the impact.

the enforcement of mitigation measures, similar to the constitutional "due process vagueness doctrine." (Opn. 55, fn. 24.)

The only authority the court cited for this new vagueness doctrine is Public Resources Code section 21081.6, which is the statutory requirement that mitigation measures be "'fully enforceable through permit conditions, agreements or other measures.'" (Opn. 57, quoting § 21081.6, subd. (b).) What the court ignored, however, is that the County adopted a mitigation monitoring and reporting program, which is the identified statutory mechanism for setting forth how a public agency will ensure that a project proponent complies with adopted mitigation measures during project implementation. (§ 21081.6, subd. (a)(1); see also *Lincoln Place Tenants Association v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1510 [judicially enforcing adopted mitigation measure]; AR 166–273.) Through compliance with the MMRP, the County in coordination with the Air District, will implement MM 3.3.2, or equally effective measures, as parts of permits, agreements, or other measures made in connection with future project approvals. (*Ibid.*; AR 24–25.) MM 3.3.2 is thus fully enforceable.

Furthermore, by establishing a new "vagueness doctrine" for mitigation measures, the Court of Appeal once again violated Public Resources Code section 21083.1, which prohibits the courts from interpreting CEQA in a manner that imposes requirements beyond those explicitly stated in CEQA and the Guidelines.

With its analogy to the constitutional "due process vagueness doctrine," the Court of Appeal also ignored the fact that a heightened degree of specificity is warranted with respect to laws and regulations of general application because citizens need to be able to ascertain what the law requires of them. In contrast, mitigation measures adopted under CEQA are simply requirements that a lead agency imposes on itself and/or a project applicant to reduce a project's environmental impacts; due process concerns are not implicated, not even by analogy.

Nevertheless, applying the new vagueness standard to MM 3.3.2, the court held that the measure is impermissibly vague for failing to identify the means by which the County will make its component requirements enforceable. (Opn. 55–57.) For example, the court concluded, the measure is not clear as to whether the requirement for equipping HVAC units with catalyst systems would be a permit condition. (Opn. 56.) The court also cited a lack of specificity about who will implement the components, such as who will select trees for shading buildings. (Opn. 55–57.) Additionally, the court concluded that some of the measures will only be implemented where "appropriate," a term not defined in CEQA or the Guidelines. Accordingly, reasoned the court, this term could be interpreted as granting the County a wide range of discretionary authority with regard to the imposition of future mitigation. (Opn. 57.)

CEQA does not require this level of exactitude. Rather, as this Court determined in *Laurel Heights I*, courts must uphold mitigation measures if substantial evidence, on the whole, demonstrates that the mitigation measures will mitigate (i.e., lessen, reduce, avoid) the impact. (*Laurel Heights I, supra*, 47 Cal.3d. at pp. 407–408; see also *id.* at p. 418 [upholding mitigation measure to reduce parking impact to less-than-significant level that required the university to "promote ongoing campus transportation systems, management programs, including promotion of transit, carpooling, vanpooling, and related activities"]; *Neighbors*, *supra*, 57 Cal.4th at pp. 465–477 [upholding parking mitigation measure that required agency to monitor impact and work with local jurisdictions to implement permit program or other options]; Guidelines, § 15370.) Importantly, the fact that the "mitigation measures might be imperfect in various particulars" does not necessarily mean that the mitigation measures violate CEQA. (*Laurel Heights I*, at p. 408.)

Here, substantial evidence shows that MM 3.3.2 contains numerous specific provisions that, on the whole, will minimize the project's significant and unavoidable operational air quality impact. The County will monitor and enforce MM 3.3.2 through the adopted MMRP. (AR 172–175; § 21081.6, subd. (a).) MM 3.3.2 is therefore sufficiently enforceable and definite to meet CEQA's mitigation requirements.

Lastly, any minor defects in the measure are not prejudicial. (§ 21005, suds. (a)–(c); compare, e.g., Opn. 58 [holding MM 3.3.2 violates CEQA for stating the measures will "substantially" reduce the impact without quantifying its effectiveness].) Under these facts, the Court should uphold MM 3.3.2 and reverse the court's decision below.

V.
CONCLUSION

This Court should reverse the Court of Appeal's decision that the County prejudicially abused its discretion with respect to the Friant Ranch EIR's air quality analysis and air quality mitigation measure. The substantial evidence standard of review applies to claims challenging the sufficiency of an EIR's discussion of a required subject. The Court of Appeal wrongly applied the de novo "failure to proceed" standard to the EIR's air quality analysis, and thereby applied its judgment in place of that of the County. In doing so, the decision below imposes new analytic requirements under CEQA, in violation of Public Resources Code section 21083.1.

When viewed under the proper standard of review – the substantial evidence standard – Appellants' challenge to the adequacy of the EIR's air quality analysis fails. Substantial evidence supports the County's air quality analysis as well as the County's implicit decision not to include in the EIR

a health correlation analysis; and a correlation analysis is not necessary for informed decisionmaking.

Furthermore, the Court should reaffirm that mitigation measures adopted under CEQA must be upheld where substantial evidence, on the whole, demonstrates that the mitigation measure will minimize the impact. MM 3.3.2, while perhaps not perfect, meets this standard in that substantial evidence, on the whole, demonstrates that MM 3.3.2 will reduce the project's air emissions, and therefore minimize the impact. Any minor defects in the measure are not prejudicial. (§ 21005, subd. (a).)

Respectfully submitted,

REMY MOOSE MANLEY, LLP

Dated: December 1, 2014

JAMES G. MOOSE
Attorneys for
Real Party in Interest and Respondent
FRIANT RANCH, L.P.

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this OPENING BRIEF ON THE MERITS contains 13,999 words, according to the word counting function of the word processing program used to prepare this brief.

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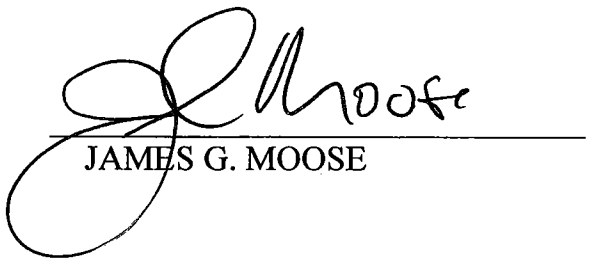

JAMES G. MOOSE

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

PROOF OF SERVICE

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

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Bonnie Thorne

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

SERVICE LIST

Sara Hedgpeth-Harris LAW OFFICE OF SARA HEDGPETH-HARRIS 2125 Kern Street, Suite 301 Fresno, CA 93721 Tel.: (559) 233-0907 Fax: (559) 272-6046 Email: sara.hedgpethharris@shh-law.com	Attorney for Plaintiffs and Appellants *Sierra Club et al.* **VIA U.S. MAIL** courtesy copy by email
Daniel C. Cederborg Bruce B. Johnson, Jr. OFFICE OF THE FRESNO COUNTY COUNSEL 2220 Tulare Street, Suite 500 Fresno, CA 93721 Tel.: (559) 600-3479 Fax: (559) 600-3480 Email: bjohnson@co.fresno.ca.us	Attorneys for Respondents *County of Fresno* **VIA U.S. MAIL** courtesy copy by email
Bryan N. Wagner WAGNER & WAGNER 7110 N. Fresno St, Suite 340 Fresno, CA 93720 Tel.: (559) 224-0871 Fax: (559) 224-0885 Email: bryan@wagnerandwagner.com	Attorney for Real Party in Interest/Respondent *Friant Ranch, L.P.* **VIA U.S. MAIL** courtesy copy by email
Clerk of the Court Fifth District Court of Appeal 2424 Ventura Street Fresno, CA 93721 Tel.: (559) 445-5491	**VIA U.S. MAIL**

Clerk of the Court
Superior Court of California
County of Fresno
1130 O Street
Fresno, CA 93721
Tel.: (559) 457-1900

VIA U.S. MAIL

Courtesy copies:

R. Tyson Sohagi
THE SOHAGI LAW GROUP
11999 San Vicente Blvd., Suite 150
Los Angeles, CA 90049
Tel.: (310) 475-5700
Fax: (310) 475-5707
Email: tsohagi@sohagi.com

Attorney for Amici Curiae *League of California Cities, and the California State Association of Counties*

VIA U.S. MAIL

Marcia L. Scully
General Counsel
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
P.O. Box 54153
Los Angeles, CA 90054
Tel.: (213) 217-6115

Attorney for Amicus Curiae *The Metropolitan Water District of Southern CA*

VIA U.S. MAIL

Amy Minteer
CHATTEN-BROWN & CARSTENS LLP
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Tel.: (310) 798-2400
Fax: (310) 798-2402
Email: ACM@CBCEarthlaw.com

Attorney for Amici Curiae *Association of Irritated Residents, Medical Advocates for Healthy Air, and Coalition for Clean Air*

VIA U.S. MAIL

Shanda M. Beltran
General Counsel
BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION
17744 Sky Park Cr., Suite 170
Irvine, CA 92614
Tel.: (949) 553-9500
Fax: (949) 769-8943
Email: sbeltran@biasc.org

Attorney for Amicus Curiae *Building Industry Legal Defense Foundation*

VIA U.S. MAIL

Gene Talmadge
President
CALIFORNIA ASSOCIATION OF
ENVIRONMENTAL PROFESSIONALS
40747 Baranda Court
Palm Desert, CA 92260
Tel.: (760) 340-4499
Fax: (760) 674-2479

Attorney for Amicus Curiae
California Association of Environmental Professionals

VIA U.S. MAIL

Jennifer L. Hernandez
HOLLAND & KNIGHT LLP
50 California Street, Suite 2800
San Francisco, CA 94111
Tel.: (415) 743-6927
Fax: (415) 743-6910
Email: jennifer.hernandez@hklaw.com

On behalf of Amicus Curiae
CEQA Research Council

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