No. S219783

IN THE SUPREME COURT OF CALIFORNIA

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

Plaintiffs-Appellants,

v.

COUNTY OF FRESNO
Defendants-Respondent,

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

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

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

ANSWER BRIEF ON THE MERITS

LAW OFFICE OF SARA HEDGPETH-HARRIS
Sara Hedgpeth-Harris (Bar No. 124114)
5445 E. Lane Avenue
Fresno, CA 93727
Ph: 559-233-0907
Email: sara.hedgpethharris@shh-law.com
Attorney for Sierra Club, Revive the San Joaquin and League of Women Voters of Fresno.

No. S219783

IN THE SUPREME COURT OF CALIFORNIA

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

Plaintiffs-Appellants,
v.
COUNTY OF FRESNO
Defendants-Respondent,

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

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

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

ANSWER BRIEF ON THE MERITS

LAW OFFICE OF SARA HEDGPETH-HARRIS
Sara Hedgpeth-Harris (Bar No. 124114)
5445 E. Lane Avenue
Fresno, CA 93727
Ph: 559-233-0907
Email: sara.hedgpethharris@shh-law.com
Attorney for Sierra Club, Revive the San Joaquin and League of Women Voters of Fresno.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

STATE CASES

PUBLIC RESOURCES CODE

CALIFORNIA CODE OF REGULATIONS, CEQA GUIDELINES

CALIFORNIA CODE OF REGULATIONS TITLE 17

HEALTH AND SAFETY CODE

I. INTRODUCTION

Plaintiffs and Appellants Sierra Club, Revive the San Joaquin and League of Women Voters of Fresno (collectively, "Sierra Club") claim that the County of Fresno ("County") abused its discretion within the meaning of Public Resource Code § 21168.5[1] because it failed to prepare the environmental impact report ("EIR") for the Friant Community Plan and the Friant Ranch Specific Plan Project (the "project") in compliance with the legal standards for information disclosure mandated by the California Environmental Quality Act ("CEQA")[2], and because it failed to impose enforceable mitigation as required by CEQA.

In order to avoid full compliance with CEQA, Real Party in Interest and Respondent, Friant Ranch L.P., ("Friant Ranch") has transformed this case into a vehicle for proposing a major change in the standard of review. What Friant Ranch proposes would eliminate independent judicial scrutiny when courts are asked to determine the sufficiency of an EIR as an informative document. It also proposes a major change in the legal standards for information disclosure and mitigation if a project impact cannot be mitigated to less-than-significant. Sierra Club urges this Court to reject Friant Ranch's attempt to use this Court to accomplish a major overhaul of the law that CEQA's foes have been unable to accomplish through a vote of the State Legislature.

CEQA is intended to protect, maintain, preserve and enhance the health of the environment for the people of the State of California. Pub. Resources Code §§ 21000, 21001, 21002, 21002.1; CEQA Guidelines § 15003[3]. CEQA's fundamental objective is to "compel government at all levels to make decisions with environmental consequences in mind." Guidelines § 15003. Of particular

---

[1] All further statutory references are to the Public Resources Code unless otherwise indicated.

[2] Public Resources Code, section 21000 et seq.

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

importance in this case is that the State Legislature has explicitly stated that it is the policy of the State to "[t]ake all action necessary to provide the people of this state with clean air." § 21001 (b).

CEQA's mandated procedures are intended "to assist public agencies in *systematically identifying* both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects" on the environment. § 21002 (italics added). Central to accomplishing this objective is the legislative mandate that all local agencies must prepare an environmental impact report ("EIR") on any project they intend to carry out or approve whenever a fair argument can be made that a project or activity will have a significant impact on the environment. § 21151. An EIR is an informational document. Its purpose is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." §§ 20161, 21002.1. The EIR serves the legislative mandate "that the public be fully informed as to the environmental consequences of action by their public officials." *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 404 ("*Laurel Heights I*").

This Court's first opinion to interpret CEQA, *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247 ("*Mammoth*"), declared that the role of an independent judiciary in enforcing CEQA's legislative mandates is "to assure that important environmental purposes, heralded in legislative halls, are not lost or misdirected in the vast hallways of administrative bureaucracy." *Id.* at 254. Independent judicial scrutiny serves to ensure that CEQA is "scrupulously followed" so that "the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." *Laurel Heights I, supra,* 47 Cal.3d at 392. Only through the exercise of independent judgment in determining whether an EIR complies with CEQA's

legal standards "can a subversion of the important public purposes of CEQA be avoided, and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus, allowing for appropriate action come election day should a majority of the voters disagree." *People v. County of Kern* (1974) 39 Cal.App.3d 830, 842; *see also Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 823 ("Santiago") ["[w]e must be satisfied that the County has fully complied with the procedural requirements of CEQA, because only in this way 'can a subversion of the important public purposes of CEQA be avoided.'"]

The exercise of independent judgment ensures that the public is not misled as to the reality of the impacts because a public agency has employed the wrong legal standard and chosen a methodology that precludes full consideration of actual environmental impacts. *Comtys. For A Better Env't v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 322 ("*CBE*") ["An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent."] Independent judicial scrutiny helps to ensure that an EIR does not simply ignore a problem with potentially catastrophic environmental consequences or assume a solution to the problem will be found. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 ("*Vineyard*"). Review by an objective and independent judiciary increases the likelihood that data in an EIR is not only sufficient in quantity, but also "presented in a manner calculated to adequately inform the public and decision makers." *Id.* at 442.

When a petition for writ of mandamus claims that an agency has not complied with CEQA, the reviewing court must determine whether there has been a "prejudicial abuse of discretion." § 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *Ibid.* When determining whether an agency has proceeded in the manner required by law a

reviewing court exercises its independent judgment, because the claim presents a legal issue. *Vineyard, supra,* 40 Cal.4th at 426-427. Whether the preparer of an EIR has applied the correct legal standard presents a legal issue. *Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry And Fire Prot.* (2008) 43 Cal.4th 936, 954 ("*Ebbetts Pass*"). And, it is the "*quintessential judicial duty*" of a reviewing court to apply its "independent judgment de novo to the merits of the *legal* issue before it." *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 ("*Yamaha*") (italics added).

By contrast, when a petition claims that an agency's determination or decision is not supported by substantial evidence, "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]." *W. States Petroleum Ass'n v. Super. Ct.* (1995) 9 Cal.4th 559, 571 ("*WSPA*"). For CEQA purposes, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." § 21080 (e). "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." *Id.*

Sierra Club's claims present straightforward legal issues regarding whether the EIR's discussion and consideration of significant air quality impacts and measures to mitigate those impacts complies with CEQA's standards for information disclosure. Specific legal standards for these discussions are set forth in Guidelines § 15126.2 (a) ("Consideration and Discussion of Significant Environmental Impacts") and Guidelines § 15126.4 ("Consideration And Discussion Of Mitigation Measures Proposed To Minimize Significant Effects"). Sierra Club also claims that the County impermissibly deferred the formulation of enforceable mitigation measures in violation of CEQA's standards for mitigation. § 15126.4.

The Court of Appeal exercised its independent judgment and determined that the EIR's significance analysis and its discussion and consideration of

mitigation measures did not comply with the law. The appellate court also determined that the County failed to impose enforceable mitigation and impermissibly deferred the formulation of mitigation measures without performance standards. The Court of Appeal agreed with Sierra Club that the County's failure to comply with CEQA's legal standards for information disclosure was prejudicial because it deprived the public and the Fresno County Board of Supervisors ("Board") of substantial relevant information about the magnitude of potential health problems associated with massive project-generated criteria air pollutant emissions.

Friant Ranch proposes a new interpretation of § 21168.5's abuse of discretion standard that would have this Court review the determination of a lead agency that it has proceeded in the manner required by law for substantial evidence. In other words, the same standard that applies to the agency's factual findings and factual determinations would apply to its determination that an EIR is legally sufficient as an informative document. This is contrary to the legal principle that "the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." *Ass'n of Irritated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383, 1392; *Vineyard, supra*, 40 Cal.4th at 426-427.

Under Friant Ranch's radical interpretation of the standard of review, a lead agency has the final say with regard to whether those who prepared an EIR complied with the legal standards for information disclosure, discussion and consideration; lead agencies interpret CEQA and its guidelines; and, when the language of a statute or regulation is subject to more than one meaning, the lead agency decides what to discuss and consider in an EIR; the Court cannot pass upon whether the EIR complies with CEQA's information disclosure requirements if the information provided is "sufficient." And, according to Friant Ranch, the courts do not have the subject matter expertise to decide what is "sufficient."

Sierra Club urges the Court to reject this reconstruction of CEQA's enforcement framework because it eliminates the vital role of an independent

judiciary in ensuring that lead agencies scrupulously comply with CEQA's information disclosure requirements. Friant Ranch's argument is not tethered to an expression of legislative intent and it ignores CEQA's fundamental purposes. The argument is based upon fundamentally flawed interpretations of many opinions wherein this Court exercised independent judgment when the issue concerned the sufficiency of an EIR as an informative document. Friant Ranch misconstrues the principles associated with the separation of powers doctrine in a manner that would have reviewing courts abdicate their constitutional judicial obligation to exercise independent judgment when determining whether a lead agency has complied with the law. *See Yamaha, supra,* 19 Cal.4th at 8.

Under Friant Ranch's proposed standard of review, the public can have no confidence that a lead agency has adopted an interpretation that ensures that an EIR serves its purpose as an informative document or that the lead agency has, "in fact, analyzed and considered the ecological implications of its action." *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86. Fortunately, as discussed below, there is a wealth of California Supreme Court precedent that disposes of this attempt to subvert the authority of the both the State Legislature and State judiciary.

Sierra Club also urges the Court to reject the proposition that CEQA's legal standards for information disclosure and enforceable mitigation measures be less demanding when a significant adverse impact cannot be reduced to less-than-significant. According to Friant Ranch's interpretation of CEQA, the Legislature did not intend to protect the environment or to inform the public and decisionmakers about a project's significant adverse impacts unless those impacts can be avoided. This interpretation is unsupported. As with its standard of review argument, Friant Ranch cites no statutory language or expression of legislative intent to support such a radical policy shift.

II. ISSUES PRESENTED FOR REVIEW

This Court granted review to consider the following issues regarding the standard of review for determining whether an agency has abused its discretion within the meaning of Public Resources § 21168.5:

Issue No. 1: In determining whether a general discussion of significant air quality impacts measures up to CEQA's legal standards, does the Court exercise its independent judgment or must the Court apply the deferential substantial evidence standard of review to the determination by those who prepared the EIR that a general discussion is sufficient? Summary Answer: The Court must exercise its independent judgment in determining whether a general discussion of significant air quality impacts is sufficient to comply with CEQA's legal standards.

Issue No. 2: Does a one-paragraph general discussion of the health problems typically associated with criteria air pollutant emissions satisfy CEQA's legal standard for what must be analyzed and explained in an EIR's consideration and discussion of a project's significant air quality impacts? Summary Answer: No, a general discussion of the health problems associated with criteria pollutant emissions does not satisfy CEQA's legal standards for a significance analysis.

Issue No. 3: Does a general discussion of mitigation measures without performance standards for measuring effectiveness satisfy CEQA's legal standards for what must be included in an EIR's consideration and discussion of how significant environmental effects will be mitigated? Summary Answer: No, a general discussion of mitigation measures without identifying performance standards to assess the effectiveness of mitigation does not satisfy CEQA's legal standards for the consideration and discussion of mitigation measures.

Issue No. 4: Are the legal standards for mitigation different when a significant environmental impact cannot be reduced to less-than-significant? Summary Answer: The legal standard for measuring the sufficiency of an EIR's discussion and consideration of mitigation measures and the substantive standards for mitigation are the same regardless of whether a project's significant environmental impacts will be reduced to less-than-significant.

III. STATEMENT OF THE FACTS

Friant is a small, rural residential community located in the foothills nine

miles north of the city limits of Fresno, just below Friant Dam and Millerton Reservoir. AR[4] 798, 5367, 5369, 5372, 5614, 9490, 21860. In 2000, when there were 236 residences and 519 people living within the existing Friant Community Plan area, the County determined it was "built out." AR 365, 1022, 5371, 14314. According to the current community plan, Friant's urban growth area can only accommodate another 367 residents. AR 1023, 4706, 5028. On completion of the proposed project, Friant will expand from a rural village of at most 800 people to an urban village of 5,000 to 7,000 people. AR 1, 539, 5370.

The project is located far from employment centers and is not served by public transit because its remote location makes transit economically infeasible. AR 1041, 4677. Consequently, residents, employees and visitors will rely on their cars to commute to and from the project area. AR 5389. It is undisputed that the project will generate criteria air pollutant emissions far in excess of the standards set by the San Joaquin Valley Air Pollution Control District ("Air District"), primarily as a result of the increased vehicle trip length and number of vehicle miles traveled ("VMT") associated with the project.

Using URBEMIS software to estimate area and operational emissions for the project, the draft EIR ("DEIR") forecast that the project will generate over 190 tons every year of reactive organic gases ("ROGs"). AR 818, 821, 4619. The Project's ROG emissions are 19 times above the Air District thresholds, which conclude that a project will have a significant adverse impact on air quality if ROG emissions exceed just 10 tons per year. AR 807. The DEIR also forecast that the project will generate more than 102 tons of nitrogen oxides ("NOx"), over 10 times above the Air District's NOx significance threshold of 10 tons per year. AR 818, 821, 807. NOx and ROGs are precursor emissions to the formulation of ozone. AR 802. Finally, a comment letter from the Air District pointed out that the threshold of significance for fine particulates ("PM10") is 15 tons per year. AR 4296. The project will generate over 117 tons of PM10 per year at build out,

---

[4] Citations to the Administrative Record are designated "AR".

over 7 times above the PM10 threshold. AR 807.

Based upon the fact that emissions will violate Air District standards, the DEIR concludes that the project "will create a significant impact in regards to the area and operational emission content." AR 824. The DEIR lists community and specific plan policies and goals that it claims will reduce the number and length of vehicle trips, but concludes there are no known additional feasible mitigation measures which will reduce the project's air quality impacts to a less-than-significant level. AR 824.

The DEIR purported to address air quality impacts with proposed Mitigation Measure 3.3.2 ("MM 3.3.2"), which provides "guidelines" to be used by the County when approving future "non-residential development" in the project area "with intent that specified measures be required where feasible and appropriate." AR 824. The guidelines provide for the careful selection and location of shade trees; utilization of efficient HVACs "if economically feasible"; and installation of two 110/ 208 volt power outlets for every two loading docks. AR 824-825. According to MM 3.3.2, the County, in consultation with the Air District, will implement several measures "or equivalent measures" to reduce residential energy consumption by 10-20% and to promote bicycle usage. Additionally, "transportation related mitigation" in MM 3.3.2 includes providing trail maps, information about "commute options," and information about Air District programs to "reduce county-wide emissions." AR 172-73, 824-26, 4816-18. According to the DEIR, MM 3.3.2 will "substantially reduce air quality impacts related to human activity within the entire Project area, *but not to a level that is less than significant*" (AR 824 (emphasis added)), and not below the Air District's thresholds. AR 826 (Effectiveness of Mitigation). Therefore, the project's impacts on air quality would remain significant and unavoidable. AR 826.

The DEIR provided a one paragraph description of the typical adverse health effects associated with ozone and fine particulate matter (PM10 and PM2.5) emissions. AR 802-803. The DEIR's analysis of the significance of the project's air quality impacts does not discuss the connection between the high

levels of these pollutants that would be generated by the completed project and potential adverse health effects. AR 818-824. The DEIR's discussion of mitigation measures similarly failed to consider mitigating adverse health effects associated with project-generated emissions. AR 824-825.

During the public comment period, the DEIR's discussion of air quality impacts was criticized for failing to disclose the human health-related effects of the project's air pollution impacts as required by Guidelines § 15126.2(a). AR 4602. In response to this criticism, the final EIR ("FEIR") claims that the discussion complies with § 15126.2 (a) because it "provides a general discussion of adverse health effects associated with certain development related pollutants." *Ibid.*

The DEIR's discussion of mitigation and the measures proposed in MM 3.3.2 were criticized for being ambiguous, unenforceable and deferred. AR 4620, 4371. While seeming to concede the point, the FEIR claims that mitigation is not improperly deferred because *future applicants for development in the project area will be required to consult with the Air District and to comply with its requirements for mitigation.* AR 4621. The FEIR also seems to imply that measurable and enforceable mitigation is not required because criteria air pollutant emissions cannot be reduced to less-than-significant levels. *Ibid.*

During the Board's hearing on the project, a Supervising Air Quality Specialist with the Air District, Dan Barber, spoke at length to "reinforce" Air District concerns about the EIR and the magnitude of the project's violations at 10 and 20 times above the significance thresholds set by the Air District for an individual project. AR 8862-8864. Mr. Barber's objections included the County's failure to consider and require specific mitigation measures to reduce project-related impacts, as previously recommended by the Air District; the failure to consider the magnitude of potential health impacts from the development; the failure to adopt recommended design features that would reduce impacts; the lack of specificity for implementing mitigation measures; and the absence of a mechanism to trigger actual enforcement of mitigation measures. AR 8862-8867. Mr. Barber advised the County that several other development projects within the

San Joaquin Valley had been approved with mitigation measures imposed by the land use agency that required essentially *net zero air quality impacts*. He concluded that "it is feasible to do much better than what's being proposed here." AR 8866.

Mr. Barber encouraged the County to reconsider requiring specific design elements and enforceable mitigation measures to reduce project-generated emissions. AR 8863. He invited the County and Friant Ranch to meet with Air District staff to discuss how this could be accomplished. *Ibid.* Finally, contrary to the FEIR's contention, Mr. Barber explained to the Board that the Air District had no independent authority to impose mitigation measures on the project. "Earlier in the discussion, it was mentioned that the project would be subject to District Rule 9510 ISR and the district would... impose additional mitigation measures. *The district has no land use authority; has no ability to impose additional design elements and mitigation measures on the project.*" AR 8862-8863 (emphasis added).

The Board approved the project and certified the FEIR without any additional mitigations. The Board resolution certifying the FEIR includes a finding that "the FEIR is adequate and has been prepared and completed in compliance with CEQA and the State CEQA Guidelines." AR 8. The Board also found that "the FEIR reflects the independent judgment of the County." AR 9. With respect to the project's violations of Air District air quality standards, the Board simply made a finding that "there are no other feasible mitigation measures or alternatives that could be adopted that would reduce this impact to a less-than-significant level." AR 24. The Board adopted a statement of overriding considerations for the project's air quality impacts, citing the following "facts":

> This mitigation measure would reduce the Project's potential to result in a significant impact on air quality to the greatest extent feasible by encouraging bicycle use and commute alternatives, and design guidelines encouraging reduced generation of air pollutants. However, this measure will not reduce this impact to a less-than significant level.....There are no additional feasible mitigation

measures or alternatives that could avoid or substantially lessen this impact. The County therefore finds that this impact is both significant and unavoidable. AR 24.

IV. STATEMENT OF THE CASE

Friant Ranch appeals from a judgment of the Court of Appeal ruling that the County abused its discretion within the meaning of § 21168.5 because (1) the EIR did not include a significance analysis that correlated the project's emissions of air pollutants to its impact on human health; (2) the mitigation measures are "vague, unenforceable and lack specific performance criteria"; and (3) the statement that the air quality mitigation provisions will *substantially* reduce air quality impacts is "unexplained and unsupported." Opinion p. 1.

The appellate court granted Sierra Club's petition for writ of mandate and directed the County to set aside its approval of the project and to prepare a revised EIR that "(1) contains an analysis of the adverse human health impacts that are likely to result from the air quality impacts identified in the EIR; (2) addresses the deficiencies concerning vagueness, enforceability and lack of specific performance standards in MM 3.3.2; and (3) addresses the issues related to the statement that those mitigation provisions will *substantially* reduce air quality impacts." Opinion, p. 65.

V. DISCUSSION

A. The Court Must Exercise Its Independent Judgment When Determining The Sufficiency Of An EIR As An Informative Document.

1. Whether An Agency Has Complied With CEQA's Information Disclosure Requirements Presents A Legal Issue.

As stated previously, it is settled that a reviewing court exercises its independent judgment when determining whether an agency has proceeded in the manner required by law, because the claim presents a legal issue. *Vineyard*, supra, 40 Cal.4th at 426-427. More specifically, whether the preparer of an EIR has applied the correct legal standard presents a legal issue. *Ebbetts Pass, supra,* 43 Cal.4th at 954. It is the "quintessential judicial duty" of a reviewing court to

apply its "independent judgment de novo to the merits of the *legal* issue before it." *Yamaha, supra,* 19 Cal.4th at 8.

As noted above and discussed in more detail below, CEQA provides standards for determining whether an EIR is sufficient as an informative document. In determining that the County abused its discretion in this case, the Court of Appeal measured the EIR against those standards.

Friant Ranch eliminates any reference to the applicable legal standard and re-characterizes Sierra Club's claim as raising the issue of whether the information is "sufficient." Opening Brief On The Merits ("OBM") p. 11. From the outset, the argument is confusing and difficult to understand because it uses the quality of being "sufficient" without reference to a purpose or standard. The word "sufficient" has no meaning without a related purpose or standard. For example, a reviewing court determines the sufficiency of an EIR *as an informative document. Laurel Heights I, supra,* 47 Cal.3d at 392. An EIR is sufficient *as an informational document* if it complies with CEQA's information disclosure requirements, which presents a question of law. *Ibid.* Friant Ranch does not frame the issue as whether the EIR is sufficient as an informational document.

Instead, Friant Ranch proposes that when the sufficiency of an EIR's discussion of a required subject is challenged, the challenger should have the burden of proving: (1) that substantial evidence in the record as a whole does not support the agency's determinations and actions, including the choice of analytical methodologies; and (2) that any additional information the challenger insists should have been included was necessary for informed decisionmaking and public participation. OBM pp. 16-17. The second part of Friant Ranch's proposed test appears to be consistent with the standard of review in that the abuse of discretion by omission of required information in an EIR's significant impacts analysis "is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 463.

However, to the extent Friant Ranch contends that a claim concerning the omission of required information from an EIR should be treated as an inquiry into

whether there is substantial evidence supporting the decision to omit the information in the first place, their proposed test is inconsistent with the established standard of review. Friant Ranch conflates the two distinct inquiries a reviewing court makes when determining whether a lead agency has abused its discretion: (1) whether the agency failed to proceed in a manner required by law, and (2) whether the agency made a determination or decision that is not supported by substantial evidence. § 21168.5.

According to Friant Ranch's interpretation of the standard of review, whether the EIR's air quality analysis fails to comply with CEQA's legal standard as set forth in § 15126.2 (a) is irrelevant if the decision to provide a general explanation of adverse health effects typically associated with criteria air pollutants is supported by substantial evidence in the record. Friant Ranch cites the seminal discussion regarding the standard of review in *Laurel Heights I, supra,* 47 Cal.3d at 392-393, as support for this construction of § 21168.5. However, it fails to identify any language in that discussion that can be construed as requiring a reviewing court to defer to a lead agency's determination that an EIR is sufficient as an informative document. To the contrary, the *Laurel Heights I* court explains that "[a]s a result of [§ 21168.5], 'The court does not pass upon the correctness of the EIR's environmental conclusions, *but only upon its sufficiency as an informative document.*'" 47 Cal.3d at 392-393.

Friant Ranch's argument presumes that a court reviews *an agency's judgment or determination* that an EIR is sufficient. OBM, p. 12, 16. In point of law, the court reviews *the EIR de novo* to determine whether the agency has complied with CEQA's legal standards. *Vineyard, supra,* 40 Cal.4th at 435; *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1355 ("*Berkeley Jets*"), 91 Cal.App.4th at 1355 [inadequate or unsupported EIR studies entitled to no judicial deference]. Friant Ranch cites no authority for the proposition that the court reviews the agency's determination that the EIR is adequate and legally compliant.

Friant Ranch also cites no authority to support its assertion that reviewing courts consider the record as a whole to determine whether an EIR complies with

CEQA's information disclosure requirements. OBM p. 16. To the contrary, whatever is required by CEQA to be considered in an EIR "must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report." *Santiago, supra,* 118 Cal.App.3d at 831, quoted with approval in *Laurel Heights I, supra,* 47 Cal.3d at 405.

Sierra Club has no quarrel with Friant Ranch's assertion that lead agencies have the discretion to decide the type, scope, and amount of information to include in EIRs. OBM pp. 14-15. However, the agency's exercise of discretion is subject to review for abuse. § 21168.5. When a claim challenges the reliability or accuracy of an EIR's scope of analysis or the methodology for studying an impact, data, or technical opinions, courts of appeal have concluded that the claim presents a predominantly factual issue that is reviewed for substantial evidence. (*See e.g. Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620; *Fed'n of Hillside and Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259 ("*Fed'n of Hillside*"); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1198, ("*Bakersfield Citizens*"); *Cal. Native Plant Soc'y v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986; *Save our Peninsula Comty. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 120; *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143-1144. However, <u>when determining whether the agency employed the correct legal standard in choosing the scope of analysis or methodology, etc., the reviewing court must exercise its independent judgment.</u> *Ebbetts Pass, supra,* 43 Cal.4th at 954.

Sierra Club agrees that the interactive public and agency review process is a vital part of CEQA. Sierra Club also acknowledges that members of the public and other agencies must exhaust their administrative remedies before filing court claims challenging the sufficiency of an EIR as an informative document. § 21177 (a). However, Friant Ranch fails to explain the correlation between the public and agency review process and the court's exercise of independent judgment when

deciding whether an EIR complies with CEQA's information disclosure requirements.

Friant Ranch's argument that decisions regarding what information to include in an EIR should not be "reviewed in a vacuum" because the administrative record contains a wealth of information misses the point. The purpose of an EIR is to make that information accessible and understandable to the public and the decision making body in the EIR. §§ 20161, 21002.1.

2. The Court Is The Subject Matter Expert When Determining Whether An EIR Complies With CEQA's Legal Standards.

This Court's opinion in the *Yamaha, supra,* 19 Cal.4th at 1, is key to understanding why Friant Ranch's proposed standard of review is untenable. In that case, the California Franchise Tax Board determined that state sales taxes were owed, but the taxpayer successfully challenged that determination in the trial court. The Court of Appeal reversed the judgment based upon a statutory interpretation contained in an annotation in the Board's "Business Taxes Law Guide." 19 Cal.4th at 6-7. The question before this Court was "what legal effect courts must give to the Board's annotations when they are relied on as supporting its position in taxpayer litigation." *Ibid.* "In the broader context of administrative law generally, the question is what standard courts apply when reviewing an agency's *interpretation* of a statute." *Ibid.* The Court held that it was the duty of the court to apply its independent judgment de novo to the merits of the *legal* issue and that the appellate court abdicated its judicial duty by deferring to the Board's interpretation of the law. *Id.* at 8. The agency's interpretation of a statute or regulation *that it did not adopt* is "merely its litigating position." *Id.* at 9. It "represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." *Id.* at 11.

Likewise here, since the State Legislature adopted CEQA and its guidelines, the County's interpretation of the meaning and effect of CEQA's legal standards for information disclosure is merely the County's litigating position.

The decision in *WSPA, supra,* 9 Cal.4th 559, does not alter the duty of the court to exercise its independent judgment when determining whether an EIR

complies with CEQA's legal standards. The issue in *WSPA* was whether extra-record evidence was admissible to show the court that the California Air Resources Board (ARB) adopted administrative regulations based upon inaccurate and unsound science. *Id.* at 565-566. This Court concluded that when reviewing for abuse of discretion under §21168.5, a court sits in the same position as a court of appeal when reviewing a trial court's findings in non-CEQA cases. The appellate court reviews only legal issues, *including the substantiality of the evidence*, and does not consider evidence that was not before the trial court. 9 Cal.4th 559, 573.

This Court reasoned, based upon the constitutional separation of powers, that it would be inappropriate for a court to be the judge of whether an administrative agency with subject matter rule-making authority has adopted rules based upon inaccurate and unsound science. *Id.* at 572.

Deference was also appropriate because of ARB's subject matter expertise. *Id.* at 572-573. The Court echoed the following statement from *Laurel Heights I, supra*,

> 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. [Citation.] A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. *We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so.* Our limited function is consistent with the principle that "The 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.]

47 Cal.3d at 393 (italics added).

To be clear, *Laurel Heights I* does not say that the court has no duty or the resources or the expertise to engage in *a legal analysis* to determine whether CEQA's informational requirements are scrupulously followed and neither does *WSPA*.

3. The Standard Of Review Does Not Change If The Legal Standard Is Not Explicit.

Friant Ranch argues that the determination of legal compliance does not present a question of law if the relevant legal standards are not *explicit*. This argument is based upon Friant Ranch's interpretation of § 21083.1 which provides;

> It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.

Friant Ranch presumes that the Legislature intended to radically alter the standard of review when it adopted § 21083.1. Down this rabbit hole, the Court does not interpret what CEQA's legal standards require or whether an agency has complied with those standards if the statutory or regulatory language is ambiguous. If there is a dispute over the standard, the agency, or more specifically, those who prepared the EIR, decide whether the EIR is sufficient and this Court must defer to that decision.

This standard of review subverts the role that an independent judiciary serves in enforcing CEQA's legislative mandates. *See Friends of Mammoth, supra,* 8 Cal.3d at 254. The exercise of independent judgment ensures that CEQA's informational disclosure requirements are "scrupulously followed" so that "*the public will know* the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." *Laurel Heights I, supra,* 47 Cal.3d at 392. It is the duty of the court to resolve conflict

over the meaning of CEQA's statutes and regulations when there is conflict over legislative intent. *Friends of Mammoth, supra,* 8 Cal.3d at 259.

> Statutes... are not inert exercises in literary composition. They are instruments of government, and in construing them the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. Judge Learned Hand described interpretation of statutes as the art of proliferating a purpose.

Id. at 267, fn. 9 (citations and internal quotes omitted).

Friant Ranch also presumes that, for purposes of determining the standard of review, the Legislature intended to draw a distinction between an EIR that completely omits an explicitly-required discussion and an EIR that provides a sufficient discussion of a matter that is not explicitly required. The Court determines the former, Friant Ranch argues, by exercising its independent judgment, while it reviews the latter for substantial evidence. This distinction makes no sense and is expressed nowhere in CEQA's statutory or regulatory language.

When the question is whether an EIR complies with CEQA's information disclosure requirements, Supreme Court precedent makes no distinction between the *omission* of a required discussion (*Laurel Heights I, supra,* 47 Cal.3d at 392-394 [failure to discuss impacts of future activities and project alternatives]), and the *sufficiency* of a required discussion. *Vineyard, supra,* 40 Cal.4th at 439 [discussion factually inconsistent and incoherent].

In both situations, the reviewing court has a duty to exercise its independent judgment in determining (1) what the law requires (*Yamaha, supra,* 19 Cal.4th at 8), (2) whether the preparer of the EIR applied the correct legal standard, (*Ebbetts Pass, supra,* 43 Cal.4th at 954 [scope of cumulative impacts analysis legally compliant]) and (3) whether the failure to comply with the law "deprived the public and decision makers of substantial relevant information

about the project's likely adverse impacts." *Neighbors for Smart Rail,* 57 Cal.4th at 463 [use of improper baseline not prejudicial].

The deferential substantial evidence standard of review only applies when the reviewing court must determine whether the evidence supports an agency's finding or determination of predicate facts, (*Ebbetts Pass, supra,* 43 Cal.4th 955 [cannot foresee "precise parameters of future herbicide use"]) or ultimate environmental conclusions. *Laurel Heights Improvement Association v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129 ("*Laurel Heights II*") [new evidence not significant].

As this Court recognized in *WSPA, supra,* 9 Cal.4th 559, "the substantial evidence standard of review prescribed by [CEQA] is analogous to the substantial evidence standard of review applied by appellate courts to evaluate the findings of fact made in trial courts." *Id.* at 565. "[W]hen a [finding] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]." *Id.* at 571.

Friant Ranch takes great creative license with Supreme Court precedent to urge its claim that this Court cannot exercise independent judgment when determining whether an EIR's discussion is *sufficient.* An honest reading of Supreme Court opinions instead reflects that the Court defers to agency findings of fact only when the application of a legal standard turns upon a factual finding or ultimate environmental conclusion. However, when called upon to decide what the law requires, i.e., whether the agency failed to comply with a legal standard and whether the failure to comply with the standard was prejudicial, the Court has consistently exercised its independent judgment.

In *Laurel Heights I, supra,* the Court applied the deferential substantial evidence standard of review to a neighborhood association's claim that challenged an agency's ultimate conclusion that the project's adverse environmental effects, including toxic air emissions, would be mitigated. 47 Cal.3d at 387, 403-422. The Court exercised its independent judgment and determined that the Regents were required to consider and discuss the impacts of reasonably foreseeable future

activities. *Id.* at 393-399. The Court also exercised its independent judgment in determining that it was irrelevant that the Regents had not formally approved future plans. *Id.* at 394-395. The Court exercised its independent judgment in determining that the Regents were required to consider and discuss project alternatives; that the EIR did not discuss and consider alternatives; and, that the fact that the Regents had decided alternatives were not feasible before the EIR was prepared was irrelevant. *Id.* at 395-407.

> *The Regents miss the critical point that the public must be equally informed.* Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process. We do not impugn the integrity of the Regents, but neither can we countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials. 'To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions.' [Citations.] An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

Id. at 404-405.

Citizens of Goleta Valley v. Bd. of Supervisors (1990) 52 Cal.3d 553 ("*Goleta Valley II*") only applied the deferential substantial evidence standard of review to the Board's finding regarding the predicate fact of "feasibility." The legal issue regarding the sufficiency of the EIR's discussion was resolved by this factual finding because an EIR is only required to consider feasible alternatives. *Id.* at 566-567. Similarly, in *In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, the legal issue regarding whether the EIR should have considered and discussed a reduced export alternative in greater detail was resolved because substantial evidence in the record supported CALFED's factual finding that the alternative was inconsistent

with program objectives. *Id.* at 1165-1167.

In *Laurel Heights II, supra,* the legal issue was whether the Regents should have recirculated the final EIR because it contained information that was not in the draft EIR. The legal issue was resolved because substantial evidence in the record supported the Regents' factual determination, *as explained in the EIR*, that the new information was not significant. 6 Cal.4th at 1134-35

In *Vineyard, supra,* the Court applied the substantial evidence standard of review in determining that the record supported the County's findings and factual conclusion that water would be available in the near term. 40 Cal.4th at 436. However, the court exercised its independent judgment in determining that CEQA does not require "firm assurances of future water supplies at relatively early stages of the land use planning and approval process." *Id.* at 434. "The ultimate question under CEQA,...is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project." *Ibid.* The Court also exercised independent judgment in deciding that "[u]ncertainty in the form of competition for identified water sources is an important point that should be discussed in an EIR's water supply analysis," and that the EIR had included that discussion. *Id.* at 436. And the Court exercised its independent judgment in determining, with respect to long-term supplies, that "[t]he FEIR discloses the remaining uncertainty regarding actual provision of surface water, noting that "provision of a long-term reliable water supply...cannot be ensured until facilities are approved." *Id.* at 438. The Court then applied the substantial evidence standard of review in determining that the record supported the County's "conclusion that *some part* of the planned new surface water supplies will be developed and made available." *Ibid.*

Importantly, the Court exercised its independent judgment in determining that "the FEIR's discussion of the *total* long-term water supply and demand...leaves too great a degree of uncertainty regarding the long-term availability of water for this project." *Vineyard, supra*, 40 Cal.4th at 439.

> Factual inconsistencies and lack of clarity in the FEIR leave the reader—and the decision makers—without substantial evidence for

> concluding that sufficient water is, in fact, likely to be available for the Sunrise Douglas project at full build out. Most fundamentally, the project FEIR and the Water Forum Proposal final EIR provide no consistent and coherent description of the future demand for new water due to growth in Zone 40 or of the amount of new surface water that is potentially available to serve that growth.

Ibid.

In *Ebbetts Pass, supra,* the Court very clearly explained the standard of review.

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

43 Cal.4th at 954.

Consistent with the foregoing statement, the Court exercised its independent judgment in determining that the California Department of Forestry ("CDF") was not required to use a particular methodology for analyzing cumulative biological impacts of timber harvest plans and also independently reviewed the sufficiency of the discussion to determine whether it satisfied CEQA's information disclosure requirements. *Id.* at 949. The legal issue as to whether the EIR should have included a more detailed discussion regarding future herbicide use was resolved because substantial evidence in the record supported CDF's predicate factual finding "that the precise parameters of future herbicide use could not be predicted." *Id.* at 955.

In *Neighbors for Smart Rail, supra,* the Court exercised its independent judgment in concluding that "existing conditions is the normal baseline under CEQA, but that factual circumstances can justify an agency departing from that norm when necessary to prevent misinforming or misleading the public and

decision makers." 57 Cal.4th at 448. The Court applied the substantial evidence standard of review in determining that the factual circumstances did not justify departing from the norm. *Ibid.* However, the Court exercised its independent judgment in determining that the error was not prejudicial. *Ibid.*

None of the foregoing cases support the proposition that when a legal standard is not explicit, the Court applies the substantial evidence standard of review whenever it reviews the sufficiency of an EIR's discussion.

4. Change Can Only Come From The State Legislature.

Finally, Friant Ranch complains that CEQA is an arduous process that will become uncertain, unpredictable, time consuming, costly and create waste in government if agencies and project applicants must wait for a reviewing court to exercise independent judgment. OBM, p. 12. This argument ignores the fact that the courts in this state have been exercising their independent judgment for almost fifty years when determining whether EIRs comply with CEQA's legal standards.

There is no doubt that the California Legislature has long been aware that there is uncertainty, unpredictability, delay and cost associated with CEQA review, connected with its mandate to protect the state's environment. Yet Friant Ranch can point to no legislative directive that courts must reduce CEQA's protections by application of the substantial evidence standard of review to reduce the time and expense of complying with CEQA's important information disclosure requirements. Regardless of Friant Ranch's perspective, this Court has "no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed." *Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-33 ("*Cal. Teachers Ass'n*").

B. <u>The EIR's Consideration And Discussion Of The Project's Significant Air Quality Impacts Does Not Comply With Guidelines Section 15126.2 (a).</u>

1. Principles of Statutory Interpretation

When interpreting or construing a statute, the fundamental role of a reviewing court "is to ascertain and effectuate the legislative intent." *Laurel Heights II, supra,* 6 Cal.4th at 1127. Ascertaining "the intent of the Legislature so

as to effectuate the purpose of the law is the "touchstone of statutory interpretation." *Dyna–Med, Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387. A court does not "examine [statutory] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." *Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 165. "CEQA was intended to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." Guidelines § 15003 (f).

2. The EIR Does Not Comply With Applicable Legal Standards.

The Legislature has made it clear that an EIR is "an informational document." § 21061. Its manifest purpose "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." *Ibid.*; Guidelines, § 15003, subds. (b)–(e).) The general standard for an informative EIR is that it "shall include a *detailed statement* setting forth...*All significant effects* on the environment of the proposed project" and "*Any significant effect* on the environment that cannot be avoided if the project is implemented." § 21100. [Italics added.]

> 'To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions.' [Citations.] An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

Laurel Heights I, supra, at 404-405.

Pursuant to Guidelines § 15126, significant impacts must be "discussed as directed" in Guidelines § 15126.2 which is entitled, "Consideration And Discussion Of Significant Impacts." Significantly, Guidelines § 15126.2 is never mentioned in the Friant Ranch EIR's significance analysis. AR 793-830. Subdivision (a) of the Guideline provides:

> An EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area... Direct and indirect significant effects of the project on the environment shall be *clearly identified and described*, giving due consideration to both the short-term and long-term effects. The discussion should include *relevant specifics* of the area, the resources involved, physical changes...[and] *health and safety problems caused by the physical changes...*

§ 15126.2 (a).

According to Friant Ranch, the legal standard set by CEQA's information disclosure requirements is a general discussion of adverse health effects associated with certain development related pollutants. OBM, pp. 42-43. This is inconsistent with the express purpose of an EIR and is not supported by the language of the Guideline. The language chosen by the Legislature does not express an intention that CEQA's information disclosure requirements would be satisfied by a general discussion of significant adverse health impacts in an EIR's significance analysis. The legal standard as reflected in the regulatory language mandates that those effects must be "clearly identified"; the discussion must include the "relevant specifics" about physical changes that the project will cause and the "relevant specifics" about the health problems "caused by the physical changes." § 15126.2 (a).

Friant Ranch seizes upon the Court of Appeal's use of the words "correlation," "correlate" and "correlating" when describing the missing analysis and claims there is no explicit requirement to include a correlation analysis in EIR's significance analysis.[5] This is a red herring for several reasons. First, this

---

[5] To be clear, the Court of Appeal did not hold that the EIR lacks a "specific health correlation analysis." The opinion concludes that the Friant Ranch EIR is

Court is reviewing the content of the EIR for legal error, de novo, and is not reviewing the decision of the appellate court. *Vineyard, supra,* 40 Cal.4th at 427. And according to *Oxford Dictionary of English*, "correlation" means "the process of establishing a relationship or connection between two or more things."[6] The Court of Appeal properly interpreted § 15126.2 (a) as requiring a significance

---

inadequate under CEQA "because it does not *analyze* the adverse human health impacts that are likely to result from the air quality impacts identified in the EIR." Opinion, p. 50. Nor did the Court of Appeal specify the methodology or type of study that the County was required to perform or otherwise direct the County to prepare a specific health correlation analysis. To the contrary, after providing an example of how the analysis might use Air District data to demonstrate "the potential magnitude of the impact on human health" the Court explained:

> "The foregoing references to the data provided in the EIR should not be interpreted to mean that County *must* connect the project's levels of emissions to the standards involving days of nonattainment or parts per million. County has discretion in choosing what type of analysis to provide and we will not direct County on how to exercise that discretion. § 21168.5. Nonetheless, there must be some analysis of the correlation between the project's emissions and human health impacts. *Bakersfield Citizens, supra,* 124 Cal.App.4th at 1219-1220. In other words, we agree with plaintiffs that it is not possible to translate the bare numbers provided into adverse health impacts *resulting from this project.*"

Opinion p. 49.

[6] Oxford Dictionaries (2010-10-19). Oxford Dictionary of English, 2nd Edition (Kindle Location 155348). Oxford University Press - A. Kindle Edition.

analysis that identifies the project's significant effects, and considers and discusses relevant specifics regarding the relationship between physical changes that the project will cause and the health problems caused by the physical changes, in detail.

Friant Ranch acknowledges that the EIR's significance analysis uses a methodology for determining whether project emissions will be significant that is not designed to explain the effects that the project's criteria air pollutant emissions will have on human health in the affected area. OBM p. 41. Friant Ranch argues that evidence in the record suggests it is not feasible or possible to provide the missing analysis. "If that is the case, the EIR should say so." *Santa Clarita Org. for Planning the Env't v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 722 [possibility that reliable data was not available].

The Final EIR explains why it is not possible to provide a Health Risk Assessment for Toxic Air Contaminants but does not explain why it is not feasible or possible to consider and discuss relevant specifics regarding the relationship between the project's criteria air pollutant emissions and health problems in the affected area.[7] AR 4602. Instead, the Final EIR claims that a

---

[7] A "Toxic air contaminant" is "a substance identified by the Air Resources Board as a toxic air contaminant pursuant to Health and Safety Code § 39657." Cal. Code Regs. tit. 17, § 95603. A "Health risk assessment" ("HRA") is "a detailed comprehensive analysis prepared pursuant to Section 44361 to evaluate and predict the dispersion of hazardous substances in the environment and the potential for exposure of human populations and to assess and quantify both the individual and population-wide health risks associated with those levels of exposure. Health & Saf. Code § 44306. Although Sierra Club does not claim that the EIR is defective because of the omission of a HRA, the County certainly has the discretion to require one. § 21160; *see Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1228. ["Section 21160, by its express terms, therefore authorizes the public agency—here, the department—to request from the plan

"general discussion of adverse health effects associated with certain development related pollutants" is sufficient to satisfy § 15126.2(a); AR 4602.

Friant Ranch argues that a comment letter from the Air District explains why it is not feasible or possible to provide the missing analysis. OBM, p. 43. That letter says that "the required level of detail" for an "[a]ccurate quantification of health risks and operational emissions" is "*typically* not available until project specific approvals are being granted." AR 4553. [Italics added.] However, there is nothing to indicate that this letter is explaining the omission of the analysis required by § 15126.2 (a). Moreover, the Air District does not explain why the available level of detail known about the Friant Ranch Specific Plan is not sufficient *at this point in time* to explain the connection between the project's criteria air pollutant emissions and resulting health impacts.[8] Furthermore, Mr. Barber's statement to the Board reflects that the Air District objected to the absence of an analysis of potential health impacts from the development. AR 8863

Friant Ranch's current suggestion that there is no accepted methodology for analyzing the adverse health effects of project-generated criteria air pollutants in the affected area does not excuse the total absence of analysis or explanation in the EIR. The County was required "to do the necessary work to educate itself about the different methodologies that *are* available." *Berkeley Jets, supra,* 91

---

submitter the information that it needs to satisfy its obligations."]

[8] "CEQA...permits the environmental analysis for long-term, multipart projects to be "tiered," so that the broad overall impacts analyzed in an EIR at the first-tier programmatic level need not be reassessed as each of the project's subsequent, narrower phases is approved, but tiering 'is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause.'" *Vineyard, supra,* 40 Cal.4th at 429.

Cal.App.4th at 1370-71. "Drafting an EIR ... involves some degree of forecasting. While foreseeing the unforeseeable is not possible, *an agency must use its best efforts to find out and disclose all that it reasonably can.*" Guidelines § 15144 (italics added). "If, *after thorough investigation,* a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." Guidelines § 15145 (italics added).

More to the point, it was the County's responsibility to explain in the EIR what relevant detail is missing and why it is not available for analysis *before* the project is approved. Guidelines, § 15020 ["Each public agency is responsible for complying with CEQA and these Guidelines. A public agency must meet its own responsibilities under CEQA and shall not rely on comments from other public agencies or private citizens as a substitute for work CEQA requires the lead agency to accomplish."]; Guidelines § 15004 (a) ["Before granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR.]

The audience to whom an EIR must communicate is not the reviewing court but the public and the government officials deciding on the project. That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved.*Vineyard, supra*, 40 Cal. 4th at 443

The County responded to the Air District's comment letter by saying that it will "assess potential health risks...when assessing future discretionary approvals." AR 5443. This does not assist Friant Ranch's argument because "CEQA's demand for meaningful information 'is not satisfied by simply stating information will be provided in the future.' [Citation]. *Vineyard, supra,* 40 Cal.4th at 431. The purpose of an EIR is to ensure that "the public and decision makers receive full information before the project is approved." *Ebbetts Pass, supra,* 43 Cal.4th at 950.

Finally, Friant Ranch argues that the EIR's discussion is sufficient without

the missing analysis because the information that was provided allows the public to understand that there are health consequences and allows the Board to understand that the project's air quality impacts are significant and unavoidable. OBM p. 46. Prejudice is not determined based upon a project proponent's opinion that an EIR's significance analysis provides sufficient information. The correct legal standard provides that "[a]n omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." *Neighbors for Smart Rail, supra,* 57 Cal.4th at 463.

The omitted information is substantial and relevant for many reasons. It is not possible to determine appropriate mitigation for the significant adverse health effects resulting from the project without understanding the potential magnitude of those effects. Without the missing analysis, "a reader [is unable] to determine whether the 100-plus tons per year of PM10, ROG and NOx will require people with respiratory difficulties to wear filtering devices when they go outdoors in the project area or nonattainment basis or, in contrast, will be no more than a drop in the bucket to those people breathing the air containing the additional pollutants." Opinion pp. 48-49. As the Court of Appeal perceptively explains:

> [I]nformation about the magnitude of the human health impacts is relevant to the board of supervisors' value judgment about whether other considerations override the adverse health impacts. In other words, a disclosure of respiratory health impacts that is limited to the better/worse dichotomy does not allow the decision makers to perform the required balancing of economic, legal, social, technological and other benefits of the project against the adverse impacts to human health because they have not been informed of the weight to place on the adverse impact side of the scales.

Opinion p. 49, footnote 23.

The Court of Appeal was correct in requiring the County to revise the EIR to provide an analysis of the adverse human health impacts that are likely to result from the air quality impacts identified in the EIR. Opinion p. 50.

C. The Friant Ranch EIR Does Not Comply With CEQA's Legal Standards For The Consideration And Discussion Of Mitigation Measures to Minimize The Project's Significant Air Quality Impacts.

1. Background.

According to MM 3.3.2, "[i]mplementation of the following mitigation measures shall substantially reduce air quality impacts related to human activity within the entire Project area but not to a level that is less than significant." AR 172, 824, 4816. The identified measures can be summarized as follows: careful selection and location of shade trees; utilization of efficient HVACs "if economically feasible"; reduction of energy consumption by 10-20% by using efficient air conditioning and heating systems and appliances; "installation of two 110/ 208 volt power outlets for every two loading docks"; paving with "reflective attributes"; and promoting the use of bicycles. Additionally, "transportation related mitigation" in MM 3.3.2 includes: providing residents with guidelines for careful selection and location of trees, providing trail maps, information about "commute options," and information about Air District programs to "reduce county-wide emissions." AR 172-73, 824-26, 4816-18.

2. Legal Standards.

One of the basic purposes of CEQA is to "[p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible." Guidelines § 15002 (a)(3). Public agencies have a duty to "minimize environmental damage" and CEQA prohibits approval of a project as proposed "if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment." Guidelines § 15021(a)(2).

> 'Mitigation' includes: (a) *Avoiding* the impact altogether by not taking a certain action or parts of an action. (b) *Minimizing* impacts by limiting the degree or magnitude of the action and its implementation. (c) *Rectifying* the impact by repairing, rehabilitating, or restoring the impacted environment. (d) *Reducing*

or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) *Compensating* for the impact by replacing or providing substitute resources or environments.

Guidelines § 15370, italics added.

One of the basic purposes of an EIR is to "list ways in which the significant effects of such a project might be minimized." Pub. Resources Code § 21061. To accomplish its purpose, an EIR must include "a detailed statement" setting forth "[m]itigation measures proposed to minimize significant effects on the environment." Pub. Resources Code § 21100 (b)(3). An EIR's consideration and discussion of the mitigation measures proposed to minimize the significant effects of a project must be discussed as directed in Guidelines § 15126.4. Guidelines § 15126. As with the EIR's significance analysis, Guidelines § 15126.4 is never mentioned in the Friant Ranch EIR's discussion of mitigation. AR 793-830.

3. The EIR Does Not Comply With The Legal Standards.

An EIR must consider and discuss mitigation measures that will minimize "each significant environmental effect identified in the EIR." § 15126.4 (a)(1)(A). The Friant Ranch EIR identifies adverse health effects as a significant environmental effect but does not consider and discuss any mitigation measures to minimize this effect.

"Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified." §15126.4 (a)(1)(B). The EIR provides a list of purported mitigation measures, but there is no discussion and no analysis explaining the basis for selection. The EIR does not explain how it can be determined whether any of the identified measures will be effective in achieving the stated goal of substantially reducing air quality impacts.[9] *Ibid.* While the significance analysis, as discussed above, at least uses

---

[9] Nor does the EIR discuss what efforts the County undertook to identify feasible

numbers and data and modeling to measure the amount of emissions the project will generate, the mitigation analysis is devoid of criteria for measuring the effectiveness of mitigation measures.

"Formulation of mitigation measures should not be deferred until some future time." § 15126.4 (a)(1)(B). MM 3.3.2 states: "The County and SJVAPCD may substitute different air pollution control measures for individual projects, that are *equally effective or superior to those proposed herein*, as new technology and/or other feasible measures become available in the course of build-out within the Friant Community Plan boundary." AR 174-75,824-26, 4818 (italics added). The County is thus deferring formulation because the current measures do not specify performance standards for substitute measures. § 15126.4 (a)(1)(B). In other words, performance standards for determining effectiveness have not yet been formulated.

Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments." § 15126.4 (a)(2). A lead agency is responsible for "ensuring that implementation of the mitigation measures occurs in accordance with a mitigation the program." Guidelines § 15097. MM 3.3.2 assigns implementation to Friant Ranch and monitoring to the County, but there is no explanation regarding what triggers compliance or how compliance will be monitored or what will be monitored or if monitoring includes any enforcement measures. The EIR's mitigation analysis fails to explain how the County will ensure that mitigation occurs.

According to Friant Ranch, MM 3.3.2 will be implemented and enforced because it was adopted by the County. OBM pp. 55-57. It cites no authority for

---

mitigation measures, such as consulting with the Air District, the most logical source of information. CEQA requires consultation. § 21153. It is clear from the comments of Mr. Barber that the County did not consult with the Air District "to discuss project mitigation or project design elements to assist in reducing project related impacts." AR 8863-64.

the proposition that an adopted mitigation monitoring and reporting program is itself a legally binding instrument; the program must provide enforcement mechanisms. *Fed'n of Hillside, supra,* 83 Cal.App.4th at 1261.

Finally, since this Court is not reviewing the appellate court's opinion for compliance with Guidelines § 15126.4 (a), Friant Ranch's assertion that the Court of Appeal adopted a new "vagueness doctrine" is a diversionary tactic designed to avoid the real issue. It is also based upon another false narrative regarding the opinion. Using the concept of vagueness to frame the issue is simply another way of saying that MM 3.3.2 is not enforceable without the detailed information required by § 15126.4 (a).

D. CEQA's Legal Standards For Mitigation Do Not Change When A Significant Environmental Impact Cannot Be Reduced To Less-Than-Significant.

Friant Ranch appears to acknowledge that the EIR's discussion and consideration of mitigation measures does not measure up to the legal standards set forth in Guidelines § 15126.4. According to Friant Ranch, when mitigation measures cannot reduce an impact to a less-than-significant level a general discussion is sufficient because the legal standards do not apply. Not surprisingly, Friant Ranch provides no express statutory or regulatory authority to support this argument.

It would be inimical to CEQA's fundamental environmental purposes if a project were deemed exempt from information disclosure requirements because an environmental impact is *so* significant that it cannot be reduced to less-than-significant. See §§ 21000, 21001, 21002, 21002.1 and Guidelines § 15003. If this was the intended legal standard, the Legislature would surely have made it as explicit as it did with respect to mitigation of insignificant effects. See Guidelines §15126.4 (a) (3) ["Mitigation measures are not required for effects which are *not* found to be significant."]

Friant Ranch makes a chilling prediction that public agencies and project applicants might not even attempt to mitigate significant environmental impacts that cannot be reduced to less-than-significant if they are held to "extreme levels

of specificity." OBM, p. 53, fn 22. Yet the levels of specificity are established by the Legislature as expressed in § 15126.4 (a), not by a reviewing court. In eleven pages of argument, Friant Ranch cites § 15126.4 (a) in two string cites but never considers whether the EIR complies with its mandates. OBM, p. 48-49. The brief makes no attempt to measure the contents of the EIR's discussion of mitigation measures against the applicable legal standard. This implied threat of future non-compliance with CEQA's information disclosure requirements should serve as a red flag.

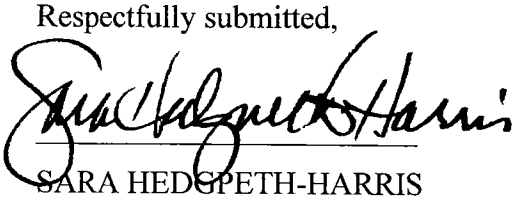
VI. CONCLUSION

The people of the State of California rely upon the courts to scrupulously enforce CEQA's mandates and to exercise their independent judgment when determining the sufficiency of an EIR as an informative document. Sierra Club urges the Court to reject this frontal attack on the integral role that independent judicial review serves in accomplishing CEQA's purposes.

Sierra Club trusts that this Court will continue to interpret CEQA's statutory and regulatory provisions in a manner consistent with CEQA's environmental and informational purposes. It would subvert CEQA's purposes if this Court were to accept the proposition that CEQA's legal standards for information disclosure and enforceable mitigation measures are less demanding when a significant adverse impact cannot be reduced to less-than-significant.

February 11, 2014

Respectfully submitted,



SARA HEDGPETH-HARRIS
Counsel for Plaintiffs and
Appellants

VERIFICATION & CERTIFICATION OF LENGTH

I, Sara Hedgpeth-Harris, declare:

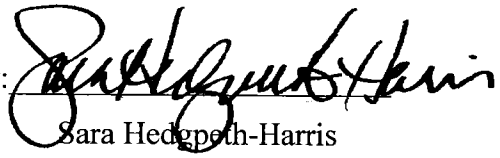
1. The facts set forth herein below are personally known to me, and I have firsthand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am the appellate attorney principally responsible for the preparation of the Answer Brief On the Merits.

3. The Brief was produced on a computer, using Microsoft Word and the font is 12-points Times New Roman.

4. According to the Word Count feature of Microsoft Word, the Opening Brief contains 11,934 words, including footnotes, but not including Table of Contents, Table of Authorities and this Certification.

5. I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on February 11, 2015 at Fresno, California.

By: 
Sara Hedgpeth-Harris

PROOF OF SERVICE

I declare that I am over the age of 18 and not a party to the within action. My business address is 5445 E. Lane Ave, Fresno, CA 93727. On February 12, 2015, I served the follow documents:

ANSWER BRIEF ON THE MERITS

☒ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

☐ **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package designated by an overnight delivery carrier with delivery fees paid or provided for and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **VIA MESSENGER SERVICE.** I served the above-referenced document(s) by placing them in an envelope or package addressed to the person(s) at the address(es) listed below and provided them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)

☐ **VIA FACSIMILE TRANSMISSION.** Based on an agreement of the parties to accept service by fax transmission, I faxed the above-referenced document(s) to the persons at the fax number(s) listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

☐ **VIA ELECTRONIC SERVICE.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 12, 2015, at Fresno, California.

Sara Hedgpeth-Harris

SERVICE LIST

Honorable Rosendo A. Pena, Jr.
Fresno Superior Court
1130 O Street
Fresno, CA 93721

Clerk of the Court
Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721

Daniel C. Cederborg
Bruce B. Johnson, Jr.
Office of The Fresno County Counsel
2222 Tulare Street, Suite 500
Fresno, CA 93721
bjohnson@co.fresno.ca.us

Bryan N. Wagner
Wagner & Wagner
7110 N. Fresno Street, Suite 340
Fresno, CA 93720
bryan@wagnerandwagner.com

James G. Moose
Tiffany Kristine Wright
Laura M. Harris
Remy Moose Manley LLP
555 Capitol Mall, Suite 800
Sacramento, CA 95814
jmoose@rmmenvirolaw.com
twright@rmmenvirolaw.com