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.

REPLY BRIEF ON THE MERITS

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I.
INTRODUCTION

This case presents the far-reaching question of whether the California Environmental Quality Act ("CEQA") (Pub. Resources Code,[1] § 21000 et seq.) allocates the responsibility to determine what information belongs in environmental impact reports ("EIRs") on required topics to the courts, rather than to the public agencies charged with administering CEQA. As this Court has held on numerous occasions, CEQA requires the courts to apply the substantial evidence standard of review to challengers' claims that EIRs lack sufficient information on a required subjects. (See Opening Brief on the Merits ["OB"], § IV, A.3, pp. 23–35.) Real Party in Interest Friant Ranch, LP ("Real Party") respectfully requests that this Court reaffirm this important legal principle.

Contrary to the statements made by Appellants Sierra Club et al. ("Appellants"), independent judicial review of claims that EIRs lack sufficient information on required subjects, is not necessary, or even advisable, to achieve CEQA's informational purposes. By ensuring that EIRs' discussions of required topics are supported by substantial evidence, reviewing courts safeguard the public's confidence in the CEQA environmental review process while maintaining the constitutional

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

separation of powers between the judiciary and the agencies entrusted with the administration of CEQA.

In contrast, independent judicial review of technical and scientific analyses would undermine the public's faith in the CEQA process by sending the message that lead agencies cannot be trusted to make sound decisions about the factual contents of their EIRs. As this Court has recognized, however, lead agencies can and should be trusted to make such decisions because the lead agencies, and not the courts, have the resources and technical expertise to enable them to weigh conflicting evidence and draw conclusions, based on public and other agency input, regarding the methodologies, scopes, types, and amounts of analyses to include in EIRs. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*).)

The substantial evidence standard of review is searching enough to ensure that agency determinations are reasonable and based on solid, credible evidence. (See § 21082.2, subd. (c) [substantial evidence "include[s] facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts"]; see also *Ofsevit v. Trustees of Cal. State Univ. & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9 ["'[s]ubstantial' evidence is evidence of 'ponderable legal significance ... reasonable in nature, credible, and of solid value'"]; and *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144 ["court

must ... review the *entire administrative record* to determine whether the [agency's] findings are supported by substantial evidence"] [italics added].)

In the instant case, the Court of Appeal incorrectly applied its independent judgment in assessing the sufficiency of the EIR prepared by the County of Fresno ("County") for the Friant Community Plan Update and Friant Ranch Specific Plan ("Friant Ranch"). In doing so, the Court of Appeal wrongly held that the EIR's air quality analysis violates CEQA by failing to include an analysis "correlating" Friant Ranch's air pollutant emissions to specific health impacts.

Appellants implicitly agree that CEQA does not require a health correlation analysis, asserting that the Court of Appeal did not actually require such an analysis. (Answer Brief on the Merits ["AB"], pp. 27–28.) Appellants therefore urge this Court to ignore the Court of Appeal's holding and review Appellants' claims de novo. (*Ibid.*)

In particular, Appellants claim that the EIR violates section 15126.2, subdivision (a), of the CEQA Guidelines[2] by failing to address health problems that could be caused by air pollutant emissions associated with Friant Ranch. (*Ibid.*) As discussed below, however, the EIR's air quality discussion easily satisfies Guidelines section 15126.2, subdivision (a).[3]

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

[3] As explained in Section III.B.1, *post*, the directive that EIRs *should* include "health and safety problems caused by the physical changes"

Lastly, Appellants misconstrue Real Party's arguments regarding CEQA's requirements for mitigation measures. Real Party does not suggest that CEQA's standards for mitigation are always less demanding when an impact cannot be mitigated to less-than-significant levels. Instead, Real Party emphasizes that the long-recognized purpose of *performance standards* is to provide evidentiary bases for agencies' conclusions that mitigation measures that are otherwise lacking in detail will reduce significant impacts to less-than-significant levels. When significant impacts cannot feasibly be mitigated to less-than-significant levels, it may not always be possible to tie the mitigation measures to performance standards, as is the case here. Moreover, most of the components of Friant Ranch's operational air quality mitigation measure (MM #3.3.2) are not deferred *at all*; and where they are, performance standards are identified. Therefore, the Court of Appeal erred in concluding that the measure as a whole was impermissibly deferred. Finally, substantial evidence demonstrates that the County will enforce all components of the measure.

In short, the Friant Ranch EIR complies with CEQA's procedures and is supported by substantial evidence.

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associated with a proposed project is purely *advisory*, and not mandatory. (See Guidelines, § 15005, subd. (b) [defining "should" as used in the Guidelines"].)

II.
ADDITIONAL FACTUAL BACKGROUND

A. Friant Ranch is Designed to Minimize Air Pollution.

As expected, Appellants repeatedly attempt to describe Friant Ranch as negatively as possible, often misrepresenting the record. They claim, for example, that the project has a "remote location" that is "far from employment centers," and make much of the fact that the project's emissions of reactive organic gases (ROG) will exceed the applicable significance threshold by 19 times. (See AB, p. 8.)

As Real Party explained in its Opening Brief (at pp. 5–7), however, Friant Ranch has been intentionally designed and planned to reduce overall vehicle miles traveled by its residents and users, which in turn, will reduce air pollutant emissions. (Administrative Record ["AR"] 9875, 9881–9882, 9886–9887.) Friant Ranch 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.) As an age-restricted community, Friant Ranch will generate far fewer vehicle trips (approximately 75 percent fewer during peak hours) than would a traditional single-family development, partly because retired residents will not travel to employment centers. (AR 4543–4544, 4754, 7797–7798, 18031–18035, 11035–11046.)

Friant Ranch incorporates smart growth principles, and thus includes a compact growth strategy, on-site commercial, retail, and recreational amenities, and Neighborhood Electric Vehicle paths on major interior roadways. (AR 9769, 9799, 7947, 163.) Friant Ranch will provide transportation alternatives such as carpooling and shuttle buses, pedestrian/bicycle facilities, neighborhood trails, and "local retail linkages." (AR 1157, 7788, 7947, 163, 9783–9786, 9794.) To facilitate use of mass transit, rights-of-way for two mass transit stops are set aside in the village center. (AR 9800, 9785, 9795.)

The fact that ROG emissions will substantially exceed the applicable significance threshold is purely a function of the size of the project, which, though not large compared with many land use plans, is large enough to allow for the use of the planning tool called a "specific plan." (See Gov. Code, §§ 65450–65457.)

A specific plan is an optional long-range planning tool prepared to implement an adopted general plan and provide for orderly community growth. (Gov. Code, § 65450.) Specific plans typically apply to substantial geographic areas and provide for buildout over extended time periods. As a result, implementation of an *entire* specific plan will generally result in greater environmental impacts than would a typical smaller subdivision or commercial project alone. (See AR 8867.) A local agency's adoption of a specific plan, however, is more environmentally effective land-use planning

than piecemeal approval of individual development projects. Among other things, specific plans provide a policy-based framework for orderly growth and development that ensures the adequate provision of infrastructure and provides standards for natural resource conservation. (See Gov. Code, § 65451; AR 9481, 9535.)

In this case, Friant Ranch will help implement the County's vision for the existing Friant area, and will invigorate that unincorporated community economically, socially, and aesthetically. (AR 160–165, 9816, 9770, 9817–9819, 9878–9889, 9768.) For instance, the project will provide much-needed wastewater treatment facilities with capacity sufficient to serve the existing residents of Friant. (AR 604, 9481, 162–163.) It will also help the County meet its senior housing demands. (AR 9816, 7748.)

As part of its effort to portray Friant Ranch in a negative light, Appellants cite statements made by Dan Barber of the San Joaquin Valley Air Pollution Control District ("Air District"), who had not commented on the Draft EIR during the public comment period, but who voiced concerns at the final hearing on the project. (AB, pp. 10–11.) Mr. Barber encouraged the County Board of Supervisors ("Board") to "give further consideration to requiring project specific design elements that will favorably reduce [vehicle miles traveled] related emissions." (AR 8863.) Mr. Barber did not, however, identify any additional feasible operational air quality mitigation measures. (AR 8862–8867.) Ultimately, the Board adopted the

environmentally superior alternative (Alternative 3), which reduces the amount of development proposed under Friant Ranch (and thereby reduces its air quality impacts), and increases the amount of permanent conservation land. (AR 24, 1200–1204.) In doing so, the Board acted consistently with Mr. Barber's suggestion that the Board modify the project's design to further reduce air pollutant emissions. In its Statement of Overriding Considerations, the Board explained why it believed that the project's many benefits outweighed its significant environmental effects, including air pollution. (AR 160–165.) Although Mr. Barber may disagree with the Board over the wisdom of approving Friant Ranch, that policy disagreement is not a basis to overturn the EIR. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.)

B. Friant Ranch is Subject to the Air District's Indirect Source Rule.

Relying further on Mr. Barber's comments, Appellants state that the Air District does not have any independent authority to impose mitigation measures. (AB, p. 11, citing AR 8862–8863.) The administrative record is clear, however, that the Air District will impose additional mitigation requirements on Friant Ranch through the District's Indirect Source Review ("ISR") program (Rule 9510).[4] (AR 18812–18831.) Through ISR, Friant

[4] For a detailed discussion of the ISR rule see *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control District* (2009) 178 Cal.App.4th 120, 124–129.

Ranch will be required to reduce its operational emissions of nitrogen oxide (NO_x) (an ozone precursor) by one-third, and its emissions of course particulate matter (PM_{10}) by one-half. (AR 18823, 22287.) Individual projects under Friant Ranch will undergo ISR at the tentative map stage, when proposed development patterns and unit counts will become more concrete than they are in the Specific Plan. (AR 4790, 7783; Opn. 63–65.)

III.
ARGUMENT

A. The Substantial Evidence Standard Applies to Claims that an EIR Lacks Sufficient Information on a Required Topic.

Both parties agree that if an agency omits from its EIR information *required* by CEQA, the agency has failed to proceed in the manner required by CEQA. (AB, p. 13; OB, pp. 3, 14; see also Slip Opinion ["Opn."] 23.) The first question presented, however, addresses the legal gray area, recognized by the Court of Appeal, regarding the standard of review that applies when an EIR addresses all the topics required by CEQA but challengers still claim that the information provided in the EIR is insufficient. (OB, pp. 1, 11; Opn. 23.) As demonstrated in Real Party's Opening Brief, the substantial evidence standard applies to such claims, rather than the "failure to proceed" standard of review applied by the Court of Appeal. Rather than address this legal gray area, Appellants maintain that *all* questions regarding the sufficiency of an EIR are "legal questions" that must be reviewed independently – even where "the legal standard is

not explicit." (AB, § V.A.3, p. 18.) Appellants also assert that such use of courts' independent judgment is necessary to enforce CEQA policies favoring informed decision-making and meaningful public input. As demonstrated below, Appellants are mistaken.

1. Appellants improperly conflate the standard of review under section 21168.5 with the standard for prejudice under section 21005.

Appellants seem to urge that, when CEQA does not explicitly require certain information to be included in an EIR, the reviewing court must independently review the EIR to determine whether the omitted information is necessary to informed decision-making and informed public participation. (See AB, pp. 13, 19-20.) In so urging, Appellants improperly impute the standard used by the courts to determine *prejudice* under CEQA to the question of whether the agency abused its discretion in the first instance. If the Court were to accept Appellants' position, it would dramatically undermine regularity and predictability in the CEQA review process. Appellants' position is also contrary to the plain language of CEQA and the holdings of this Court.

Under CEQA, judicial review of an agency's action extends only to whether there was a prejudicial abuse of discretion. (§§ 21168.5, 21168.[5]) As this Court recognized in *Neighbors for Smart Rail v. Exposition Metro*

[5] The "standard of review is essentially the same under either section" 21168 or 21168.5. (*Laurel Heights I, supra*, 47 Cal.3d at p. 392, fn. 5.)

Line Construction Authority (2013) 57 Cal.4th 439, 463 (*Neighbors*), CEQA sets forth a two-part inquiry for determining whether there was a prejudicial abuse of discretion.[6] (See *ibid.*; see also §§ 21168.5, 21005.) First, the reviewing court asks whether the agency abused its discretion under CEQA, *at all.* (§ 21168.5.) Under section 21168.5, an "[a]buse 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."[7] If the reviewing court is satisfied that the agency has *not* abused its discretion in that the agency followed CEQA's procedural requirements and supported its decisions with substantial evidence, the court's inquiry ends there; the agency has not abused its discretion, let alone prejudicially abused it. (§ 21168.5.)

If, on the other hand, the reviewing court determines that the agency *has* abused its discretion by failing to follow CEQA's procedures or failing to support its decisions with substantial evidence, then – and only then – does the court ask whether that abuse of discretion is *prejudicial.* (§§ 21168.5, 21005; *Neighbors*, *supra*, 57 Cal.4th at p. 463 [having determined that the respondent agency abused its discretion by applying the wrong

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[6] In his concurring and dissenting opinion in *Neighbors*, Justice Liu did not appear to disagree with the Court's *statement of the law* governing prejudice, though he clearly disagreed with his colleagues with respect to the *application* of prejudice principles under the facts of that case. (57 Cal.4th at pp. 478–481.)

[7] Section 21168.5 does not define "*prejudicial* abuse of discretion." A separate provision, section 21005, defines prejudice.

baseline, the Court, under a separate heading, considered whether such abuse of discretion was prejudicial].) "[T]here is no presumption that error is prejudicial." (§ 21005, subd. (b).) Rather, an abuse of discretion may be prejudicial if "noncompliance with the information disclosure provisions of [CEQA] ... precludes relevant information from being presented to the public agency." (§ 21005, subd. (a).)[8]

This standard for prejudice has been characterized by numerous courts as follows: "'A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Neighbors, supra*, 57 Cal.4th at p. 463, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 (*Kings County*); see also *Association for Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 [noting that "*[n]umerous* authorities have followed and applied this *prejudice* standard" (italics added) and listing several cases]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 926–927 (*Rialto*); *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046; *Mount Shasta Bioregional Ecology Center v.*

[8] In this respect, CEQA is similar to other statutory schemes in which the Legislature has declared what types of errors rise to the level of being prejudicial, and what types of errors are harmless. (See, e.g., Gov. Code, §§ 65010 [Planning and Zoning Law], 56107, subd. (a) [Cortese-Knox-Hertzberg Local Government Reorganization Act].)

County of Siskiyou (2012) 210 Cal.App.4th 184, 203; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1469.)

Appellants would have the Court borrow this prejudice standard and independently apply it to *all* claims that an EIR lacks sufficient information on required topics. (See AB, pp. 13, 19-20.) The problems with Appellants' approach are obvious and manifold.

First, under Appellants' view, CEQA would require that an EIR include all information deemed "relevant" by a reviewing court, regardless of whether CEQA explicitly requires that information or whether substantial evidence supports the breadth of the EIR's existing analysis on required topics. Such a result is inconsistent with CEQA's framework and this Court's precedents, which establish that lead agencies, not project opponents or the courts, determine the content of EIRs. As this Court has cautioned, "[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." (*Laurel Heights I, supra*, at p. 415; see also Guidelines, § 15204, subd. (a) ["CEQA does not require a lead agency to conduct every test ... recommended or demanded by commentors"].)

Second, Appellants' proposed standard of review would introduce needless complexity and uncertainty into the environmental review process. For one thing, the ease by which project opponents can allege that

information is "relevant" or "necessary for informed decision-making" – and therefore, in Appellants' view, required by law – would allow for legal challenges any time project opponents dream up additional analyses that could be included in an EIR on a required subject. The mere threat of such challenges may prompt lead agencies, at great expense in treasure and time, to pack their EIRs with every study and piece of information suggested during the environmental review process, regardless of whether that information is expressly required by CEQA, or whether substantial evidence supports the agency's decision to reject the suggestion for additional analysis. Agencies and applicants would also be unable to predict whether their EIRs contain sufficient relevant information until a reviewing court independently decides whether they do or do not. These results would frustrate the declared state policy requiring that the review process be conducted efficiently and expeditiously to conserve financial and governmental resources so that those resources may be better applied toward the mitigation of actual significant impacts on the environment. (§ 21003, subd. (f); see also Guidelines, §§ 15003, subd. (j), 15003, subd. (g).)

Third, Appellants' proposed standard of review would interfere with constitutional separation of powers principles. Agencies charged with administering CEQA are the final arbiters of what information belongs in an EIR, provided that such EIRs comply with CEQA's procedural requirements and are supported by substantial evidence. (See *Laurel*

Heights I, supra, 47 Cal.3d at p. 393; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572 (*WSPA*).) The courts are only a *check* on the agencies' legislatively delegated discretion; courts must not exercise de facto legislative power through the guise of judicial review.

Finally, Appellants' proposed standard of review is contrary to the plain language of the relevant statutes. As discussed above, CEQA's actual standard of review is clear: an abuse of discretion is established only when the agency has failed to proceed in the manner required by law or lacks substantial evidentiary support for its decisions. (§ 21168.5.) It is only when an agency has abused its discretion that the question of prejudice comes into play. (§ 21005; *Neighbors, supra*, 57 Cal.4th at p. 463.) If the courts were to jump directly to the prejudice question as part of their review of the merits of substantive attacks on EIRs, such an approach would negate the statutory principle that an abuse of discretion is only established if the agency has not proceeded in the manner required by law or supported its decisions with substantial evidence. (§ 21168.5.)

The Court should therefore reject Appellants' attempt to conflate the standard of review under section 21168.5 with the standard for prejudice under section 21005. Instead, as demonstrated in Real Party's Opening Brief, when a challenger claims that an EIR lacks sufficient information on a required topic, the burden should be on the petitioner 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, if the evidence is not substantial, that any additional information the challenger insists should have been included was necessary for informed decision-making and public participation. Absent *both* of these showings, a court should refuse to hold that the agency prejudicially abused its discretion with respect to the EIR's discussion of a required topic. (OB, pp. 16–17; §§ 21168, 21168.5, 21005); *Neighbors*, *supra*, 57 Cal.4th at p. 463; see also *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 709–710; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 534–535.)

2. Whether an agency prejudicially abused its discretion under CEQA is a question of law; but this does not mean that a court applies its independent judgment to an agency's factual decisions.

In a novel, but confusing argument, Appellants urge that a reviewing court must apply its independent judgment to all claims regarding the sufficiency of EIRs' impact analyses, regardless of whether those claims raise predominantly procedural issues or predominantly factual issues, because the question of whether an agency has abused its discretion under CEQA presents a legal issue. (AB, pp. 12–13.) This argument rests on a fundamental misconception about administrative law.

In any mandamus action, the court's function is inherently "legal," in that administrative agencies are the finders of facts, and the courts only review the agencies' actions for prejudicial abuses of discretion. (*WSPA*, *supra*, 9 Cal.4th at p. 573 ["the factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of trial courts, that the substantiality of the evidence supporting such an administrative decision is a question of law, and both types of substantial evidence review are governed by similar evidentiary rules"].) In other words, application of the "failure to proceed" standard of review and the "substantial evidence" standard of review both involve "legal issues." (*Ibid.*; see also *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 849, fn. 2.) This does not mean, however, that all claims arising under CEQA are reviewed de novo and without deference to the agency whose actions are at issue.

In a related argument, Appellants oddly invoke *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 6–7 (*Yamaha*), a non-CEQA case involving the proper judicial posture in reviewing administrative agencies' interpretations of statutes. In that case, this Court appropriately concluded that, although an agency's interpretation is a factor for a court to consider, a reviewing court itself is the final arbiter of the meaning of statutes. (*Id.* at pp. 7–8.) Real Party does not dispute this common-sense conclusion. In reasoning that is difficult to follow, however,

Appellants contend that *Yamaha* "is key to understanding why Friant Ranch's proposed standard of review is untenable." (AB, p. 16.) Appellants seem to reason that independent review is appropriate in all cases challenging the sufficiency of EIRs discussions of required topics because such cases necessarily involve issues of statutory interpretation. (AB, pp. 17–18.) This argument ignores the fact that many (and perhaps most) CEQA cases involving disputes over the adequacy of required analyses do *not* involve disputes over statutory interpretation. Moreover, the argument finds no support whatsoever either in the language of sections 21168.5 and 21168 or in any published decision interpreting CEQA. The Court should therefore reject Appellants' unclear but obviously flawed reasoning.

3. Appellants' attempt to distinguish this Court's decisions fails, and in fact helps to demonstrate that the substantial evidence standard applies to claims that an EIR lacks sufficient information on a required subject.

Appellants assert that Real Party "takes great creative license with Supreme Court precedent to urge its claim that the Court cannot exercise independent judgment when determining whether an EIR's discussion [of a required topic] is sufficient." (AB, p. 20, italics omitted.) If the Court reviews its previous decisions discussed in Real Party's Opening Brief, however, it will find that Real Party accurately summarized the Court's legal analyses and holdings. Moreover, Appellants' recitation of those cases is consistent with Real Party's in that Appellants concede that in each case,

the Court applied de novo review to the question of whether the respondent agency complied with CEQA's procedural requirements, but deferred to the lead agencies' factual decisions regarding the sufficiency of the EIRs' analyses of required topics. (See AB, pp. 19–24.)

4. "Independent judgment" of factual issues is not necessary to ensure CEQA is scrupulously followed; no case holds, or even suggests, this approach.

Lastly with respect to the standard of review, Appellants insist that independent judicial review is necessary to ensure that the public is not misled about a project's environmental consequences. (AB, pp. 2–3.) Without saying as much, Appellants seem to assume that judicial officers are generally more inclined towards protecting the environment than elected state or local officials and their appointees, who, in contrast, are comparatively less trustworthy. This argument assumes too much ideological uniformity throughout the judiciary, as well as too much skepticism about the motives of politically accountable entities such as city councils and boards of supervisors. Appellants fail to understand that judges on both sides of the political spectrum sometimes succumb to the temptation to issue activist decisions, and that many agency officials throughout California have very strong environmental values (as do their constituents).

For these reasons, the de novo review standard championed by Appellants would not necessarily lead to better environmental protection. It

would, however, lead to significant uncertainty in the environmental review process. Inevitably, each judge interprets statutes and regulations through the subjective prism of his or her own experiences and values, despite best efforts to maintain objectivity. As a result, different judges viewing the same administrative record could reach vastly different conclusions despite the fact that they are all applying the same sets of statutes and regulations. These observations by Real Party are not meant to show any lack of respect for the individual jurists involved, but rather simply reflect a reality that underlies all human institutions, as Real Party has experienced first-hand.[9] The substantial evidence standard of review, with its deference to reasonable agency factual determinations, minimizes the uncertainties associated with CEQA litigation because project proponents are better able to predict the outcomes.

Furthermore, none of the cases cited by Appellants for the proposition that an independent judiciary is necessary to assure environmental protection says anything of the sort. (See AB, pp. 2–3.) In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 254 – which was decided *before* the Legislature enacted sections 21168 and

[9] The standard announced by the Court of Appeal in this case would leave litigants in total doubt over the ultimate outcome of "sufficiency" claims because a reviewing court, exercising its own judgment, would engage in a line-drawing exercise that could not be predicted in advance. "The terms themselves—sufficient and insufficient—provide little, if any, guidance as to where the line should be drawn. They are simply labels applied once the court has completed its analysis." (Opn. 23.)

21168.5 (Stats. 1972, ch. 1154, § 16, p. 2277) – this Court did not use the term "independent judiciary" or any synonym thereof, and did not address the standard of review to be applied to EIRs. Similarly, in *Laurel Heights I, supra*, 47 Cal.3d at p. 392, the Court in no way stated, as Appellants claim, that the exercise of independent judicial judgment is necessary to ensure that the public and decision-makers are informed. (Compare AB, p. 2.) To the contrary, the Court in *Laurel Heights I* stressed the necessity of *deference* to a lead agency's factual conclusions about the amount and type of analysis to include in an EIR. (*Laurel Heights I, supra*, 47 Cal.3d at p. 393, 415; see also *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320, 322 [cited by Appellants, but applying the substantial evidence standard to the agency's choice of baseline]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431[cited by Appellants and holding that the failure to follow CEQA's *procedures* regarding tiering is a failure to proceed in the manner required by law]; compare AB, p 2.)

For each of these reasons, and those set forth in Real Party's Opening Brief, the Court should confirm that the substantial evidence standard of review applies to claims that EIRs lack sufficient information on required topics.

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B. The EIR's Air Quality Analysis Complies with Guidelines Section 15126.2, Subdivision (a).

Appellants cannot point to any section of the act or the Guidelines that requires the type of correlation analysis found necessary by the Court of Appeal. Instead, Appellants claim that the Friant Ranch EIR's analysis violates Guidelines section 15126.2, subdivision (a), which provides that an EIR's discussion should include the health and safety problems caused by the physical changes. The EIR fully complies with this advisory directive.

1. Principles of Interpretation

At the outset, Appellants entreat this Court to determine the *legislative* intent behind Guidelines section 15126.2, subdivision (a). (AB, pp. 24–25.) But the Guidelines are promulgated by the California Natural Resources Agency, not the Legislature. (§ 21083.) Notably, moreover, not every provision in the Guidelines is intended to create a mandatory obligation. (Guidelines, § 15005 [the Guidelines contain "mandatory, advisory, or permissive" elements].) In broad terms, the words "must" or "shall" create mandatory obligations; the word "should" creates advisory directives; and the word "may" connotes permissive options available to agencies. (*Ibid.*)

Here, the relevant portion of Guideline section 15126.2, subdivision (a), is only advisory, as it begins with the word "should": "[t]he discussion should include … health and safety problems caused by the physical

changes[.]" Subdivision (b) of Guidelines section 15005 explains that the word "'[s]hould' identifies *guidance* provided by the Secretary for Resources . ... Public agencies are *advised* to follow this guidance in the absence of compelling, countervailing considerations." (Italics added.)

Despite the purely advisory nature of this operative language and the fact that it is not found in statute, Appellants ask this Court, in interpreting the language, to follow the principle that "CEQA was intended to be interpreted in such manner as to afford the fullest protection to the environment within the reasonable scope of the statutory language." (AB, p. 25, citing Guidelines, § 15003, subd. (f).) This principle of interpretation, however, would not apply even if the operative language were found in statute.

Originally announced by this Court in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, the notion that CEQA should always be broadly interpreted to protect the environment reflected the statutory language of CEQA as originally enacted in 1970, including the intent language found in sections 21000 and 21001. This approach must be tempered, however, by language of section 21083.1, added in 1993. Under that provision, "'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 1416, 1430; see also

Berkeley Hillside Preservation v. City of Berkeley (Mar. 3, 2015, S20116) __Cal.4th__ [p. 24].)

2. The EIR's air quality analysis complies with the law and is supported with substantial evidence.

Appellants claim that the EIR's air quality analysis violates Guidelines section 15126.2, subdivision (a), which states, in relevant part, that an EIR's discussion "*should* include … the … health and safety problems caused by the physical changes." (Italics added; see AB, § V.B.2, 16–31.)

Even assuming *arguendo* that this language creates a legally binding mandate, it conspicuously does *not* require that EIRs "correlate" a project's air quality impacts to specific health consequences (such as how many additional days of non-attainment might occur per year or how many people might have to wear air filtering devices). (Compare Opn. 48–49.) Moreover, the Friant Ranch EIR readily complies with the very general directive created by the language at issue.

In particular, the EIR acknowledges the causal relationship between adverse ambient air quality and adverse health consequences, and identifies the potential health effects of adding more pollutants to a nonattainment air basin. (AR 802–806.) The EIR clearly identifies, in separately labeled paragraphs with references to scientific reports, those possible effects of each of the criteria pollutants on human health. The EIR includes a

discussion of the expected human physiological responses to the identified pollutants. Specific illnesses are named. (*Ibid.*)

The EIR reports, for example, that "health effects associated with exposure to ozone pertain primarily to the respiratory system" and that ozone affects "not only sensitive receptors, such as asthmatics and children, but healthy adults as well." (AR 802.) Exposure to ozone can lead to "an increase in the permeability of respiratory epithelia; such increased permeability leads to an increase in responsiveness of the respiratory system to challenges, and the interference or inhibition of the immune system's ability to defend against infection." (*Ibid.*) The EIR warns that "adverse health effects associated with...PM_{10} concentrations may include breathing and respiratory symptoms, aggravation of existing respiratory and cardiovascular diseases, alterations to the immune system, carcinogenesis, and premature death." (AR 803.) Similar explanations are provided for carbon monoxide (CO), nitrogen dioxide (NO_2), and sulfur dioxide (SO_2). (AR 804–805.)

The EIR explains that the national and state ambient air quality standards were created to protect human health. (AR 793–797; see also 42 U.S.C. § 7409.) The EIR reports that Fresno County is designated in severe non-attainment for state and national 8-hour ozone standard, giving it "among the most severe" ozone problems in California. (AR 802–803.) The EIR also reports that Fresno County is designated as a non-attainment area

for the state and national PM_{10} standards. (AR 802–803.) The EIR explains that "[b]ecause the area is Non-Attainment for ozone and PM_{10}, a major criterion for review is whether the Project will result in a net increase of pollutants impacting ozone precursor pollutants and of particulate matter." (AR 806.) The EIR discloses that Friant Ranch will exceed the Air District's standards, which, in turn will make it more difficult to attain state and national ambient air quality standards. (AR 818, 824.) Taken together, the information presented in the EIR satisfies Guidelines section 15162, subdivision (a) (assuming *arguendo* that this directive is mandatory rather than purely advisory).

Had anyone commented on the Draft EIR that a health correlation analysis should be provided, the County would have provided a response to that comment. (See Guidelines, § 15088.) As discussed in Real Party's Opening Brief, however, only one comment questioned whether the EIR complies with Guidelines section 15162, subdivision (a). (AR 4602 [stating "under CEQA, the EIR must disclose the human health related effects of the Project's air pollution impacts"].) The Final EIR explains that a more specific analysis of health impacts is not possible at this early planning phase,[10] but refers the commentor to the EIR's discussion of the general

[10] Here, Appellants note that Guidelines section 15144 provides that a lead agency must "find out and disclose all that it reasonably can." (AB, p. 30.) The County did so. Given the broad planning nature of the Specific Plan, it was not possible to conduct a more detailed health impact analysis because

health consequence. (AR 4602.) This same commentor submitted a follow-up letter critiquing the Final EIR's responses, but did not question the adequacy of the response regarding air quality health effects. (AR 6763–6789.) On this record, the air quality analysis satisfies Guidelines section 15126.2, subdivision (a), and is supported by substantial evidence.

C. The Project's Mitigation Measures Comply with CEQA.

1. The air quality mitigation measures comply with legal standards and are enforceable.

Appellants advance three arguments that Mitigation Measure #3.3.2 ("MM #3.3.2") does not comply with legal standards. (AB, pp. 33–35.) Each argument lacks merit.

First, Appellants argue that the EIR violates Guidelines section 15126.4, subdivision (a)(1)(B), which provides that "[w]here several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measures should be identified." (AB, p. 33.) The EIR's compliance with this provision is not on review before this Court. In any event, this requirement applies only where one mitigation measure is chosen out of a longer list. (Guidelines, § 15126.4, subd. (a)(1)(B) ["...the basis for selecting *a particular measure* should be identified" (italics added)].) In this case, the EIR recommends, and the

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the precise designs for future subdivision- or use permit-level projects consistent with the Specific Plan are not known. (AR 4602, 8863, 4553; see also Guidelines, § 15146.)

County adopted, all of the mitigation measures listed.[11] (AR 824–825, 24–25.)

Second, Appellants argue, as the Court of Appeal held, that the County deferred formulation of mitigation because the EIR states that the County and Air District may substitute equally or better air quality mitigation as new technology becomes available, but the EIR does not quantify the emission reductions of each measure identified. (AB p. 34; Opn. 60–63.) This contention fails because, among other reasons, it is desirable, from a policy standpoint, to provide this kind of flexibility for planning projects proposed to build out over time. (See *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 357–358 (*Napa Citizens*) ["[a] county's needs necessarily change over time. ... It follows that a county must have the power to modify its land use plans as circumstances require"].)

Moreover, under existing law, an agency can change its adopted mitigation measures at any time—a fact that Appellants do not dispute.

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[11] Footnote 9 of Appellants' Answer Brief (p. 33) states that 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." (AB, p. 34, fn. 9.) Appellants are wrong. The County provided the Air District the Notice of Preparation, which is the procedural devise used to initiate interagency dialogue on an EIR. (AR 26494; § 21080.4; Guidelines, § 15082.) The Air District then commented on the Draft EIR. (AR 4553–4558, 4569, 4524; see also AR 8841.) The County then modified the EIR in response to the District's Comments. (AR 4554–4558.) Furthermore, the EIR's analysis is based on the Air District's written guidelines. (AR 793, 795–796, 818.)

(OB, p. 52; AB, pp. 34–35; *Napa Citizens*, *supra*, 91 Cal.App.4th at pp. 357–360; *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508–1509.) Such flexibility does not create a loophole in CEQA because if a modification to a mitigation measure creates a new or substantially more severe significant impact, more environmental review would be required under Public Resources Code section 21166. (See *Mani Brother Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1388–1389 [no need for supplemental EIR where substantial evidence supported city's conclusion that mitigation measures were no longer necessary].) This would have been true for Friant Ranch's mitigation measures, even if they had not explicitly said so. The fact that the mitigation measures are subject to change, however, does not mean that they are impermissibly deferred.

In short, the Court of Appeal's approach would effectively penalize agencies for being forthright about reserving their right to improve their mitigation measures as technology advances. Had Fresno County been silent on this issue, the Court of Appeal would have had nothing to censure. (See § III.C.2, *post*, for further argument regarding deferral of mitigation.)

Lastly, Appellants argue that MM #3.3.2 is "unenforceable without the detailed information required by § 15126.4(a)." (AB, p. 35.) In so arguing, Appellants appear to disavow the Court of Appeal's Opinion, which held that MM #3.3.2 is "vague on matters essential to enforceability

and, therefore, County has violated the requirement in CEQA that it 'shall provide' mitigation measures that 'are fully enforceable through permit conditions, agreements or other measures'" (Opn. 57, quoting § 21081.6, subd. (b); compare AB p. 35.) As demonstrated in Real Party's Opening Brief, CEQA does not require the level of specificity found necessary by the Court of Appeal and the County will enforce MM #3.3.2 through the adopted Mitigation Monitoring Program ("MMP"). (OB, pp. 54–58.)

In Answer, Appellants do not challenge the adequacy of the MMP or argue that MM #3.3.2 is too vague. Instead, Appellants claim that there is "no authority for the proposition that an adopted mitigation monitoring program is itself a legally binding instrument; the program must provide enforcement mechanisms." (AB, pp. 34–35.) This argument ignores the plain language of section 21081.6, subdivision (a)(1), which states that the MMP "shall be designed to ensure compliance during project implementation."[12] (See also *Sierra Club v. County of San Diego* (2014)

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[12] Appellants cite *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (*Federation*) for the proposition that a mitigation monitoring and reporting program is not an enforceable document. (AB 35.) To the contrary, that case states just the opposite: that an MMP ensures "that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation*, *supra*, 83 Cal.App.4th at p. 1261.) Furthermore, unlike the situation in this case, in *Federation* there was no substantial evidence demonstrating that the mitigation measures would ever be implemented. It is not clear from the *Federation* court's recitation of the facts whether the measures at issue were even included in the mitigation monitoring program. (*Ibid.*)

231 Cal.App.4th 1152, 1167–1169 [enforcing mitigation measure adopted in mitigation monitoring and reporting program for general plan update].)

In approving Friant Ranch, the County adopted the MMP. (AR 9, 138.) The text of the MMP provides:

> The County will adopt this mitigation and monitoring program at the time of adoption of the Specific plan and Community Plan broad planning-level actions. Moreover, the Specific Plan and Community Plan documents will incorporate a requirement to comply with this mitigation and monitoring program. Such compliance will be enforced through subsequent conditions of approval for future discretionary actions related to these broad entitlements, such as a conditional use permit for the wastewater treatment plant and tentative maps for the proposed subdivision of the Specific Plan Area. As such, mitigation measure contained herein shall be included as conditions of approval for the Project, to the extent permitted by law. Fresno County shall ensure that all construction plans and project operations conform to the conditions of the mitigated project.

(AR 166; see also AR 634–635 [EIR explaining enforcement of the MMP]; compare AB, p. 34 [Appellants assert the EIR does not explain mitigation enforcement]; see also Opn. 54, fn. 25 [same].)

In turn, the Specific Plan itself requires that "[t]he County shall monitor compliance with the Specific Plan and mitigation measures"; and the Specific Plan then specifies the stages of the planning process at which particular measures must be completed (e.g., prior to the recording of any parcel map, during review of working drawings, prior to issuance of grading or building permits, and upon the receipt of any written complaint). (AR 9899 [Specific Plan, § 8.11 "Specific Plan Administration"]; see also §

21081.6, subd. (a)(2).) In light of these facts, Appellants have failed to demonstrate that the County lacks substantial evidence to support its conclusion that that MM # 3.3.2 is enforceable or that MM #3.3.2 violates Guidelines section 15126.4. The Court should therefore reject Appellants' claim and reverse the Court of Appeal's decision below.

2. CEQA does not require Friant Ranch's air quality mitigation measures to include performance standards.

Appellants suggest that Guidelines section 15126.4 imposes a mandatory duty on agencies to include performance standards in all mitigation measures they adopt. (AB, p. 35.) This is not the law. By way of background, CEQA generally prohibits an EIR from postponing the formulation of mitigation measures, but permits measures to be deferred if the agency establishes a performance standard and commits to meeting that standard. (Guidelines, § 15126.4, subd. (a)(1)(B).)

In this case, many of the requirements set forth in MM #3.3.2 are not correctly viewed as deferring mitigation *at all* because they do not require the County or the applicant to undertake future study or to develop a plan for mitigation in the future. (AR 824–826; compare *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [rejecting mitigation measure requiring submission of acoustical analysis and approval of mitigation recommended by analysis because no mitigation criteria or potential mitigation measures were identified].) Therefore, the

general rule against deferral of mitigation measures does not apply to these components of MM #3.3.2. (See Guidelines, § 15126.4, subd. (a)(1)(B).)

To the extent that the residential energy component of MM #3.3.2 defers formulation of some mitigation (e.g., to establish tree-planting guidelines and to establish paving guidelines), the deferral is not "impermissible" because the mitigation measures sets a specific performance standard that must be achieved, to wit: "an overall reduction of 10 to 20% in residential energy consumption relative to the requirements of the 2008 State of California Title 24." (AR 825.) Thus, contrary to Appellants' contention (and the Court of Appeal's holding), the EIR did not impermissibly defer mitigation or violate any requirement to include a performance standard.

Appellants also misunderstand Real Party's arguments. In particular, Real Party does not suggest that standards for mitigation measures are always relaxed when an impact cannot be reduced to less-than-significant levels. (AB, pp. 35–36.) CEQA unquestionably requires an agency to adopt feasible mitigation measures to avoid, minimize, rectify, reduce, or eliminate a project's significant impact, regardless of the level of significance ultimately achieved. (§ 21002, 21081, subd. (a); Guidelines, § 15370.) Real Party's point is that performance standards are one type of evidence an agency can use to demonstrate that its mitigation measures will, in fact, reduce an impact to less-than-significant levels. (See, e.g.,

Sacramento Old City Assn. v. City Council of Sacramento (1991) 229 Cal.App.3d 1011, 1020–1023, 1030.) For this reason, performance standards are typically tied to the thresholds of significance. As explained in *Rialto Citizens*, *supra*, 208 Cal.App.4th at p. 945, "[d]eferred mitigation measures must ensure that the applicant will be required to find some way to reduce impacts to less than significant levels. If the measures are loose or open-ended, such that they afford the applicant a means of avoiding mitigation..., it would be unreasonable to conclude that implementing the measures *will* reduce impacts to less than significant levels." (Italics original).)

On the other hand, where it is not feasible to reduce the impact to below the significance thresholds, it does not necessarily make sense to include a performance standard in the mitigation measure. (*Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 244–245 ["the EIR explains what the environmental impacts would be, and it concludes that the impacts would be significant and unmitigable regardless of the proposed mitigation measures or future studies. Under such circumstances, the Board may adopt a statement of overriding considerations and approve the project"].) This is particularly true for a plan-level project, such as Friant Ranch, because it may not be possible to formulate the measures with enough specificity to achieve a specific or quantified standard. (*Rominger, supra,* 229 Cal.App.4th at pp. 690, 724 [rejecting argument that

mitigation measure violated CEQA because the petitioners "fail to explain what sort of performance standard could have been included given the uncertainty over exactly what land uses may eventually occur" in the subdivision project]; see also *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 442 ["[w]hile detailed mitigation measures may not be possible before a specific development plan is proposed, general mitigation measures may be adopted"].)

Such is the case here. By way of illustration, MM #3.3.2 requires all non-residential projects to provide bicycle lockers and/or racks. (AR 825.) It is not known at this phase of the planning process, however, how many non-residential projects will be developed under the Specific Plan. (AR 9794, 9795.) It is also not possible to predict how many people will take advantage of the racks/lockers. While surely the provision of racks/lockers will make it easier for residents of Friant Ranch and the County to choose to bike, rather than drive, the County cannot require its residents to forego their automobiles. For these reasons, it is not feasible, or even reasonable, to require the measure to identify a quantified amount by which the bicycle lockers/racks must reduce emissions.

By holding that the mitigation measures must include quantified performance standards, the Court of Appeal imposed unreasonable levels of specificity on the measures. As discussed in Real Party's Opening Brief (§ IV.C, pp. 47–58), this Court has previously made it clear that mitigation

measures need not be perfect. Rather, the courts must uphold mitigation measures provided that substantial evidence, as a whole, supports the agency's conclusion that the measures will be effective at reducing the impact to the degree claimed by the public agency. (*Laurel Heights I*, *supra*, at pp. 407–408.) Here, substantial evidence supports the County's conclusion that MM #3.3.2 will reduce (although not eliminate) Friant Ranch's operational air quality impacts. This Court should therefore reverse the Court of Appeal's decision on this issue and uphold MM #3.3.2.

IV.
CONCLUSION

For the foregoing reasons and those presented in Real Party's Opening Brief, the Court should reverse the Court of Appeal's decision below and uphold the EIR prepared for the Friant Ranch project.

Respectfully submitted,

REMY MOOSE MANLEY, LLP

Dated: March 4, 2015

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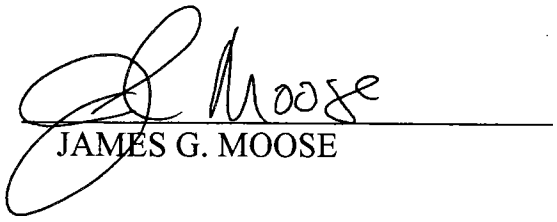
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this REPLY BRIEF ON THE MERITS contains 8,380 words, according to the word counting function of the word processing program used to prepare this brief.

Executed on this 4th day of March 2015, at Sacramento, California.



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)

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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
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