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CASE NO. S_____

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

PETITION FOR REVIEW

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I.

ISSUES PRESENTED

This petition presents four issues under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.):

1. Does the substantial evidence standard of review apply to a court's review of whether an environmental impact report ("EIR") provides *sufficient information* on a topic required by CEQA, or is this a question of law subject to independent review by the court?
2. Is an EIR adequate when it identifies the health impacts of air pollution and quantifies a project's expected emissions, or does CEQA further require the EIR to *correlate* a project's air quality emissions to specific health impacts?
3. Does a lead agency impermissibly defer formulation of mitigation measures when it retains discretion to substitute the adopted measures with equally or more effective measures in the future as better technology becomes available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness?
4. Do mitigation measure adopted by a lead agency to reduce a project's significant and unavoidable impacts comply with CEQA when substantial evidence demonstrates that, on the

whole, the measures will be at least partially effective at mitigating the impact, or must such measures meet the same (or even heightened) standards of adequacy as those adopted to reduce an impact to a less-than-significant level?

Each of these issues warrants review under Rule 8.500(b)(1) of the California rules of Court as follows.

II.

WHY REVIEW IS WARRANTED

Review is warranted on the first issue presented for two reasons. First, review is needed to secure uniformity of decision. In this case, the Fifth Appellate District concluded that the determination of whether an EIR includes sufficient information on a topic required by CEQA is a question of law subject to independent review by the courts. (Opinion, p. 23.)[1] In contrast, most other Courts of Appeal have applied the deferential substantial evidence standard to such claims because decisions about the amount, type, and scope of information to include in an EIR on a required topic are factual decisions best left to the discretion of the agency.[2]

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[1] The Court of Appeal's opinion is attached hereto as **Exhibit A**, and is cited "Opn." The Administrative Record of Proceedings is cited as "AR." The Appellants' Appendix is cited as "AA." The Reporter's Transcript is cited as "RT."

[2] See, e.g., *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, 1616–1621("*Barthelemy*"); *National Parks and Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341,

(Continued)

Review of this first issue is also appropriate because the Fifth Appellate District reached the incorrect conclusion on this very important issue of law. A public agency makes decisions regarding the amount, type, and scope of information to include in an EIR based on its experience and expertise, consultation with other agencies and outside experts, and through CEQA's public and agency scoping process. In contrast, as this Court has emphasized, judges "have neither the resources nor scientific expertise to engage in such analysis." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 ("*Laurel Heights I*").) As a result, when courts try to sort through complex technical information to assess its sufficiency, even highly intelligent judges frequently fail to fully understand either the scientific and technical information before them or the limits of the analytical tools available to experts. This is exactly what happened here, as demonstrated in the second issue presented.

Review is warranted on the second issue – whether an EIR must *correlate* a project's air emissions to specific health impacts – to settle an important question of law. The Opinion incorrectly concludes that the EIR for the Friant Community Plan Update and Friant Ranch Specific Plan (the

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(Continued)
1353 ("*National Parks*"); *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546 ("*Baykeeper*"); *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986 ("*CNPS*"); and *North Coast Rivers Alliance v. Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 637 ("*North Coast Rivers Alliance*").

"Friant Ranch" project) violates CEQA for failing to include a health impact analysis *correlating* the project's air emissions with the specific health impacts that will result. Alarmingly, the court reached this conclusion despite the facts that: (i) the analysis imagined by the court is not explicitly required by either CEQA or the CEQA Guidelines,[3] (ii) no evidence in the record suggests a "correlation" analysis is even possible to conduct with available analytical tools, and (iii) the EIR *does* disclose the general health effects of the project's impacts to air quality, thereby providing the public and decisionmakers with relevant information on this topic.

Review is warranted on the third and fourth issues – regarding standards of adequacy of mitigation measures adopted pursuant to CEQA – to secure uniformity of decision and to settle important issues of law. The lower courts are all over the map regarding what constitute adequate mitigation measures under CEQA. In this case, although the Defendant County of Fresno (the "County") readily acknowledges that the mitigation measure adopted for the project's air quality impact was not effective enough to reduce the impact to a less-than-significant level, the Opinion holds the County's mitigation measure to unprecedented standards of perfection – much higher than many courts have applied even to mitigation

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

measures that agencies concludes will mitigate impacts to less-than-significant levels. For instance, the Opinion concludes that because the County expressly retains the discretion to replace out-of-date components of the air quality mitigation measure with equally or more effective components in the future as better technology becomes available, the County impermissibly deferred formulating mitigation. The Opinion also concludes that because the mitigation measure does not satisfy a standard of specificity similar to the standard the courts apply to Constitutional due process "vagueness" claims, the mitigation measure violates CEQA. Few, if any, other published decisions hold mitigation measures to such exacting standards, although it is difficult to ascertain from the published decisions precisely what constitutes adequate mitigation under CEQA, particularly with respect to deferred mitigation.

Although this Court's decision in *Laurel Heights I* strongly suggests that the Opinion reaches the wrong conclusions on all of these issues, that case was decided more than 25 years ago and the lower courts (including the court in this case) have since chipped away at many of the vital principles the Court articulated in that case. This Court's more recent decisions, while helpful in clarifying other aspects of CEQA, have not resolved these issues, and many of the Courts of Appeal are applying inconsistent, confusing, and unwise standards is assessing the adequacy of EIRs and mitigation measures. As a result, the rules for preparing an

adequate EIR are highly uncertain, a state of affairs that makes CEQA compliance a guessing game.

III.

STATEMENT OF THE CASE

Real Party In Interest and Respondent Friant Ranch, L.P., adopts the Court of Appeal's recitation of the factual and procedural background. (Opn. 3–7, 43–44.) Additional relevant facts regarding the Friant Ranch EIR's air quality analysis and operational air quality mitigation measure are presented, as relevant, in Sections IV.B and IV.C of the "Legal Discussion" below.

As discussed in the Opinion, on appeal Plaintiffs and Appellants Sierra Club, Revive the San Joaquin, and League of Women Voters of Fresno (collectively, "Plaintiffs") abandoned many of their arguments from the trial court and raised new arguments for the first time on appeal. (See Opn. 38, 59.) The Court of Appeal nevertheless chose to reach the merits of these issues, concluding that they raised important questions of law affecting the public interest. (*Ibid.*)

The court rejected Plaintiffs' claims that: (i) the Friant Ranch project is inconsistent with the County's General Plan, (ii) the EIR violates CEQA for lacking sufficient information regarding the project's proposed wastewater treatment plant; and (iii) the Final EIR inadequately responds to comments suggesting off-site air quality mitigation measures. The court

held, however, that the EIR's discussion of health impacts of the project's air emissions is insufficient (Opn. 43–50), and that the project's operational air quality mitigation measure, Mitigation Measure 3.3.2 ("MM 3.3.2"), violates CEQA (Opn.51–63). The full text of MM 3.3.2 (i.e., AR 824–826) is attached hereto as **Exhibit B**.[4] Plaintiffs petitioned for rehearing, which the court denied.

IV.

LEGAL DISCUSSION

A. The Court Should Grant Review to Secure Uniformity of Decision and to Settle the Important Issue of Law Regarding the Standard of Review that Applies to a Claim that an EIR's Discussion of a Topic Required by CEQA is Insufficient.

1. The appellate districts are divided on what standard of review to apply to a claim that an EIR lacks sufficient information on a required topic.

An issue that "'frequently'" arises in CEQA litigation is "'whether relevant information was omitted from the EIR'" on a given topic required by statute or regulation. (*CNPS*, *supra*, 177 Cal.App.4th 957, 986–987, quoting *National Parks*, *supra*, 71 Cal.App.4th at p. 1236.) Since at least 2003, the Court of Appeal districts have disagreed as to what standard of review applies to such claims, with the Fourth, Second, and, more recently, Sixth and First Districts generally deferring to lead agencies on such claims, and the Fifth District reviewing the sufficiency of the information

[4] The EIR's Air Quality Chapter is at AR 793–826 and 4941–4970.

contained in an EIR independently.

a. The Pre-*Vineyard* Split between Fourth, Second, and Fifth Districts

The issue of the correct standard of review for a claim that an EIR omits relevant information first came to the forefront in 1995, when the Fourth District, in *Barthelemy*, concluded that when a petitioner alleges that an EIR fails to include sufficient information on a particular issue, the reviewing court should generally treat such an argument as a claim that the EIR is not supported by substantial evidence, rather than a claim that the agency failed to proceed in the manner required by law. (*Barthelemy*, *supra*, 38 Cal.App.4th 1609, 1616–1621; compare Pub. Resources Code, § 21168.5 [lays out two types of issues for judicial review in CEQA cases].) In *National Parks*, the Fourth District reiterated this deferential statement as to how to differentiate between issues raising alleged "failures to proceed in a manner required by law" and issues involving an alleged lack of substantial evidence supporting agency determinations. (71 Cal.App.4th 1341, 1353.) A year later, the Second District followed suit in *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1258, stating that "[c]hallenges to the scope of the analysis, the methodology for studying an impact, and the reliability or accuracy of the data present factual issues, so such challenges must be

rejected if substantial evidence supports the agency's decision as to those matters and the EIR is not clearly inadequate or unsupported."

In 2003, however, the Fifth District parted company with its two sister districts, claiming that its earlier decisions in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 ("*Kings County*") and *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App. 4th 713, had set forth a different approach to discerning whether an agency had acted prejudicially. In *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 ("*AIR*"), the Fifth District criticized *Barthelemy* and *National Parks* insofar as the two decisions suggested that "claims that information has been omitted from an EIR essentially should be treated as inquiries whether there is 'substantial evidence to support [the] decision to approve the project.'" These opinions, said the court in *AIR*, "fail to acknowledge the important public informational purpose that EIR's serve. (*Id.* at p. 1392.) An EIR is an educational tool not just for the decisionmaker, but for the public as well." (*Ibid.*) Thus, "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." (*Ibid.*) Instead, "'[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.'" (*Id.* at p. 1391, quoting *Kings County, supra*, 221 Cal.App.3d at p. 712; accord *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208 ("*Bakersfield*").)

b. The Post-*Vineyard* Split

In 2007, in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ("*Vineyard*"), this Court took the opportunity to clarify the dual standards of review under CEQA. The Court explained:

> In evaluating an EIR for CEQA compliance, ... a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency "failed to proceed in the manner prescribed CEQA" (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; see also *Santiago County Water Dist. v. County of Orange* [(1981)] 118 Cal.App.3d [818], 829 [EIR legally inadequate because of lack of water supply and facilities analysis].) In contrast, in a factual dispute over "whether adverse effects have been mitigated or could be better mitigated" (*Laurel Heights I, supra*, 47 Cal.3d at [p.] 393), the agency's conclusion would be reviewed only for substantial evidence.

i. Most Post-Vineyard decisions properly apply the substantial evidence standard to claims that an EIR lacks sufficient information.

It appears that, to most appellate districts, the *Vineyard* decision settled the question of what standard of review applies to claims that an EIR lacked sufficient information on a topic required by CEQA: unless the

particular information at issue is explicitly mandated by the statute or CEQA Guidelines, the substantial evidence standard applies.

In *CNPS v. Santa Cruz*, for example, after summarizing the standard of review articulated by the Court in *Vineyard*, the Sixth District Court of Appeal explained: "[a]n EIR will be found legally inadequate—and subject to independent review for procedural error—where it omits information that is *both required by CEQA* and necessary to informed discussion." (177 Cal.App.4th 957, 986, italics added.) As an example of this type of error, the court cited *Sierra Club v. State Board of Forestry*, in which the "'record contained no site-specific data regarding the presence of four old-growth-dependent species' and it reflected the agencies 'failure to make "site specific recommendations regarding mitigation measures."'" (*CNPS*, 177 Cal.App.4th at p. 986, quoting *Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1236.) Under those circumstances, "the 'absence of any information regarding the presence of the four old-growth-dependent species on the site ... made any meaningful assessment of the potentially significant environment impacts of timber harvesting and the development of site-specific mitigation measures impossible.'" (*CNPS*, 177 Cal.App.4t at p. 986, quoting *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th at pp. 1236–1237.) "'In evaluating and approving the timber harvest plan in the absence of such data and recommendations the board failed to proceed in

the manner required by CEQA.'" (*CNPS*, 177 Cal.App.4th at p. 986, quoting *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th at p. 1236.)

The court in *CNPS* contrasted this type of procedural claim with the frequent claim that an EIR omits relevant information. (177 Cal.App.4th at p. 986, citing *National Parks*, *supra*, 71 Cal.App.4th 1341, 1343.) The court explained: "[m]any CEQA challenges ... concern the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology. These are factual determinations." (*CNPS*, 177 Cal.App.4th at pp. 986–987, citing *Barthelemy*, *supra*, 38 Cal.App.4th 1609, 1620.) The court concluded that, in the case before it, petitioners' claim that the respondent city's "choice of alternatives resulted in an analysis that was 'merely perfunctory,' thereby precluding informed decision-making and public participation" fell within this "factual" category, rather than the "procedural" category. In reaching this decision, the court observed that the petitioners did "not tether that claim to any specific informational or procedural requirements of CEQA. (Cf. *Planning and Conservation League* [*v. Department of Water Resources* (2000)] 83 Cal.App.4th [892] 898, 916 [EIR failed to discuss the required 'no project' alternative].)" (*CNPS*, 177 Cal.App.4th at p. 987.) "'CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR.'" (*Ibid.*, quoting *Citizens of Goleta Valley v. Board of Supervisors*

(1990) 52 Cal.3d 553, 566).) Therefore, the court reviewed petitioner's claim for substantial evidence and upheld the EIR.

In 2011, the Second District, in *Baykeeper*, reached a similar conclusion. In that case, the petitioner asserted that de novo review was appropriate "since City did not proceed as required by law because the EIR failed to adequately analyze impacts." (193 Cal.app.4th 1538, 1546.) The court characterized petitioner's "argument regarding the standard of review" as "too simplistic." (*Ibid.*) Concurring with the Sixth District, the Second District explained that "CEQA challenges concerning the amount or type of information contained in the EIR, the scope of analysis, or the choice of methodology are factual determinations reviewed for substantial evidence." (*Ibid.*, citing *CNPS v. Santa Cruz*, *supra*, 177 Cal.App.4th at pp. 986–987.) "Put another way, '[the courts] apply the substantial evidence test to conclusions, findings, and determinations and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of data upon which the EIR relied because these types of challenges involve factual questions.'[Citation.]" (*Baykeeper*, 193 Cal.App.4th at p. 1546.) Applying the substantial evidence standard, the court held that the EIR for a proposed park project adequately analyzed groundwater and cumulative groundwater impacts because substantial evidence supported the EIR's conclusions on those issues. (193

Cal.App.4th at pp. 1559–1561; see also *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 390–395.)

Relying on the Second District's opinion in *Baykeeper*, the First District in *North Coast Rivers Alliance* recently overturned a trial court's ruling that an EIR for a desalination plant "did 'not contain an adequate discussion of the frequency' of the shock-chlorination treatment." (216 Cal.App.4th 614, 637.) The court explained that "[t]his issue focuses on 'the amount or type of information contained in the EIR'" and therefore is reviewed for substantial evidence. (*Ibid.*, quoting *Baykeeper*, *supra*, 193 Cal.App.4th at p. 1546.) Applying the substantial evidence standard to the petitioner's claim, the court concluded that the EIR complied with CEQA because substantial evidence supported its brief statement that the impact of shock-chlorination would not be significant. (*North Coast Rivers Alliance*, 216 Cal.App.4th at pp. 637–639.)

After the *Vineyard* decision, the Fourth District has generally adhered to its previous holdings in *Barthelemy* and *National Park* and applied the substantial evidence standard to claims that an EIR lacked sufficient information.[5] For example, in *Save Round Valley Alliance v.*

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[5] But see *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 12 (suggesting that under *Vineyard*, the substantial evidence standard only applies to claims over the *adequacy* of the information contained in the EIR, not over claims that an EIR failed to include relevant information).

County of Inyo (2007) 157 Cal.App.4th 1437, the court rejected petitioner's argument that the EIR must include a "quantitative analysis" of the project's biological impacts. (*Id.* at p. 1468.) The court explained that "'the issue is not whether the studies are irrefutable or whether they could have been better. The relevant issue is only whether the studies are sufficiently credible to be considered as part of the total evidence that supports the' agency's decision." (*Ibid.*, quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 409.)

ii. The Opinion splits with the other authorities and concludes that claims that an EIR fails to include sufficient information, whether or not specifically required by CEQA, are reviewed independently for legal error.

Diverging with the weight of the post-*Vineyard* authorities, the Opinion stakes out a standard of review that is arguably even less deferential to a public agency than set out in the court's pre-*Vineyard* decision in *AIR* (107 Cal.App.4th 1383, 1392). In particular, the Opinion describes the rules governing the adequacy of an EIR's discussion as follows:

> Generally, claims that the information presented in an EIR is legally inadequate under CEQA can be divided into two types. The first type involves a situation where the EIR does not discuss a topic that a statute, regulation, or judicial opinion says must be discussed. This type of claim is relatively easy to decide—either the required information was in the EIR or it was omitted. (E.g., *Laurel Heights* [*I, supra,*] 47 Cal.App.3d [at p.] 404 [EIR concluded there was no feasible alternative sites for relocation of biomedical research

> facilities; EIR's discussion was insufficient because it contained no analysis of alternative locations].)
>
> The second type of claim, which is presented in this case, is more complex. It involves an EIR that has at least addressed the required topic and a claim by the plaintiff that the information provided about that topic is insufficient. Conceptually, this type of claim involves the reviewing court's drawing a line that divides *sufficient* discussions from those that are *insufficient.* Drawing this line and determining whether the EIR complies with CEQA's information disclosure requirements presents a question of law subject to independent review by the courts. (*Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 102.)

(Opn., 23, italics original.)

This non-deferential standard of review is in marked contrast to the decisions of the other appellate districts, discussed above, which recognize that to invoke the "failure to proceed" standard of review, petitioners must point to the specific procedural obligation in the statute or CEQA Guidelines that, in their view, was violated. (See Pub. Resources Code, § 21168.5 ["[a]buse of discretion is established if the agency has not proceeded in a manner *required* by law" (italics added)].) The Court's review is necessary to secure uniformity of decision on this far-reaching issue.

2. If left to stand, the Opinion will introduce great uncertainty into the CEQA review process and conflict with important separation of power principles.

As is well known, CEQA has been the subject of much public debate in recent years, as both government agencies and private entrepreneurs in