Case No. S219783

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

Plaintiffs and Appellants,

vs.

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. Pena, Jr.

APPLICATION BY THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET AL. TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

BROWNSTEIN HYATT FARBER SCHRECK, LLP
*Lisabeth D. Rothman, SBN 107040 / Rajika L. Shah, SBN 232994
2049 Century Park East, Suite 3550
Los Angeles, California 90067
Telephone: 310.500.4600 / Facsimile: 310.500.4602
Emails: LRothman@bhfs.com / RShah@bhfs.com
Attorneys for Amici Curiae
CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET AL.

Case No. S219783

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

Plaintiffs and Appellants,

vs.

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. Pena, Jr.

APPLICATION BY THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET AL. TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

BROWNSTEIN HYATT FARBER SCHRECK, LLP
*Lisabeth D. Rothman, SBN 107040 / Rajika L. Shah, SBN 232994
2049 Century Park East, Suite 3550
Los Angeles, California 90067
Telephone: 310.500.4600 / Facsimile: 310.500.4602
Emails: LRothman@bhfs.com / RShah@bhfs.com
Attorneys for Amici Curiae
CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET AL.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CALIFORNIA RULES OF COURT

CALIFORNIA REGULATIONS

LOCAL AGENCY REGULATIONS

OTHER AUTHORITIES

I.
APPLICATION TO FILE AMICI CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

Pursuant to California Rules of Court, Rule 8.200(c), the California Building Industry Association (CBIA) and Building Industry Legal Defense Foundation (BILD) ask for leave of court to file the attached amici curiae brief in support of Real Party in Interest and Respondent Friant Ranch, L.P.

Presented for this Court's decision is the appropriate standard of review under the California Environmental Quality Act (CEQA) evaluating whether an environmental impact report (EIR) contains sufficient analysis of a project, and the level of the specificity required for mitigation measures for an EIR that provides both programmatic and project level analysis. The appellate opinion [formerly published at 226 Cal.App.4th 704 (Opinion)] evaluated the sufficiency of the Program/Project EIR's air quality impacts under the legal "failure to proceed in the manner required by law" standard instead of the substantial evidence standard most other courts have employed. It also determined that the mitigation measure establishing guidelines for imposing specified mitigation on future project-specific submittals for non-residential development in the Specific and Community Plan areas, was not sufficiently specific and did not comply with CEQA. The Opinion did not consider the programmatic nature of the review, the fact that the EIR expressly contemplated future site specific submittals for the commercial area, and the applicability of the San Joaquin Valley Air Pollution Control District (Air District) indirect source rule (ISR) requirements which effectively dictated the minimal level of reduction in significant air quality impacts mitigation must achieve.

CEQA compliance for the unique features of large scale Specific and

Community Plan projects is of such importance that the leading organizations representing the interests of residential and commercial real estate have joined together to offer this amici curiae brief to this Court.

CBIA is a statewide non-profit trade association representing approximately 3,000 businesses – homebuilders, land developers, remodelers, subcontractors, architects, engineers, designers, and other industry professionals – that develop property all over California. CBIA's members are involved in all aspects of the planning, building, and construction industry, and work with local authorities in the planning stages of building projects, including CEQA compliance.

BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. (BIA/SC). BIA/SC, in turn, is a non-profit trade association representing nearly 1,000 member companies. The mission of BIA/SC is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians. BILD's purposes are, among others, to monitor legal and regulatory developments and to intervene when appropriate to improve the legal climate for BIA/SC's members and the construction industry in Southern California.

Amici's interest in this matter is inextricably connected to the Opinion's impact on residential and commercial projects. These organizations recognize that despite the financial cost, ensuring environmental protection is an important consideration and part of the process by which mixed use commercial and residential projects are approved. Plaintiffs in CEQA cases often challenge the adequacy of an EIR based on discretionary factual decisions the lead agency is legally entitled to make. Contrary to law applied by most courts in the State including this Court, the Opinion did not apply the more deferential substantial evidence standard to evaluate the sufficiency of the

Program/Project EIR's air quality impacts analysis.

In addition, the Opinion did not take into account the level of specificity for mitigation in EIRs which are a combined Program and Project EIR, an issue initially addressed by this Court in the context of PEIRs in its decision in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143. As master planning is increasingly utilized by cities and counties for large scale Specific Plan and Community Plan areas, combined PEIRs and Project level EIRs such as this one will be used to analyze impacts for large scale projects for which subsequent site specific CEQA analysis will occur in the future. Clarification regarding the level of detail required for such combined EIR documents is essential for the efficient and cost effective processing and development of these projects.

Litigation is now a common outcome of the project approval process throughout the state and frequently is used as a tactic to attempt to delay or jeopardize the implementation of residential and commercial projects. Accordingly, the issues presented for review are not limited to the facts of this case but directly impact amici and their members.

Amici respectfully submit that the Opinion applied the incorrect failure to proceed legal standard of review when it held that the EIR should have correlated air quality impacts with specific health impacts.

Likewise, the Opinion is incorrect when it held that a PEIR or combined Program/Project EIR must formulate specific detailed mitigation measures for future site specific commercial development without considering the nature of the EIR and the express intent that future site specific applications would be forthcoming. Because these holdings increase uncertainty in how to prepare CEQA compliant EIRs for large scale projects, if allowed to stand, they will result not only in a substantial increase in the cost of PEIRs, but also in legal challenges based on the

concomitant insufficiency of the analyses and mitigation.

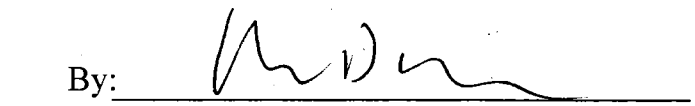
This case presents an opportunity for the Court to provide much needed guidance in this area. CBIA and BILD believe the Court should address the issues by confirming the rule that judicial review of the sufficiency of an EIR is governed by the substantial evidence standard and that the more general analysis allowed in a combined Program/Project EIR can result in less detailed mitigation measures that nevertheless comply with CEQA.

Pursuant to Rule 8.520(f)(4), the undersigned states that counsel contacted the law firm representing Friant Ranch, L.P. to obtain courtesy copies of the parties' appellate briefs filed in this Court and excerpts from the administrative record. Other than providing counsel with this material, amici certify that no party or counsel for a party authored the proposed Amicus Curiae Brief in whole or in part or made a monetary contribution to fund the preparation or submission of this Brief, and that such monetary contributions only came from the amici.

Accordingly, amici respectfully request that this Court consider their Statement of Interest and grant them permission to file the accompanying amici curiae brief to address these issues.

Dated: April 6, 2015

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

Lisabeth D. Rothman
Rajika L. Shah
Attorneys for Amici Curiae California Building Industry Association and Building Industry Legal Defense Foundation

II.

BRIEF OF *AMICI CURIAE*

A. This Court Should Confirm the Existing Rule That the Substantial Evidence Test Is the Appropriate Standard of Review to Evaluate Whether the Amount of Information and Analysis in an EIR Complies with CEQA

All parties to this appeal agree that the fundamental purpose of CEQA is informational – to ensure that government agencies are fully informed about, and take feasible steps to minimize, any significant adverse environmental impacts of their proposed actions. (Pub. Resources Code §21000(g); *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 254-56.) The EIR is "the heart of CEQA." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goleta II*).) The EIR must identify significant environmental impacts that might foreseeably result from the proposed project, measures that could mitigate those impacts, and possible project alternatives for decision-makers, other agencies and the public to consider prior to project approval. (*In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162 (*Bay-Delta*).)

The disagreement regarding the standard the court employs to determine the EIR's compliance with CEQA has remained controverted despite this Court's repeated efforts to elucidate it. The standards for reviewing the challenged quasi legislative decision approving the project's Community Plan amendment and Specific Plan is governed by Public Resources Code sections 21168.5 and 21005. Section 21168.5 provides that judicial inquiry into the actions of state and local administrative and legislative bodies "shall extend only to whether there was a prejudicial abuse of discretion." "Abuse of discretion" under section 21168.5 is established only if "the agency has not proceeded in a manner required by

law or if the determination or decision is not supported by substantial evidence" in light of the whole record.[1] (Pub. Resources Code §21168.5; *Laurel Heights Improvement Assn v. Regents of University of California* (1988) 47 Cal.3d 376, 392-93 & fn. 5 (*Laurel Heights I*).) Because court reviews the agency's action, not the decision of the trial court, review on appeal is always de novo under either standard. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard*).)

This Court has assiduously attempted to distinguish between the de novo review entailed in evaluating the strictly legal question of whether the lead agency may have abused its discretion because it failed to proceed in the manner required by law, or whether the lead agency may have abused its discretion because its decision is not supported by substantial evidence. (*Vineyard*, 40 Cal.4th at 435.) While this Court has noted that both standards ultimately involve a legal determination, since the ultimate question of the substantiality of evidence is a legal one [*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 (*Western States*)], courts have consistently concluded that they must evaluate the adequacy of the information, analysis, and scope of review in the EIR under the more deferential substantial evidence test. Such deference is also key to CEQA's goals for a complete but user friendly EIR.

The distinction is significant for amici for two reasons. First, the consequence of a court second guessing the lead agency's exercise of discretion on such factual determinations will be the production of lengthy analyses; detailed, highly technical studies, etc. But such an approach is contrary to many CEQA policies and mandates:

---

[1] Section 21168 adopts the same "prejudicial abuse of discretion" standard from Code of Civil Procedure section 1094.5(b).

1) CEQA does not require an EIR be technically perfect but requires only "adequacy, completeness, and a good faith effort at full disclosure." (CEQA Guidelines §15003(i))[2];

2) The purpose of CEQA is not to generate paper but to compel agencies to make decisions with environmental consequences in mind. (Guidelines §15003(g); *Goleta II*, 52 Cal.3d at 564);

3) CEQA should not be subverted into an instrument for the oppression and delay of social, economic, or recreational development. (*Id.* §15003(j); *Goleta II*, 52 Cal.3d at 576.)

Second, the test adopted by the Opinion melds two distinct statutory requirements. The court must first ascertain if the lead agency abused its discretion by not complying with CEQA and only then must the court determine if that abuse of discretion was prejudicial. (Pub. Resources Code §§21168; 21168.5; 21005(a), (b).) To ascertain an EIR's compliance with CEQA, courts engage in a three step review. First, the court must determine if the EIR contains all required information. Next, the court must ascertain if the EIR's analysis and information is sufficient under the substantial evidence test. Finally, if the court determines the EIR did not comply with CEQA's requirements under either of the first two steps, it must then determine if the CEQA violation constitutes a prejudicial abuse of discretion. For the following reasons, amici ask this Court to confirm that the substantial evidence test applies to evaluating the scope of the EIR's content, and that evaluating whether a CEQA violation is prejudicial requires a separate analysis.

---

[2] While not binding, the Guidelines (Cal. Code. Regs., tit. 14., §§15000–15387) (Guidelines) adopted pursuant to CEQA [§21083] are entitled to great weight. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448, fn. 4.)

1. The Substantial Evidence Test Is the Standard for Evaluating the Scope of Information and Analysis in an EIR

When the alleged defects in a CEQA case are based on a dispute over the facts, the action or decision is reviewed under the deferential substantial evidence standard. (*Vineyard*, 40 Cal.4th at 435). The EIR must be upheld as long as there is substantial evidence – controverted or uncontroverted – in the record supporting it. (*Western States*, 9 Cal.4th at 571.) In applying the substantial evidence standard, the court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117 (*Save Our Peninsula*).)

Substantial evidence in a CEQA case is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines §15384(a).) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Resources Code §§21080(e)(1), 21082.2(c); Guidelines, §15384(b); *Barthelemy v. Chino Basin Municipal Water Dist.* (1995) 38 Cal.App.4th 1609, 1620.)

Based on the language of Public Resources Code sections 21168 and 21168.5, the substantial evidence standard of review is often framed as evaluating whether the agency's determination, decision or findings is supported by substantial evidence. This is stated in a variety of ways in the case law. A court employing substantial evidence review "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable, for, on factual questions, our task is not to weigh conflicting evidence and determine who has the better argument." (*Vineyard*, 40 Cal.4th at 435; internal quotations

and citations omitted). The issue is whether there is any substantial evidence, contradicted or uncontradicted, that will support the agency's findings. (*Western States*, 9 Cal.4th at 571, *citing Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429). The court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. (*Id.; Save Our Peninsula*, 87 Cal.App.4th at 117; *see Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497 ("the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision)"; *accord Laurel Heights I*, 47 Cal.3d at 393.) The administrative agency's obligation is to inform. (Guidelines, §15121(a).) That is why the court does not pass on the correctness of the environmental conclusions in a CEQA case, but only on the EIR's sufficiency as an informational document. (*Goleta II*, 52 Cal.3d at 564.)

But contrary to the Sierra Club's contention, the substantial evidence standard of review is not limited to evaluating whether the evidence supports the lead agency's findings. It applies to challenges to such things as "the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1230 (*Banning Ranch*); *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 795-96 (*State Water Resources Control Bd. Cases*); *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1364-65 (*National Parks*); *accord Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135 (*Laurel Heights II*); *see* Guidelines, §15121; Guidelines §15151.)

Hence, courts have upheld the adequacy of EIRs **under the substantial evidence test** based upon agencies' determination of such issues as the methodology used [*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 412; *Residents Ad Hoc Stadium Com. v. Bd. of Trustees* (1979) 89 Cal.App.3d 274, 289], the sufficiency of the scope of evaluation of an environmental impact [*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530-31]; *No Slo Transit, Inc. v. City of Long Beach* (1987)197 Cal.App.3d 241, 255]; baseline [*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 467-68 (*Neighbors*); *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328 (*CBE*)]; mitigation [*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1041 (*Environmental Council*)]; and growth-inducing impacts [*Greenebaum*, 153 Cal.App.3d at 401, 411].

To the extent that the Sierra Club and Opinion rely on select evidence from an Air District representative to conclude that the level of analysis of emissions and mitigation was deficient, their conclusion cannot be upheld, and in any event is governed by the substantial evidence test. One cannot simply cite to selected portions of the record – the entire administrative record must be reviewed to determine if the agency's decision is supported by substantial evidence. (*Laurel Heights II*, 6 Cal.4th at 1132-33). The EIR is presumed adequate, the burden of establishing abuse of discretion rests on the petitioner, and the reviewing court will not independently review the record to make up for a petitioner's failure to carry its burden. (*Neighbors*, 57 Cal.4th at 475.)

Key to the issue presented here though is that the substantial evidence test applies to judicial review of the amount and type of information contained in an EIR. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900-903 (*Oakland Heritage*)

[whether EIR sufficiently analyzed and mitigated for seismic impacts evaluated under the substantial evidence test]; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 916, 930 [whether EIR adequately studied the energy impacts of a new store evaluated under the substantial evidence test]; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898 [substantial evidence test applies to the scope of an EIR's analysis of a topic], Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed. 2014 (CEB)) (Kostka & Zischke), §23.34 at 23-42.) An EIR's assessment of environmental impacts need not be exhaustive, and need not include all information that may be available on the issue. (*See National Parks*, 71 Cal.App.4th 1341, 1365; *accord San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 666.) These principles also speak to the factual basis for the EIR's scope of analysis which necessarily is evaluated under the substantial evidence standard.

That is why other courts have rejected the specific contention here – that the failure to include sufficient information is a failure to proceed in the manner required by law. Courts instead have concluded that judicial evaluation of the sufficiency of the information contained in the EIR is governed by the substantial evidence test. (*See Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546, 1558-59 [whether EIR adequately addressed the use of project's treated wastewater on park site assessed under substantial evidence standard]; *California Native Plant Society*, 177 Cal.App.4th at 984, 986-87.)

Utilizing the deferential substantial evidence standard for the sufficiency of information in an EIR is consistent with CEQA. CEQA Guidelines section 15204(a) specifically states that the adequacy of the EIR is based on "the **sufficiency** of the document in identifying and analyzing the [project's] possible impacts on the environment...." (Emphasis added.)

This Court has held that lead agencies, not the judiciary, have the resources and expertise to determine the methodologies, scope of analysis, type of analysis and amount of analysis required to evaluate project impacts. (*Laurel Heights I*, 47 Cal.3d at 393.) This Court also has determined that just because additional studies or analyses could be conducted does not provide a basis for challenging an EIR. (*Id.* at 410; *see also Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1115.) Accordingly, amici respectfully submit that this Court should reverse the Opinion on this point and confirm the rule that the sufficiency of an EIR's analysis is reviewed under the substantial evidence standard.

2. The "Failure to Proceed" Standard of Review Does Not Apply

The second ground for abuse of discretion is if the agency failed to proceed in the manner required by law. As this Court explained in *Vineyard,* 40 Cal.4th at 435, courts analyze the two grounds for possible error differently. When the alleged error involves a claim of what can be predominately characterized as a failure to comply with CEQA's procedural requirements, judicial review of compliance with these requirements is a question of law examined de novo. The failure to follow proscribed procedures includes such things as the failure to conduct environmental review at the time required by CEQA [*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131]; the complete failure of an EIR to include a required analysis [*Laurel Heights I*, 47 Cal.3d at 398]; failure to utilize a legally prescribed threshold of significance [*Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777,793], and a failure by an agency to prepare the correct CEQA document [*CBE*, 48 Cal.4th at 319]. Under this standard, factual predicates for compliance with legal requirements are reviewed under the more deferential substantial evidence standard. (*Ebbetts Pass Forest Watch v. Dept. of Forestry and*

Fire Protection (2008) 43 Cal.4th 936, 954.)

Both the Sierra Club and the Opinion argue that the language in Guidelines section 15126.2(a) converts the standard for analyzing a project's air quality impacts from substantial evidence to failure to proceed, but that is not the case. The pertinent language of that section requires that the EIR's "discussion should include relevant specifics of …health and safety problems caused by physical changes…." Determining what is "relevant" depends on the context and ought to be left to the sound discretion of the lead agency as long as the determination is supported by substantial evidence. (*See, e.g.*, Guidelines §15064(b).) But the fact that the lead agency "should" discuss the specifics of health problems caused by the project does not mean that under all circumstances it "shall," *i.e.*, that it must. Guidelines section 15005(b) distinguishes between these terms. "Should" indicates "guidance" agencies are "advised to follow… in the absence of compelling, countervailing considerations." (Guidelines §15005(b).) "Shall" means that public agencies are required to follow the specific directive. (Guidelines §15005(a).)

A statement that the lead agency should discuss the relevant specifics of health problems does not provide a mandatory directive that compels the specific scope of analysis of correlating adverse health impacts – *e.g.*, the additional number of days of nonattainment of air quality standards and whether people with respiratory issues will need to wear filtering devices [Opinion at 744-745] – to specific levels of pollutants as the Opinion concluded. Procedural errors constituting legal errors subject to de novo review are necessarily limited to the procedures actually mandated by CEQA or its implementing regulations. (*See* Pub. Resources Code §21083.1.) In *South Orange County Wastewater Auth. v. City of Dana Point* (2011) 196 Cal. App. 4th 1604, 1617, the court noted that: "The Legislature has expressly forbidden courts to interpret CEQA or the

regulatory guidelines to impose 'procedural or substantive requirements beyond those explicitly stated' in the act or in the guidelines."

By finding the EIR legally insufficient because it did not provide information correlating the magnitude of specific health impacts with the precise levels of emissions from the project [Opinion at 742-745], the Opinion improperly imposed a requirement that is not present in the CEQA statutes or Guidelines. This Court should reverse the Opinion on this point and confirm the rule that the relevant specifics of an EIR's analysis are subject to the lead agency's discretion and reviewed under the substantial evidence standard.

3. The Sufficiency of an EIR's Analysis Is Necessarily Determined by the Type of Project and EIR; A Programmatic/Deferred Project Level Analysis and Mitigation Measure Requires Less Detail and Was Appropriate Here

In *Bay-Delta*, this Court found that a programmatic EIR can leave detailed evaluation of impacts of individual projects that specifically implement the program to a later second tier EIR, and need only contain generalized mitigation criteria and policy level alternatives. (*See Bay-Delta*, 43 Cal.4th at 1169-1170, 1173; *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36 (*Koster*); Guidelines § 15152(h)(3); *see also* Kostka & Zischke, §§10.6-10.9.)

As this Court stated:

> In addressing the appropriate amount of detail required at different stages in the tiering process, the CEQA Guidelines state that "[w]here a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof ..., the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a

> future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand." (Cal.Code Regs., tit. 14, § 15152, subd. (c).) This court has explained that "[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, supra, 40 Cal.4th at p. 431, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

Bay-Delta, 43 Cal.4th at 1170.

Here, the project is the "Friant Community Plan Update and Friant Ranch Specific Plan" and the EIR was a Program/Project EIR. (AR 622, 627). It provides a program level analysis for the Friant Community Plan Update and project level analysis for most development in the Specific Plan area, especially residential development. (AR 627-28). However, the EIR contemplated subsequent project-level approvals for tentative maps etc. (AR 623). It contemplated that the 31 acre, 250,000 square foot community commercial area would include retail, office, medical and possible light rail, but the specific composition of uses was deferred. (AR 639-40 [Impact#3.3.2 referencing "future project-specific submittals for non-residential development within the Specific Plan area and within the Community Plan boundary"]; AR 752-53.)

The EIR provides that the primary source of emissions and air quality impacts is vehicular traffic. (AR 854.) It states that the challenged mitigation measure MM#3.3.2 constitutes "guidelines" which "shall be used ...during review of future project-specific submittals for non-residential development within the Specific Plan area and within the

Community Plan boundary...." (AR 824.) The Community Commercial area is designed to serve the active adult community by providing commercial, retail and office needs within the project area, thus serving to lessen traffic trips and air quality impacts. (AR 752-53.) Until the retail, commercial and office services are specifically identified, however, the precise type and extent of mitigation for the Community Commercial can only be estimated. And while the EIR can safely and accurately conclude that mitigation measures for the Community Commercial area – to which challenged mitigation measure 3.3.2 is limited (AR 639-40) – will substantially lessen air quality impacts based on the inherent design of the project, the quantification of the amount would not have been feasible.

Hence, for analysis and mitigation of the Community Commercial area of this magnitude, the standard for a program EIR is more applicable here because detailed information was not feasible and deferral of more detailed mitigation analysis to later environmental documents for specific projects is appropriate. (*See Bay-Delta*, 43 Cal.4th at 1170, 1172; *Koster*, 47 Cal.App.4th at 37-38; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143; *Al Larson Boat Shop, Inc. v. Bd. of Harbor Commissioners of the City of Long Beach* (1993) 18 Cal.App.4th 729, 744; *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 371.)

"A public agency can make reasonable assumptions based on substantial evidence about future conditions without guaranteeing that those assumptions will remain true." (*Environmental Council*, 142 Cal.App.4th at 1036.) However, the lead agency is not required to speculate on analysis or mitigation where specifics of development have not been sufficiently fleshed out [*see Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1025], but should, as this EIR did, use best efforts to estimate and disclose what it reasonably can, especially when the project is

a plan level document as is this Community and Specific Plan project. (Guidelines §§15144, 15146(b); *and see San Francisco Ecology Ctr. v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 594.)

As this Court found in *Bay-Delta*, "the description of potential water sources for the CALFED Program's future projects and the environmental effects of obtaining water from those sources must be appropriately tailored to the current first-tier stage of the planning process, with the understanding that additional detail will be forthcoming when specific second-tier projects are under consideration." 43 Cal.4th at 1172.

The Opinion did not consider that the EIR analysis was at a program level for the Community Plan and mitigation of certain air quality impacts, and that the specifics of the commercial area of the project had not been fully developed. Therefore, the substantial evidence standard for conclusions regarding analysis of Air Quality impacts and mitigation is appropriate and the assessments were supported by substantial evidence. But requiring quantification of the extent to which air impacts were lessened was inappropriate, and not required by CEQA. The analysis of air quality impacts, and determination that proposed mitigation would substantially decrease impacts but not to less than significant, comply with CEQA for this plan level project. This Court should reverse the Opinion on this point and clarify the rule that more general level of analysis and mitigation formulation is allowed in a PEIR/project level EIR where subsequent approvals for more refined and specified project level development will occur in the future and be subject to further analysis as required by CEQA.

4. The Court's Assessment of Whether an EIR's Deficiency Is Prejudicial Must Be a Separate Analysis, Not Conflated with Ascertaining If a CEQA Violation Occurred

A CEQA document cannot be set aside absent a showing of

prejudicial error. The requirement for prejudicial error is mandated both by statute and relevant case law. The Opinion improperly assumed, rather than applied statutory requirements, that any deficiency in the scope of air quality analysis and mitigation was prejudicial.

Public Resources Code section 21168.5 expressly provides that in any action subject to that section, judicial inquiry extends "only to whether there was a **prejudicial** abuse of discretion." (Emphasis added).[3] Under CEQA's statutory scheme, the petitioner need not simply demonstrate an abuse of discretion, but must show a prejudicial abuse of discretion.

Public Resources Code section 21005 contains a similar legislative mandate. Subsection (a) provides that errors in CEQA's information disclosure requirements that prevent relevant information from being disclosed to the public or that constitute noncompliance with CEQA's procedural requirements **may** (not shall) constitute prejudicial abuse of discretion regardless of whether compliance would have resulted in a different outcome. But subdivision (b) of the statute mandates that courts **shall** (not may) follow the established principle that there is no presumption of prejudicial error. Accordingly, while an error may, under the specific facts of any particular case, constitute prejudicial abuse of discretion, that prejudice can never be presumed – it must be proven. (*Banning Ranch*, 211 Cal.App.4th at 1228 ["Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown."].)

Whether a legal error is prejudicial, as the Opinion contends, "depends on whether legal error hindered accomplishment of CEQA's objectives, rather than whether the error might have affected the outcome of

---

[3] Section 21168 adopts Code of Civil Procedure section 1094.5's standard of review; section 1094.5(b) also requires a determination of a "prejudicial abuse of discretion."

the process." Kostka & Zischke, §23.36 at 23-45. Whether the claimed deficiency is legal or factual, to be prejudicial, the error must have "deprived the public and decision makers of **substantial** relevant information about the project's likely adverse impacts" [*Neighbors*, 57 Cal.4th at 463 (emphasis added)], and interfered with the CEQA's public participation and information disclosure requirements. (*See generally* Kostka & Zischke, §23.37 at 23-46-48.)

Starting with this Court, the appellate courts demonstrate consistent implementation of this statutory mandate. For example, in *Neighbors*, 57 Cal.4th at 460-465, this Court held that failure to analyze project's impacts based on an existing traffic conditions baseline was not prejudicial error even though the decision to exclusively use a future baseline was not supported by substantial evidence. This Court found that under the circumstances the EIR did not lack relevant substantial information on the issue.

The recent case of *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, applies the principle that prejudice must also be established in the procedural context as well. In *Rominger*, the court held that the lead agency did not comply with CEQA when it failed to provide the mandatory 30-day public review period for a mitigated negative declaration, but held that the error did not mandate reversal because the petitioners did not establish that the error was prejudicial. (229 Cal.App.4th at 705, 709 [Citing to section 21005 and *Neighbors*, 57 Cal.4th at 463, the court stated "At the same time, however, it is clear that because there is no presumption that error is prejudicial (CEQA, § 21005, subd. (b)), we cannot conclude that the Romingers are entitled to relief simply because the county failed to comply with CEQA."].) The *Rominger* Court implemented this Court's approach to section 21005 by "look[ing] at the nature of the county's noncompliance to determine if it was of the sort that

preclude[d] informed decisionmaking and informed public participation." (*Id.*)

Here, the Opinion concluded that the EIR was required to include a more detailed analysis of air quality impacts by correlating the increase in emissions with health impacts of the project. While amici disagree with this conclusion, the Opinion nevertheless did not engage in the required analysis under section 21005; it simply assumed that the absence of the correlation was prejudicial. But the EIR complied with CEQA's information disclosure requirements by providing information about the health impacts of each of the pollutants at issue. (*See, e.g.*, AR 802, 803, 804.) Under this Court's test, the EIR did not "depriv[e] the public and decision makers of **substantial** relevant information about the project's likely adverse impacts." (*Neighbors*, 57 Cal.4th at 463 (emphasis added).)

Accordingly, amici ask this Court to affirm the rule that courts separate their analysis of CEQA compliance from their assessment of prejudicial error, and that even if a CEQA violation has occurred, Public Resources Code section 21005 requires the court to separately analyze whether, and not assume that, the error is prejudicial.

B. This Court Should Confirm the Rule That a Mitigation Measure for a Program EIR or That Satisfies Another Agency's Regulatory Requirements Complies with CEQA's Requirements for Specific, Enforceable Mitigation That is Not Improperly Deferred

As the state's population ages, large scale Specific Plan developments for active adult communities are the wave of the future. Like the Project at issue, these projects typically are age restricted to 55 years and older, and often provide in one community transitional living arrangements within the project area for the retired population they serve. They are designed to be environmentally friendly by including commercial and retail facilities within the project area, which minimizes vehicular

travel outside the project area and allows trips for shopping and appointments such as doctor, hairdresser, etc., via golf cart, walking or bicycle. (*See* AR 626, 743-44, 746, 4390, 4396, 4398-99; *see also* 9769-71, 9875, 9881-87.) While the planning document may strive to include certain types of commercial uses, until the mix of retail, service and commercial vendors is finalized, precise assessment of and mitigation for impacts such as air quality may not be feasible, but an EIR may rely on informed estimates [*Laurel Heights I*, 47 Cal.3d at 410] or reasonable assumptions as this one did. (*State Water Resources Control Bd. Cases*, 136 Cal.App.4th at 797.)

In determining that Mitigation Measure 3.3.2 did not comply with CEQA, the Opinion did not account for two significant facts which must materially change the analysis of the mitigation measure's compliance with CEQA and the conclusions reached. First, this measure provides **guidelines** for "review of future project-specific submittals for non-residential development within the Specific Plan area and within the Community Plan boundary...." (*See* AR 4426.) As the Opinion acknowledges, the EIR contemplates future individual site specific projects including tentative map approvals in which development patterns and specific density will be finalized enabling more specific analysis of impacts, and further refinement of mitigation. (*See* AR 4790, 7783; Opinion at 710-711, 748.) The principles for formulating more general mitigation measures applicable for a program EIR or a project EIR that contemplates more detailed specific analysis and mitigation measures apply, and Mitigation Measure 3.3.2 complies with CEQA under these standards. (*See* Section II.A.3., *supra.*)

Second, the Opinion noted that the project must comply with Air District's ISR and Rule 9510 requiring participation in offsite emissions reduction program which would serve to ameliorate air quality impacts.

Opinion at 756-57. But in evaluating and concluding that Mitigation Measure 3.3.2 did not comply with CEQA, the Opinion failed to consider the specific requirements of that rule that render the Mitigation Measure CEQA compliant. The Opinion finds fault with several aspects of this mitigation measure, all of which are addressed by the ISR.

First, as discussed *supra*, the Opinion found that the EIR could not conclude that mitigation would substantially lessen air impacts, although not to less than significant, without quantifying the extent of the reduction. As discussed *supra*, courts have consistently found that the lead agency's conclusions regarding the effectiveness of mitigation is evaluated under the substantial evidence standard. (*See Laurel Heights I*, 47 Cal.3d at 407; *Oakland Heritage*, 195 Cal.App.4th at 900-903; *Environmental Council*, 142 Cal.App.4th at 1041; *Sacramento Old City Assn.*, 229 Cal.App.3d at 1027. Even if CEQA required that the extent of reduction of an impact must be quantified, which it does not, Rule 9510 provides a performance standard by insuring a specific percentage reduction in air quality impacts. For example, the ISR/Rule 9510 which can be found at http://www.valleyair.org/rules/currntrules/r9510.pdf requires reduction of the operational project emissions for NOx by 33.3% over a period of ten years [Rule 9510, Section 6.2.1], and reduction of 50% of the project's operational baseline for PM10 emissions. (*Id.* Section 6.2.2). This reduction can be met through any combination of on-site emission reduction measures or off-site fees. (*Id.* Section 6.3.) The off-site fees can only be used for funding off-site emission reduction projects. (*Id.* at 3.24.) Moreover, computer modeling is used to prepare an Air Quality Impact Assessment (AIA) which identifies and quantifies on site emission reduction measures. (*Id.* Section 7.0; *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 128, 132 (*CBIA v. SJVAPCD).*) Rule 9510 is a valid regulatory

program [*see generally CBIA v. SJVAPCD*, 178 Cal.App.4th at 131-132] which imposes emission reduction fees constituting valid mitigation under CEQA. (*See, e.g., Oakland Heritage*, 195 Cal.App.4th at 906; *see also Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1274-1276.) Because Mitigation Measure 3.3.2 encompasses on site emissions reductions subject to Rule 9510 compliance, this measure complies with CEQA, and the EIR's conclusion that air quality impacts were lessened substantially was supported by substantial evidence and did not need to be further quantified to satisfy CEQA.

Second, the Opinion found that Mitigation Measure 3.3.2 was not enforceable. This is not the case. The Mitigation Monitoring Program specifies that lead agency County of Fresno and the Air District are responsible for monitoring compliance with Mitigation Measure 3.3.2, and hence for insuring its enforcement. (AR 4426). Rule 9510 contains multiple provisions insuring that on site project emissions reduction mitigation and off site fee paid to the Air District will be fully enforceable. Mitigation Measure 3.3.2 constitutes on site measures subject to Rule 9510. Section 5.3.1 of Rule 9510 requires the project applicant to identify emissions reduction measures and requires that they be fully enforceable. Section 5.4 requires a monitoring and reporting schedule for onsite measures. CEQA's specific remedy for failure to implement a mitigation measure when it must be done is to bring a writ of mandate to enforce the mitigation. (*See generally Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425; *cf. San Elijo Ranch, Inc. v. County of San Diego* (1998) 65 Cal.App.4th 608. Imposition of specific mitigation will occur by the County and Air District at the tentative map stage, and will be fully enforceable by both agencies through permit conditions. (*Id.*; Opinion at 756-57.)

Third, the Opinion disregarded that the measures listed were

"guidelines" and concluded that some were impermissibly vague and lacked specific performance standards. (Opinion at 754-755.) Again, this conclusion was not correct. For example, the Opinion concluded that the measure requiring planting of trees that would shade 25% of paved areas/buildings to lessen energy requirements in 20 years did not comply with CEQA because by not specifying the type of trees, it did not contain a specific enough performance standard. (Opinion at 750-51, 754; AR 4426.) Other cases have held to the contrary, and their conclusions are appropriate here. For example, developing a landscape plan that would "soften" the visual intrusion of a water storage tank constituted sufficient mitigation. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 628.)

The Opinion similarly concluded that the lack of a performance standard for the PremAir system would preclude substituting an equivalent system, and vagueness of the bicycle usage and transportation related measures would preclude evaluating an equivalent substituted measure and did not comply with CEQA. (Opinion at 754-55; AR 4427-28.) But Rule 9510 Section 7.0 entails modeling and evaluation of the suite of reductions in on site emissions achieved, and Sections 8.4.3 and 9.1.1 required Air District approval of any proposed substituted measures. Hence, specific performance criteria minimally are supplied by the Air District and the measure satisfies CEQA. Even absent Rule 9510, providing the suite of onsite mitigation options contained in Mitigation Measure 3.3.2, including promotion of alternative forms of transportation, was sufficient to satisfy CEQA. (*See, e.g., Sacramento Old City Assn.*, 229 Cal.App.3d at 1029-30 (identifying 7 potential options for mitigating parking problem constituted sufficient mitigation); *accord Laurel Heights I*, 47 Cal.3d 376 at 418 (promising to eliminate parking space deficit by promoting campus transportation systems including transit, carpooling, vanpooling etc.

constitutes adequate mitigation).) Accordingly, amici ask this Court to affirm the rule that compliance with a regulatory agency's requirements satisfies CEQA's mitigation requirement, and reverse the Opinion's conclusion that Mitigation Measure 3.3.2 otherwise does not comply with CEQA.

III.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Opinion on the issues set forth in this brief.

Dated: April 6, 2015

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

Lisabeth D. Rothman
Rajika L. Shah
Attorneys for Amici Curiae California Building Industry Association and Building Industry Legal Defense Foundation

CERTIFICATE OF WORD COUNT

The text of this APPLICATION BY CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET. AL. FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST consists of 7,095 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: April 6, 2015

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

Lisabeth D. Rothman
Rajika L. Shah
Attorneys for Amici Curiae California Building Industry Association and Building Industry Legal Defense Foundation

CERTIFICATE OF SERVICE

I, Melanie Duncan, declare as follows:

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Brownstein Hyatt Farber Schreck, LLP, 2049 Century Park East, Suite 3550, Los Angeles, California 90067. On April 6, 2015, I served a copy of the within document(s): **APPLICATION BY THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET AL. TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST**

☒ by placing the document(s) listed above in a sealed envelope, postage fully prepaid, with the U.S. mail at Los Angeles, CA as set forth below.

☐ by placing the document(s) listed above in a sealed ___ envelope and affixing a pre-paid air bill, causing the envelope to be delivered to a Delivery Service agent for delivery.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 6, 2015, at Los Angeles, California.

Melanie L. Duncan

SERVICE LIST

Sierra Club, Revive the San Joaquin and League of Women Voters of Fresno v. Friant Ranch, L.P.
California Supreme Court Case No. S219783

Sara Hedgpeth-Harris Law Office of Sara Hedgpeth-Harris 5445 E. Lane Avenue Fresno, California 93727 Phn.: 559.233.0907	*Attorneys for Plaintiff and Appellant, Sierra Club* *Plaintiff and Appellant, League of Women Voters of Fresno*
Bruce B. Johnson, Jr. Office of Fresno County Counsel 2222 Tulare Street, Suite 500 Fresno, California 93721	*Attorneys for Defendant and Respondent, County of Fresno* *Defendant and Respondent, Fresno County Board of Supervisors*
Zachary Stephen Redmond Office of Fresno County Counsel 2220 Tulare Street, 5th Floor Fresno, California 93721	*Attorneys for Defendant and Respondent, County of Fresno* *Defendant and Respondent, Fresno County Board of Supervisors*
Tiffany Kristine Wright James G. Moose Remy Moose Manley LLP 555 Capitol Mall, Suite 800 Sacramento, California 95814	*Attorneys for Real Party in Interest and Respondent, Friant Ranch, L.P*