

SUPREME COURT COPY

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

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From a Decision by the Court of Appeal
Fifth Appellate District filed May 27, 2014
Case No. F066798

Appeal from the Superior Court of California, County of Fresno
Case No. 110ECG00726, Honorable Rosendo A. Peria, Jr.

**APPLICATION FOR PERMISSION TO FILE
AMICUS BRIEF & AMICUS BRIEF OF CENTER FOR
BIOLOGICAL DIVERSITY**

In Support of Appellants

Michael W. Graf (CA Bar # 136172)
227 Behrens Street
El Cerrito, California 94530
Tel/Fax: (510) 525-1208

Attorney for Amicus Curiae Center for Biological Diversity

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TABLE OF CONTENTS

Page

APPLICATION TO FILE BRIEF OF AMICI CURIAE	1
BRIEF OF AMICUS CURIAE CENTER FOR BIOLOGICAL DIVERSITY	2
I. INTRODUCTION	2
II. DISCUSSION	3
A. THE COURT MUST REJECT REAL PARTY'S NEW PROPOSED STANDARD OF REVIEW AS CONTRARY TO FUNDAMENTAL CEQA LAW THAT AN EIR BE ADEQUATE AS AN INFORMATIVE DOCUMENT TO ENSURE MEANINGFUL ANALYSIS	3
1. Courts Exercise Independent Judgment in Assessing Whether an EIR Satisfies CEQA's Informational Standards.	4
a. Real Party's Approach is Unworkable and Would Eliminate a Court's Review of Whether an EIR Contained Adequate Analysis to Apprise the Public and Decisionmakers of the Relevant Issues at Stake.	7
b. CEQA's Informational Requirements Are Not Judge-Made But Instead Derive from the CEQA Legislation and Guidelines.	10
c. The Fact that There is No One Size Fits All Standard for What Constitutes Sufficient Analysis Cuts in Favor, not Against, Independent Review	14
2. Real Party Errs in Arguing that the Standard for Whether an EIR Is Adequate as an Informational Document Only Applies to the Question of Prejudice.	16
3. Real Party's Argument that Substantial Evidence in the Record May Cure an EIR's Informational Inadequacy is Contrary to Case Law and CEQA's Principles that the EIR Convey to the Public the Basis of the Agency's Decision on a Project.	20

B. ADOPTED MITIGATION TO MINIMIZE SIGNIFICANT IMPACTS
ARE SUBJECT TO THE SAME CEQA REQUIREMENTS APPLICABLE
TO MITIGATION DESIGNED TO AVOID SUCH IMPACTS.. 22

III. CONCLUSION 24

Certification of Word Count 24

TABLE OF AUTHORITIES

Page

Cases

<i>Association of Irrigated Residents v. County of Madera</i> (2003) 107 Cal. App. 4th 1383	9
<i>East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.</i> (1989) 210 Cal. App. 3d 155	20
<i>Environmental Defense Fund, Inc. v. Coastside County Water Dist.</i> (1972) 27 Cal. App. 3d 695,	4, 18
<i>Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection</i> (2008) 44 Cal. 4th 459,	18, 19
<i>Environmental Protection Information Center, Inc. v. Johnson</i> (1985) 170 Cal.App.3d 604	19
<i>Joy Road Area Forest and Watershed Association v. CDF</i> (2006) 142 Cal. App. 4th 656	21
<i>Laurel Heights Improvement Assn. v. Regents of the Univ of California</i> (1988) 47 Cal. 3d 376, 392,	5, 7, 21
<i>Neighbors for Smart Rail v. Exposition Metro Line Construction Authority</i> (2013) 57 Cal. 4th 439	14, 17
<i>Perez v. Roe 1</i> (2006) 146 Cal. App. 4th 171	15
<i>Rural Landowners Ass'n v. City Council</i> (1983) 143 Cal. App. 3d 1013	20
<i>Sierra Club v. State Bd. of Forestry</i> (1994) 7 Cal. 4th 1215,	5, 18-20
<i>Topanga Assn. for a Scenic Community v. County of Los Angeles</i> (1974) 11 Cal. 3d 506	6
<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova</i> (2007) 40 Cal. 4th 412.	5

Statutes

Pub. Res. Code § 21000(g) 11
Pub. Res. Code § 21005(a) 17
Pub. Res. Code § 21005(b) 17
Pub. Res. Code § 21002. 12, 22
Pub. Res. Code § 21061 11, 21
Pub. Res. Code § 21081(b) 12
Pub. Res. Code § 21083 10
Pub. Res. Code § 21083.1 10

Regulations

14 Cal. Code Regs. § 15126.2(a). 13
14 Cal. Code Regs. § 15126.4 23, 24
14 Cal. Code Regs. § 15126.4(a)(1)(B); 23
14 Cal. Code Regs. § 15151. 13, 14, 21

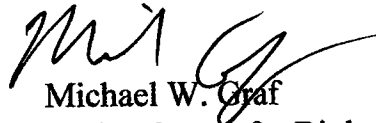
APPLICATION TO FILE BRIEF OF AMICUS CURIAE

The Center for Biological Diversity requests leave pursuant to rule 8.520 (f) of the California Rules of Court to file a brief of Amicus curiae.

The Center is a non-profit organization whose mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public health. The Center has more than 825,000 members and online activists with offices in California and other states. The Center works through science, law, and creative media to secure a future for all species hovering on the brink of extinction. The Center has been a party to many California Environmental Quality Act (CEQA) lawsuits where land use activities threaten conservation interests due to the lack of adequate environmental review. The Center has a particular interest in ensuring that the impacts of these activities are fully disclosed and mitigated if feasible.

May 6, 2015

Respectfully requested,



Michael W. Graf

Attorney for Amicus Curiae Center for Biological Diversity

**BRIEF OF AMICUS CURIAE
CENTER FOR BIOLOGICAL DIVERSITY**

I. INTRODUCTION

Amicus curiae Center for Biological Diversity ("Amicus") submits this Amicus Brief on two important issues raised in the Court's review of *Sierra Club v. County of Fresno*, Supreme Court Case No. S219783.

First, Amicus will address the standard of review issue. Real Party's briefs argue for a new standard of review in CEQA decisions, which would essentially eliminate a court's independent judgment over the adequacy of the analysis presented in a CEQA environmental review document. As discussed below, this result would alter decades of case decisions holding that an agency's failure to include adequate analysis in the CEQA review process constitutes a failure to proceed according to law. These decisions are grounded in the principle that informational adequacy in an EIR is a fundamental legislative directive set forth in the Public Resources Code and CEQA Guidelines, which courts interpret as part of judicial review.

Second, Amicus will address Real Party's argument that an agency's formulation of mitigation measures designed to minimize a project's significant cumulative impacts may be deferred without any accompanying performance standards. Real Party's argument that there is a difference

between mitigation designed to avoid significant impacts and mitigation designed to minimize -- but not avoid -- such impacts is unavailing. Both standards are substantive CEQA requirements. In asserting that either requirement will be met, the EIR constitutes a document of accountability to the public, which cannot simply be ignored through a lack of clear standards as to what level of impact mitigation will be achieved.

II. DISCUSSION

A. **THE COURT MUST REJECT REAL PARTY'S NEW PROPOSED STANDARD OF REVIEW AS CONTRARY TO FUNDAMENTAL CEQA LAW THAT AN EIR BE ADEQUATE AS AN INFORMATIVE DOCUMENT TO ENSURE MEANINGFUL ANALYSIS.**

Real Party's central argument to the Court focuses on the standard of review for an EIR, in which Real Party claims that, where at least some information on a subject matter required by CEQA is presented, a court should review the adequacy of the EIR's analysis under the deferential 'substantial evidence' standard. In Amicus' view, this approach would constitute a radical restructuring of how courts review an agency's CEQA compliance. As discussed below, this Court should reject Real Party's approach, which is in conflict with virtually every published CEQA decision that has addressed this topic.

//

1. Courts Exercise Independent Judgment in Assessing Whether an EIR Satisfies CEQA's Informational Standards.

Numerous case decisions hold that the judiciary has the authority to assess the informational adequacy of an EIR, to ensure that the information and analysis presented demonstrates a meaningful evaluation of the potential environmental impacts of a project and alternatives or mitigation that could avoid or substantially lessen such impacts. One of the earliest CEQA decisions, *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal. App. 3d 695, considered and rejected a trial court's holding that it had no authority to evaluate the adequacy of an EIR:

[T]he EIR has another function: the informing of the executive and legislative branches of government, state and local, and of the general public of the effect of the project on that revered resource which we call "The Environment." Obviously, the impact often must be deleterious to some extent to virgin land, to air, to beauty of unspoiled places because of the needs of the times. But the EIR must fulfill the role of disclosure of qualified estimations of the best way, all things considered, of meeting the demands of the present while preserving and, if possible, enlarging an ample inheritance for the future.In sustaining the propriety of the injunctive process, we are aware that a certain burden will be added to those already carried by the courts...But we envisage a limited use of the injunction in the control of the EIR. *The court does not have the duty of passing on the validity of the conclusions expressed in the EIR, but only on the sufficiency of the report as an informative document.* (citations omitted.)

Id. at 704-705 (emphasis added.)

Subsequent Supreme Court decisions have upheld this approach. *See Laurel Heights Improvement Assn. v. Regents of the Univ of Cal.* (1988) 47 Cal. 3d 376, 392 (“*Laurel Heights I*”); *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1235-1236; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 435.

Real Party does not challenge this long standing precedent head on, but instead tries to carve out a new exception based on the following:

The first question presented... 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.

See Real Party's Reply Brief, p. 9 (emphasis added.)

While it is true the Court of Appeal did utilize this distinction -- i.e., the situation where a required EIR topic is not addressed at all versus one in which the required topics are addressed but not analyzed adequately -- this does not create a legal precedent for different standards of review that would apply. This is because the *analysis* required in an EIR is just as important as the information provided; indeed in some cases the analysis will be the most critical aspect in ensuring a meaningful evaluation of

impacts and possible mitigation measures. As the Court of Appeal observed:

We will discuss these two action verbs-identify and analyze-separately.... the Friant Ranch EIR has identified, in a general manner, the adverse health impacts that could result from the Project's effect on air quality. Despite the inclusion of this information, the Friant Ranch EIR was short on analysis. It did not correlate the additional tons per year of emissions that would be generated by the Project (i.e., the adverse air quality impacts) to adverse human health impacts that could be expected to result from those emissions.

See Opinion, p. 48. (emphases added.)

Real Party's arguments gloss over the long standing authority of courts to review the *analytical process* utilized by public agencies in reaching administrative decisions that could affect numerous citizens. *See e.g. Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515-516 (courts must focus on the "analytic route the administrative agency traveled from evidence to action... By exposing the administrative agency's mode of analysis, findings help to constrict and define the scope of the judicial function. 'We must know what [an administrative] decision means,' observed Mr. Justice Cardozo, 'before the duty becomes ours to say whether it is right or wrong.'")

Adequate analysis is central to the function of an EIR to ensure that meaningful evaluation of potential environmental impacts (and feasible

mitigation for those impacts) has occurred. As this Court has held:

An EIR is an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, *analyzed and considered* the ecological implications of its action."... (citations omitted.)

Laurel Heights I, supra, 47 Cal. 3d at 392 (emphasis added.) Dozens of CEQA decisions have followed this reasoning in evaluating the adequacy of an EIR's analysis over the decades.

Real Party's standard of review arguments wholly ignore the primary role of adequate analysis in the CEQA review process. Under Real Party's approach, as long as an agency addressed a topic in any way, with any data or information, that would be sufficient to render the EIR 'adequate' from the standpoint of independent judicial review.

a. Real Party's Approach is Unworkable and Would Eliminate a Court's Review of Whether an EIR Contained Adequate Analysis to Apprise the Public and Decisionmakers of the Relevant Issues at Stake.

Real Party's standard of review argument confuses the question of whether the analysis in an EIR is adequate with the separate question of whether there is substantial evidence to support an agency's findings.

In this case, for example, Real Party argues that the County's findings that air pollution impacts will be significant and unavoidable are

supported by the EIR's discussion of air emissions from the project and disclosure of the amount of pollutants emitted per year, the health impacts of those pollutants generally, and the fact that the project areas is within a current non-attainment zone for these pollutants, thereby establishing an existing significant cumulative effect to which this project will contribute. *See e.g.*, Real Party's Opening Brief, p. 37.

The Court of Appeal, however, did not address the issue of substantial evidence; instead, the Court of Appeal determined there was a lack of requisite analysis, due to the failure to analyze the project's contribution to the adverse health impacts being experienced by local citizens. In other words, while information was provided, that information was not analyzed by the agency in a manner that would apprise the public and decision-makers of what the project impacts would be, as opposed to simply presenting raw numbers of emitted pollutants and letting the readers of the EIR make their own guesses as to the relative impacts. *See e.g.*, Opinion, p. 49 ("As presently written, the final EIR does not inform the reader what impact, if any, the project is likely to have...")

Ultimately, Real Party's approach is unworkable in attempting to substitute a 'substantial evidence' review standard in place of the separate question of whether an EIR contained an adequate analysis of the impacts

and potential mitigation for a particular project. Here, evidence alone cannot substitute for missing analysis because there is no direct correlation between the two. An EIR must explain what the evidence means so that the public and decision-makers can be adequately apprised of a project's impacts. Indeed it is for this reason that where an EIR fails as an informational and analytical document, a court does not look to see if there is substantial evidence supporting the agency's decision. In *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383, for example, the court criticized case decisions applying a 'substantial evidence' review standard to EIRs that lacked adequate information to ensure a meaningful evaluation of potential environmental impacts:

These...decisions fail to acknowledge the important public informational purpose that EIR's serve. An EIR is an educational tool not just for the decisionmaker, but for the public as well...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.

Id. at 1391-1392 (emphasis added.)

The result of adopting Real Party's approach would be to eliminate the requirement that an EIR contain adequate analysis to apprise the public and decisionmakers of potential project impacts and feasible mitigation. Instead, as long as an agency addressed the topic at all, a court's review

would be limited to whether there was evidence supporting the agency's ultimate findings and decision. That result is inconsistent with CEQA.

b. CEQA's Informational Requirements Are Not Judge-Made But Instead Derive from the CEQA Legislation and Guidelines.

A common theme of Real Party's briefs is that the Court of Appeal in this case created new requirements -- in this case, a requirement to conduct an analysis of how *this* project would contribute to daily air pollution levels acknowledged to be harmful to human health - that are not contained within CEQA. *See e.g.*, Real Party's Opening Brief, p. 38 (The Court of Appeal failed to honor [the restriction set forth in Public Resources Code § 21083.1] on its interpretive power by imposing a new legal mandate — a requirement to include in an EIR an analysis correlating a project's air emissions with specific health impacts — that is not required by CEQA or the Guidelines.")

Real Party's argument implies that if a specific type of analysis is not *expressly* required by the Public Resources Code or the CEQA Guidelines, a court may not consider the lack of such analysis in determining that an EIR fails to meet CEQA's informational standards. This argument substantially overstates the breadth of Public Resources Code § 21083.1.

The analysis found by the Court of Appeal to be necessary to ensure

a meaningful evaluation of project impacts and feasible mitigation derives from CEQA provisions that are, by definition, non-specific, but in no way less mandatory on agencies. These include the Legislature's direction in Public Resources Code § 21000(g) that all agencies "regulate such activities so that *major consideration is given* to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (emphasis added.) Here, notwithstanding Real Party's claims, it is the Court's job to determine what constitutes 'major consideration,' not the agency. Similarly, courts must determine what level of analysis is necessary to fulfill CEQA's requirement that an EIR "provide public agencies and the public in general with *detailed information* about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." *See* Pub. Res. Code § 21061 (emphasis added.) Whether information and analysis is sufficiently detailed to meet this statutory requirement is within the province of judicial review.

One of the most important CEQA provisions provides as follows:

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this

division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

Pub. Res. Code § 21002. As numerous decisions have recognized over the years, accomplishing these legislative objectives requires sufficient analysis in order for agencies and the public to understand what the project impacts are and whether or how they can be avoided or substantially lessened.

Equally important, if an agency proposes to determine that a project should be approved despite significant environmental effects, it is essential that the agency, prior to implementing the statement of overriding considerations balancing test described under Public Resources Code § 21081(b), have conducted the requisite analysis to understand the true magnitude of the impacts from the project is approving and the actual infeasibility of mitigation to avoid such impacts. Indeed, the Court of Appeal specifically cited to this balancing as a reason for why the analysis found missing in the EIR was relevant and necessary to the EIR's informational adequacy:

In this case, information about the magnitude of the human health impacts is relevant to the board of supervisors' value judgment about whether other considerations override the adverse health impacts. In other words, a disclosure of respiratory health impacts that is limited

to the better/worse dichotomy *does not allow the decision makers to perform the required balancing of economic, legal, social, technological and other benefits of the project against the adverse impacts to human health* because they have not been informed of the weight to place on the adverse impact side of the scales...

Opinion, p. 49, n. 23 (emphasis added.)

This legislative direction is further amplified by the CEQA Guidelines, which were promulgated also pursuant to legislative direction set forth in Public Resources Code § 21083. These include CEQA Guidelines § 15126.2 (a) which states in part:

Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), *health and safety problems caused by the physical changes*, and other aspects of the resource base such as water, historical resources, scenic quality, and public services.

See Cal. Code Regs., Title 14, § 15126.2, subd. (a) (emphasis added.)

Similarly, CEQA Guidelines § 15151 states:

An EIR should be prepared with *a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences*. An evaluation of the environmental effects of a proposed project need not be exhaustive, but *the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible*. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among

the experts. The courts have looked not for perfection but for adequacy, completeness, and a *good faith effort at full disclosure*.

See Cal. Code Regs., Title 14, § 15151 (emphases added.)

The determination of what constitutes a 'sufficient degree of analysis' to ensure that decision makers can make 'intelligent' decisions with respect to project approvals, environmental impacts and feasible mitigation is a job for the judiciary, who are charged with this interpretative duty. Here, far from creating a 'new legal mandate' (*see* Real Party's Opening Brief, p. 38), the Court of Appeal properly exercised its interpretive authority in this case with respect to what constitutes a sufficient analysis in an EIR regarding a significant and asserted unavoidable environmental impact.¹

c. The Fact that There is No One Size Fits All Standard for What Constitutes Sufficient Analysis Cuts in Favor, not Against, Independent Review.

The requirement for analysis in an EIR will vary depending on the

¹ A good example of a court's authority to infer statutory requirements from non-specific CEQA statutory directives is *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, in which this Court considered CEQA law and Guidelines to craft a standard for when an agency may dispense with utilizing the existing environment as a comparative baseline for an EIR's impact analysis. In so doing, this Court noted that it was not creating new requirements in violation of Public Resources Code § 21083.1, but instead merely interpreting CEQA's mandates, as courts have always done. *See id.* at 457 ("Contrary to Justice Baxter's claim, our holding here does not impose any 'wasteful' or 'additional' substantive requirement on agencies....")

project proposed, the potential impacts of that project, and the available information that can be utilized. *See e.g.*, Amicus Brief of South Coast Air Quality Management District, pp. 8-16. Here, in contrast to Real Party's claims, the Court of Appeal was careful *not* to direct the specific parameters of what an air impact analysis should look like, just that one be done so as to provide necessary information to the decision-makers and the public:

The foregoing references to the data provided in the EIR should not be interpreted to mean that County must connect the project's levels of emissions to the standards involving days of nonattainment or parts per million. *County has discretion in choosing what type of analysis to provide and we will not direct County on how to exercise that discretion....* Nonetheless, there must be some analysis of the correlation between the project's emissions and human health impacts.... In other words, we agree with plaintiffs that it is not possible to translate the bare numbers provided into adverse health impacts resulting from this project. (citations omitted.)

Opinion, pp. 49-50 (emphasis added.)

Real Party argues that because there is no bright line rule for what constitutes a sufficient analysis in an EIR, this Court should therefore dispense with judicial review authority over this issue. But the opposite is true. Contrary to Real Party's separation of powers arguments, courts -- not administrative agencies -- are tasked with the job of interpreting statutory directives such as those contained in CEQA. *See Perez v. Roe 1* (2006) 146 Cal. App. 4th 171, 177 ("A core function of the judiciary is to resolve

specific controversies between parties. As part of that function, the courts interpret and apply existing laws...")

Over the decades, courts have ably interpreted CEQA, including the substantive and procedural requirements for what constitutes an adequate EIR. Notwithstanding Real Party's claims, there are no grounds, either legal or practical, for changing this status quo regarding the courts' independent review of an EIR's informational and analytical adequacy.

2. Real Party Errs in Arguing that the Standard for Whether an EIR Is Adequate as an Informational Document Only Applies to the Question of Prejudice.

In their Reply brief, Real Party raises a novel issue, that the standard typically used by courts to determine if an EIR is adequate as an informational document is in fact a query which only comes up if 1) abuse of discretion has already been established; and 2) the question is now whether that abuse of discretion was prejudicial. *See e.g.*, Real Party's Reply Brief, p. 10 ("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.")

Amicus strongly disagrees with this flawed legal framework, which could well lead to EIRs that fail to ensure meaningful evaluation of impacts being nevertheless affirmed according to a substantial evidence review

standard with no connection to whether the EIR meets CEQA standards for informational adequacy. In response, Amicus would make two points.

First, the relevant standards set forth in the Public Resources Code and in case decisions addressing prejudice in CEQA disputes do not alter the points made above, that courts have the authority and duty to interpret CEQA and its guidelines, and thus the ability to assess whether an EIR is adequate as an informational document. No authorities cited by Real Party changes that equation. For example, Public Resources Code Section 21005 states only that "noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion..., *regardless of whether a different outcome would have resulted* if the public agency had complied with those provisions" and that "in undertaking judicial review... courts shall continue to follow the established principle that there is no presumption that error is prejudicial." *See* Pub. Res. Code §§ 21005(a)-(b). (emphasis added.)

Further, Real Party's continued citations to *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, supra*, for the proposition that abuse of discretion and prejudice are separate inquires does nothing to