CASE NO. S219783

IN THE SUPREME COURT OF CALIFORNIA

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

Plaintiffs and Appellants

v.

COUNTY OF FRESNO

Defendant and Respondent

FRIANT RANCH, L.P.

Real Party in Interest and Respondent

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

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

ANSWER TO *AMICUS CURIAE* BRIEF FILED BY THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

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I.
INTRODUCTION

Real Party in Interest Friant Ranch, L.P. (Real Party) appreciates the input of Amicus Curiae South Coast Air Quality Management District (Air District, District, or SCAQMD) insofar as the District states that its "staff does not currently know of a way to quantify ozone-related health impacts caused by NOx or VOC emissions from relatively small projects" and that the existing methodology to correlate particulate matter emissions to health impacts "is not suited for small projects and may yield unreliable results due to various uncertainties." (Amicus Curiae Brief of South Coast Air Quality Management District [hereafter, "SCAQMD Brief"], pp. 12, 14.) Real Party also appreciates the District's statement that "[t]he substantial evidence standard recognizes that the courts 'have neither the resources nor the technical expertise' to weigh conflicting evidence on technical issues." (*Id.* at p. 21, fn. 15, citing *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*).)

But, for reasons explained below, many of the other positions taken by the Air District are incorrect, as they are often wholly unsupported by any language in the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[1] or the CEQA Guidelines (hereafter,

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

"Guidelines");[2] and they often invite the courts to wade into technical thickets to act as de facto finders of fact in determining the outer limits of what sorts of technical analyses may be "reasonably feasible" to include in an environmental impact report (EIR).

The Air District wrongly assumes that the Court of Appeal was on strong legal ground in inventing the so-called "correlation requirement," and then goes on to explain the challenges in meeting such a requirement. Because this purported "requirement" has no foundation in statutory law or regulation, the District's descriptions of the technical difficulties associated with undertaking a "correlation" analysis are legally irrelevant. The Court should also reject the Air District's opinion that "[t]he ultimate question of whether an EIR's analysis is 'sufficient' to serve CEQA's informational purposes is predominantly a question of law that courts should review de novo." (SCAQMD Brief, p. App-2.) Whether an EIR's discussion of a required topic is sufficient is a question of fact to which the courts must apply the substantial evidence standard.

Contrary to the implications of much of what is said by the District, "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commenters." (Guidelines, § 15204, subd. (a).) Furthermore, CEQA

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

prohibits the courts from imposing, de novo, new analytic requirements not explicitly required by the Act or the Guidelines. (§ 21083.1.) Instead, a lead agency's explicit or implicit decision *not* to conduct any particular analysis proposed by a commenter is just one item of evidence in the overall administrative record that a reviewing court should examine in determining whether an EIR is sufficient as an informational document under the substantial evidence standard of review. If substantial evidence, in light of the whole record, supports the lead agency's conclusion that the EIR's discussion of a required topic is sufficient, then the court must uphold the discussion, even if additional reasonably feasible analysis might also be helpful. For these reasons, as more fully developed below, Real Party respectfully urges the Court to reject the District's interpretations of CEQA on these important points.

II.
ARGUMENT

A. Whether an EIR's Discussion of a Required Topic Is Sufficient Is a Factual Question Reviewed for Substantial Evidence in Light of the Whole Record.

The Air District argues that "an EIR's sufficiency as an informational document is ultimately a legal question that courts should determine using their independent judgment." (SCAQMD Brief, p. 19.) The District is mistaken for several reasons.

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First, the District misapprehends this Court's discussion of the standard of review in *Laurel Heights I.* The District quotes the statement in that case that "'[t]he court does not pass upon the correctness of the EIR's environmental conclusions, *but only upon its sufficiency as an informative document.*'" (SCAQMD Brief, p. 19, quoting *Laurel Heights I, supra*, 47 Cal.3d at pp. 392–393, italics added by SCAQMD.) The italicized language, the District believes, supports the notion that judicial review in this context should *not* be deferential. Had the District quoted the very next sentence from *Laurel Heights I*, however, the error in its understanding would be clear: "*This* standard of review is consistent with the requirement that the agency's approval of an EIR 'shall be supported by substantial evidence in the record.'" (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392-393, italics added.)

The District also incorrectly interprets this Court's holding in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 (*Vineyard*). The District states that this Court used its independent judgment in that case to determine what level of analysis CEQA requires for water supply impacts. (SCAQMD Brief, pp. 19, 24.) The District is mistaken, or at least fails to deal with a number of important nuances in the Court's decision. As discussed in detail in Real Party's Answer Brief to the Association of Irritated Residents (AIR) et al., the *Vineyard* Court assessed the sufficiency of the EIR at issue under both the

"failure to proceed" and substantial evidence standards. (Real Party's Opening Brief on the Merits [hereafter, "Opening Brief"], § IV.A.3.d, pp. 30–32; Answer Brief to AIR et al., § A.3.c.) Importantly, the procedural failures identified by the Court can be traced to ascertainable procedural requirements that CEQA imposes on all EIRs. (*Vineyard, supra*, 40 Cal.4th at pp. 429, 440, 443–444, 447.) In contrast, the factual flaws found by the Court related to the lack of evidence underlying the EIR's factual conclusions and the EIR's failure to describe the project's long-term water supply consistently and coherently. (*Id.* at pp. 439, 445, 447.)

With respect to the District's statement that the *Vineyard* Court "did not defer to the lead agency's opinion regarding the law's requirements," Real Party agrees. As discussed in its Reply Brief, Real Party does not dispute that reviewing courts need not defer to the administrative agencies' interpretation of statutes. (Reply Brief, pp. 17–18, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6–7.) This does not mean, however, that CEQA authorizes the courts, rather than lead agencies, to "design the EIR" by determining how best to fulfill CEQA's informational requirements. (*Laurel Heights I, supra*, 47 Cal.3d at p. 415.)

In addition to citing *Laurel Heights I* and *Vineyard* in support of its claim that de novo review should be applied to the question of whether an EIR's discussion of a required topic is sufficient, the District also cites a handful of appellate court decisions. (SCAQMD Brief, pp. 19, citing *Save*

Our Peninsula Comm. v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 118; 23, citing *County of Amador v. El Dorado County Water Agency* (1998) 76 Cal.App.4th 931, 954–955; 25, citing *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1123.) The invocation of these appellate decisions is of no moment, however, as they are not binding on this Court. And Real Party has acknowledged that, at the appellate level, there is a split of authority on the question of what standard of review applies to questions concerning the sufficiency of an EIR's discussion of a required topic. Indeed, the existence of this conflict between the appellate districts was the primary ground Real Party invoked in originally seeking review in this Court.

Furthermore, the appellate courts' opinions in the cases at issue, when read carefully, actually do not support the Air District's position. In each instance, the Courts of Appeal devoted substantial attention to whether the evidence in the administrative record supported the respondent agencies' respective conclusions that their EIRs were sufficient. This approach suggests that the courts actually applied the substantial evidence standard in those cases, not the "failure to proceed" standard, despite the District's assumption to the contrary.

Finally, like Appellants and amicus curiae Center for Biological Diversity, the District incorrectly conflates the standard for abuse of discretion under sections 21168 and 21168.5 with the standard for prejudice

under section 21005. A court should not even reach the question of whether prejudice has occurred until the court has first determined that the agency abused its discretion, either by failing to follow CEQA's procedural requirements or by failing to support its factual decisions with substantial evidence. If an abuse of discretion found by a court precluded informed decisionmaking or informed public participation, the court should hold that the abuse of discretion was prejudicial under section 21005. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463 ["[a]n omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts"]; Reply Brief, § III.A.1, pp. 10–16; Answer Brief to AIR, et al., II.B; see also Amicus Curiae Brief of League of California Cities et al., in Support of Real Party in Interest [hereafter, "League Brief"], § III.C, p. 29.)

B. CEQA Does Not Require Agencies to Conduct All Reasonably Feasible Studies.

The Air District argues that CEQA requires agencies to conduct all reasonably feasible analyses in preparing their EIRs. (SCAQMD Brief, pp. App-1, 2, 9, 16, 18–22.) The District also argues that, if a lead agency determines that a particular analysis is infeasible, the agency must explain the basis for its infeasibility determination in the EIR. (*Id.* at p. 20.) The District is mistaken. While the sufficiency of an EIR is to be reviewed "*in*

the light of what is reasonably feasible," this does not mean an EIR must include *all* reasonably feasible studies. (Guidelines, § 15151, italics added.) Nor does CEQA require a lead agency to track down every conceivable analytic methodology for evaluating each potential impact to be discussed in an EIR, assess whether such methodologies are feasible within the meaning of the statutory definition of that term (see section 21061.1), and explain the infeasibility conclusions in the EIR.[3] These requirements would be wasteful and unworkable in practice, would not be particularly useful to the public and decisionmakers, and do not find support in CEQA, the Guidelines, or this Court's decisions.

The law is clear that CEQA does not require lead agencies to conduct all reasonably feasible studies in preparing their EIRs or to explain in EIRs why all methodologies not employed are infeasible. As this Court has recognized: "[a] project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study ...

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[3] Although lead agencies must consult with other agencies in preparing EIRs (§ 21104, subd. (a), 21153) and must respond to comments on draft EIRs (§ 21092.5, Guidelines, § 15204, subd. (a)), The Air District's brief suggests that lead agencies must go above and beyond these consultation requirements to identify, independently, all potentially feasible methodologies for analyzing particular impacts and either conduct the studies or explain in the draft EIR why such methodologies are infeasible. (SCAQMD Brief, p. 20.) Because neither the Act nor the Guidelines imposes any such requirement, the court should reject the District's contention. (§ 21083.1.)

might be helpful does not make it necessary." (*Laurel Heights I, supra*, 47 Cal.3d at p. 415.) "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. (*Laurel Heights I, supra*, 47 Cal.3d at p. 409.)

Consistent with this Court's above-quoted statements from *Laurel Heights I*, the Guidelines direct that "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors." (Guidelines, § 15204, subd. (a); see also, e.g., *Cal. Oak Foundation v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, 267–268 [holding that the absence of specific analysis and data recommended by petitioner did not render the EIR inadequate]; *Sierra Club v. County of Orange* (2008) 163 Cal.App.4th 523, 544–545 ["[t]he mere fact plaintiff disagrees with the methodology employed by defendant to measure the project's potential traffic impacts … does not require invalidation of the [EIR], if it provides accurate information"]; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1468 [rejecting argument that EIR must contain an additional quantitative analysis where substantial evidence supports the methodology employed by the agency].) Instead "[w]hen responding to comments, lead agencies need only respond to significant environmental

issues and do not need to provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR." (Guidelines, § 15204, subd. (a).)

Furthermore, as correctly observed by amici League of California City et al., the Guidelines "seem to favor informative but concise discussion over expansive analysis." (League Brief, p. 22; see, generally, *id.* at § III, pp. 20–31.) For instance, EIRs are to be "analytic rather than encyclopedic" (Guidelines, § 15006, subd. (o)); EIRs are to mention "only briefly issues other than significant ones" (*id.*, subd. (p)); and EIRs should typically be limited to 150 pages in length, or 300 pages for projects "of unusual scope or complexity" (§§ 15141, 15006, subd. (n)). If agencies were required to conduct every reasonably feasible study (or to explain in their EIRs why all studies not conducted are infeasible), EIRs would quickly become extraordinarily voluminous.[4] Unless such EIRs were written by unusually gifted technical writers, moreover, the documents would likely be difficult for the public and decisionmakers to read and understand, thereby undermining the EIRs' practical value as informational documents.

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[4] EIRs typically address impacts within at least *17* resource categories. (See Guidelines, Appendix G, which sets forth questions lead agencies "should normally address" in initial studies, and therefore EIRs.)

A requirement for lead agencies to conduct all reasonably feasible studies or explain, in their EIRs, why all studies not conducted are infeasible, would also frustrate the state policy that public agencies carrying out CEQA do so "in the most efficient, expeditious manner," so as to "conserve the available financial, governmental, physical, and social resources" for the application toward mitigation efforts. (§ 21003, subd. (f).) Even without a requirement to conduct all reasonably feasible studies (or a requirement to explain in the EIR why such studies are infeasible), EIRs are time consuming and expensive to prepare. If this Court were to discern for the first time in CEQA a requirement that lead agencies must ferret out every available methodology for analyzing each of the various impacts discussed in their EIRs and then either employ those methodologies or disclose, in the EIRs, why they are not reasonably feasible, the result would be that the time and expense required to prepare EIRs would go up dramatically but without any concomitant increase in informational value. Instead, agencies should enjoy the discretion to settle on reasonable methodologies and then prepare their EIRs with focus on the significant effects of proposed projects and potentially feasible means of reducing the severity of such effects. (§ 21003, subds. (b), (f); Guidelines, § 15006, subds. (n)–(u).)

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C. If a Responsible or Trustee Agency Recommends the Lead Agency Conduct a Particular Study, that Recommendation and the Lead Agency's Response (or Lack Thereof) Will Be Part of the Evidence the Court Examines in Applying the Substantial Evidence Standard.

Although, as discussed above, CEQA does not require agencies to conduct all reasonably feasible studies, this is not to say that agency and expert comments recommending that lead agencies conduct further studies should or can be ignored. (See Guidelines, § 15088, subd. (c); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1124.) Instead, such comments become part of the administrative record and should be examined by the reviewing court in assessing whether an EIR sufficiently discusses a required topic. (§§ 21168, 21168.5, 21167.6, subd. (e)(7).) If the comments submitted by the public or agencies demonstrate that the agency lacked substantial evidence to support its conclusion that an EIR's discussion of a required topic is sufficient, the reviewing court should hold that the agency abused its discretion under the substantial evidence test. (See e.g., *Vineyard*, *supra*, 40 Cal.4th at pp. 447–448 [evidence submitted by experts during public comments demonstrated that EIR lacked substantial evidence to support conclusion that impacts of proposed groundwater extraction would not be significant].) Because the substantial evidence standard requires the courts to review the administrative record as a whole, application of the substantial evidence

test ensures that courts assessing the sufficiency of EIR discussions do not ignore comments submitted by agencies such as the Air District.[5]

D. By Imposing a New Regional Health Correlation Requirement, the Court of Appeal Impermissibly Imposed a New Substantive Requirement under CEQA.

The Air District argues that "[a] court determining whether an EIR's discussion of health impacts is legally sufficient does not constitute imposing a new substantive requirement." (SCAQMD Brief, p. 26.) Real Party respectfully disagrees with the premise underlying this contention. While a court's determination that an EIR's discussion of air quality impacts is insufficient under the substantial evidence standard would not impose new substantive requirements, a court's determination that an EIR's discussion is *procedurally* insufficient for failing to include a certain type of analysis not explicitly required in the Act or Guidelines—the so-called "correlation" analysis—would impose a new substantive requirement.

As relevant here, nothing in CEQA or the Guidelines requires a regional health correlation analysis. In fact, the only section in either the Act or the Guidelines that addresses health impacts is advisory, not mandatory. (Guidelines, § 15126.2, subd. (a) [EIRs "*should* include

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[5] In contrast, applying its independent judgment to the sufficiency of the Friant Ranch EIR's air quality analysis, the Court of Appeal below ignored the comments submitted by the San Joaquin Valley Unified Air Pollution Control District explaining that a health risk assessment is not feasible at the specific plan-phase of the Project. (See Administrative Record ["AR"] 4553.)

relevant specifics of the area, the resources involved, physical changes, ... [and] health and safety problems caused by the physical changes"]; see also Guidelines, § 15005, subd. (b) [defining "should" as used in the Guidelines].) In short, in deciding that a health correlation analysis is somehow required by CEQA's procedures, the Court of Appeal imposed a new substantive requirement in violation of section 21083.1.

The District further asserts that section 21083.1 "was intended to prevent courts from, for example, holding that an agency must analyze economic impacts of a project where there are no resulting environmental impacts (see CEQA Guidelines § 15131), or imposing new procedural requirements, such as imposing additional public notice requirements not set forth in CEQA or the Guidelines." (SCAQMD Brief, p. 26, fn. 19.) The District offers no support of any kind for its narrow reading of a broadly worded statute. This Court's own interpretation is substantially broader. As this Court just recently explained, the Legislature enacted section 21083.1 to "'limit judicial expansion of CEQA requirements' and to '"reduce the uncertainty and litigation risk facing local governments and project applicants by providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law."' [Citation.]" (*Berkeley Hillside Preservation v. City of Berkley* (2015) 60 Cal.4th 1086, 1107.) This "safe harbor" would become a virtual nullity if the courts were independently to decide the appropriate type, scope, and amount of analysis

that must be included in an EIR, with no deference to the agency and without review of the administrative record.

E. SCAQMD's Brief Demonstrates the Technical Complexities Involved in Determining What Type of Air Quality Analysis Is Appropriate for Any Given Project, Effectively Supporting the Real Party's Conclusion that the Courts Should Not Decide Such Matters De Novo.

Section II of SCAQMD's Brief (pp. 8–16) includes a highly technical discussion of the types of projects for which, in SCAQMD's expert opinion, a health correlation analysis would be either feasible or infeasible. The discussion amply demonstrates the complexity of assessing the feasibility of a health correlation analysis under any given fact pattern. These complexities illustrate that the courts do not have the technical expertise to determine, de novo, what amount of air quality analysis is "sufficient" under CEQA in any particular case. Instead, the courts should apply the substantial evidence standard and defer to lead agencies' factual conclusions as to the sufficiency of their EIRs' technical discussions.

In this case, Fresno County's conclusion that the Friant Ranch EIR's discussion of air quality impacts is sufficient is supported by substantial evidence. Such substantial evidence includes the fact that the County explained in its Final EIR why a localized health risk assessment is not

feasible to conduct at this "specific plan" phase of the Project.[6] The Court of Appeal, below, incorrectly ignored this evidence. And by determining, de novo, that the EIR's discussion is insufficient, the Court of Appeal imposed a requirement on the County to conduct a regional health correlation analysis that both the SJVUAPCD and the Association of Environmental Professionals (AEP) and American Planning Association, California Chapter, believe would likely be both infeasible and a source of misleading information. (Amicus Brief of San Joaquin Valley Unified Air Pollution Control District in Support of Defendant and Respondent, County of Fresno and Real Party in Interest and Respondent, Friant Ranch, L.P. ["SJVUAPCD Brief"], § II, pp. 3–15; Amicus Curiae Brief of the

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[6] The Air District notes on page 9 of its amicus brief that air pollution control districts often require proposed new sources of toxic air contaminants to prepare "health risk assessments" before the districts issue permits to construct such new pollutant sources. Such is the case with the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), which has jurisdiction over the Fresno County. (AR 4553.) Although the District does not appear to be aware of this fact, SJVUAPCD's comments on the Friant Ranch EIR stated that "[t]he required level of detail" for a health risk assessment cannot be known until site specific information, such as the "type of emission source, proximity of the source to sensitive receptors, and trip generation" is known. (*Ibid.*) Therefore, SJVUAPCD recommended that "health risks be further reviewed when approving future projects" under the Friant Ranch Specific Plan. (*Ibid.*) The County's responses concurred with SJVUAPCD and noted that "when considering future discretionary approvals for specific development" under the Specific Plan, "the County will assess potential health risks." (*Ibid.*)

Association of Environmental Planners et al. [hereafter, "AEP Brief"], § IV.B, pp. 10–15.)

Although SCAQMD does not opine on whether a regional health correlation analysis would be feasible for Friant Ranch, SCAQMD does suggest that such analyses are only appropriate for "regional scale" projects and/or very large projects emitting many more tons per year of criteria air pollutants than Friant Ranch. (SCAQMD Brief, pp. 11–15.) Even if such analyses could be feasible for regional or very large projects, there is no evidence in the administrative record in this case of the feasibility of an analysis correlating Friant Ranch's emissions of criteria pollutants with specific health consequences.

Moreover, even if a health correlation analysis were feasible for Friant Ranch, none of CEQA's mandatory procedures or substantive requirements require the County to have conducted one. Instead, whether the EIR is sufficient as an informational document in the absence of a regional health correlation analysis is a "factual" question that the court must review only for substantial evidence, in light of the whole record, and with deference to the lead agency. (See Opening Brief, § IV.A, pp. 9–36, Reply Brief, § III.A, pp. 9–21, Answer Brief to AIR et al., § II.C–D; AEP Brief, § IV.A, pp. 5–10, League Brief, §§ II–IV, pp. 3–41, Amicus Curiae Brief of California Building Association et al., § II.A, pp. 5–20.)

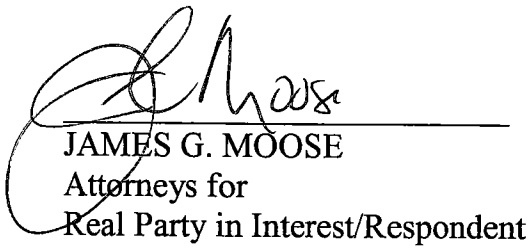
III.
CONCLUSION

For the reasons presented above, Real Party respectfully requests that this Court decline to accept the Air District's interpretation of CEQA. Instead, the Court should hold that whether an EIR's discussion of a required topic is sufficient is a *factual* question reviewed only for substantial evidence. Furthermore, CEQA does not require agencies to conduct all reasonably feasible studies. And finally, section 21083.1 prohibits the courts from independently imposing analytic requirements on agencies that are not explicitly required by the Act or the Guidelines.

Respectfully submitted,

Dated: June 10, 2015

REMY MOOSE MANLEY, LLP



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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this ANSWER TO *AMICUS CURIAE* BRIEF FILED BY THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT contains 4,132 words, according to the word counting function of the word processing program used to prepare this brief.

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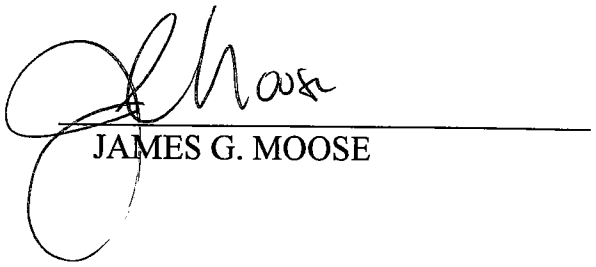

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