CASE NO. S219783 SUPREME COURT COPY

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 *AMICI CURIAE* BRIEFS OF ASSOCIATION OF IRRITATED RESIDENTS ET AL., CENTER FOR BIOLOGICAL DIVERSITY, LEADERSHIP COUNSEL FOR JUSTICE AND ACCOUNTABILITY, AND NORTH COAST RIVERS ALLIANCE

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I.
INTRODUCTION

It is understandable that petitioners challenging projects under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[1] would desire the courts to review the sufficiency of environmental impact reports (EIRs) with no deference to the lead agencies who prepared them. A project opponent cannot obtain a favorable de novo standard of review, however, simply by uttering the incantation "the EIR fails as an informational document." By *definition,* an environmental impact report (EIR) is "an informational document." (§ 21061.) To succeed in serving this function, the EIR must comply with all explicitly mandated procedural requirements *and* must be supported by substantial evidence. (§ 21168.5.) In other words, questions regarding the sufficiency of an EIR as an informational document are not limited solely to procedural questions.

The arguments of amici North Coast Rivers Alliance (NCRA) and Center for Biological Diversity (CBD) significantly downplay the rigor of the substantial evidence standard. NCRA and CBD suggest that under the substantial evidence test, courts would have to uphold EIRs that set forth only bare conclusions, provided those conclusions are supported by

[1] Unless otherwise specified, hereafter all statutory references are to the Public Resources Code.

substantial evidence somewhere in the record. Indeed, CBD suggests that the substantial evidence standard provides no review at all.

NCRA and CBD are wrong. Real Party in Interest Friant Ranch, L.P. (Real Party) does not argue that such minimalist efforts at compliance pass legal muster. Implicit in the substantial evidence standard of review is a requirement for EIRs to *analyze* and *explain* the evidence on which their conclusions are based. As this Court has emphasized, "the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 404 (*Laurel Heights I*).)

While CEQA requires EIRs to provide agencies and the public with "detailed information" about the significant effects of a proposed project, neither the Act nor the Guidelines specify what amount of "detail" or analysis is sufficient. (§§ 21061, 21100; Guidelines, §§ 15126.2.)[2] Instead, lead agencies administering CEQA must determine, on a case-by-case basis, what levels of detail and analyses are necessary and appropriate for any given project and any given specific impact. Lead agencies are in the best position to make these decisions because they have the technical expertise necessary to do so.

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

In reviewing a claim that an EIR lacks sufficient detail or analysis of a required topic, a court therefore should not step into the shoes of the lead agency and determine, de novo, whether more information and analysis is required. Instead, the court should examine the EIR's discussion of a required topic in light of the complexity of the underlying issues as reflected in the administrative record *as a whole*. In other words, in evaluating whether the extent of an EIR's discussion of a required topic is sufficient under CEQA, a court should apply the substantial evidence test. NCRA and CBD have failed to offer persuasive reasons for a different, less deferential approach.

This Court should also reject the arguments of amici Association of Irritated Residents et al. (collectively, "AIR") and Leadership Counsel for Environmental Justice and Accountability (LCJA) to the effect that the subject EIR's air quality analysis violates CEQA. Because amici's arguments talk in broad generalities, they do not address the arguments made by Real Party in its briefs before this Court, and are not based upon the administrative record. These amici's briefs thus add little to the discussion of the actual issues before this Court. As Real Party previously explained in its Opening Brief on the Merits and its Reply Brief on the Merits, substantial evidence supports the County of Fresno's conclusion that the air quality analysis is sufficient. The analysis fully complies with the directive of Guidelines section 15126.2, subdivision (a), that an EIR

"should" discuss the relevant specifics of the "health and safety problems caused by the physical changes."

Finally, the Court should reject the arguments of AIR and CBD that Friant Ranch's operational air quality mitigation measure violates CEQA. Like the Court of Appeal below, AIR ignores the fact that Mitigation Measure #3.3.2 will be enforced through the Mitigation Monitoring Program adopted by the County for Friant Ranch. And like Appellants Sierra Club et al. (collectively, "Appellants"), CBD misconstrues Real Party's argument as suggesting that CEQA's mitigation requirements do not apply to significant and unavoidable impacts. Real Party has said nothing of the sort. Real Party has simply noted the practical reality that quantified performance standards may not be feasible or necessary in every case, particularly for plan-level projects, such as Friant Ranch. Since lead agencies generally invoke performance standards as a basis for showing a commitment to mitigate impacts to less-than-significant levels, there is no generally applicable legal requirement that mitigation measures for significant unavoidable impacts must always include performance standards in order to meet CEQA standards.

For the reasons presented herein, in Real Party's prior briefs, and in the amici briefs filed by other parties in support of Real Party, the Court should reverse the Court of Appeal below and hold (i) that the sufficiency of EIRs' discussions of required topics are reviewed under the substantial

evidence standard; (ii) that the Friant Ranch EIR's air quality analysis complies with CEQA's procedures and is supported by substantial evidence; and (iii) that substantial evidence demonstrates that MM #3.3.2 is enforceable, is not impermissibly deferred, and otherwise complies with CEQA.

II.
ARGUMENT

A. NCRA and CBD Are Mistaken in Suggesting that Only through De Novo Review Can Reviewing Courts Ensure that EIRs Are Sufficient as Informational Documents.

NCRA and CBD present a caricature of Real Party's arguments when they suggest that Real Party advocates a position by which the courts would have to uphold EIRs that state only bare conclusions without any facts and analyses supporting those conclusions. (See e.g., Amicus Curiae Brief of North Coast River Alliance filed in Support of Plaintiffs and Appellants et al. [hereafter, "NCRA Brief"], p. 20; Amicus Brief of Center for Biological Diversity [hereafter, "CBD Brief"], p. 9.) Like these amici, Real Party readily agrees that CEQA requires an EIR to include facts and analysis, not bare conclusions. (*Laurel Heights I, supra*, 47 Cal.3d at p. 404.) In doing so, moreover, the EIR must set forth the "analytic route" the agency traveled from evidence to action. (*Ibid.*, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*).)

What NCRA and CBD ignore is that these requirements are *implicit* in the *substantial evidence standard of review*, not the "failure to proceed" standard, as discussed below. (*Topanga*, *supra*, 11 Cal.3d at pp. 514–516; see also *North Coast Rivers Alliance v. Marin Mun. Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 637, internal quotations omitted ["[u]nder the substantial evidence standard of review, the question is whether [the lead agency] reasonably and in good faith discussed [the environmental impact] in detail sufficient for the public to discern from the EIR the analytic route the agency … traveled from evidence to action"].)

1. Like administrative findings, EIRs must disclose the agency's analytic route from raw evidence to action.

This Court has long recognized that EIRs serve a function similar to that of administrative findings. In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270 (*Friends of Mammoth*), the Court explained that an EIR functions as the practical equivalent of an extended set of administrative findings:

> In light of the statewide concern expressed by the Legislature for written findings in the field of ecology, as evidence by [CEQA's environmental] impact *report*, the proper construction of the words "findings" or "found" requires a written statement of the supportive facts on which the agency has made its decision. Since this report involves the assessment of a myriad of elements (see § 21100) it obviously includes all those facts which would be contained in written findings if such findings were required by ordinance. Accordingly, the written report affords plaintiffs the same

> benefits that would be achieved by written findings pursuant to the ordinance[.]

(*Ibid.*, italics original.)

In its seminal decision in *Topanga*, this Court held that implicit in the substantial evidence standard of review under Code of Civil Procedure section 1094.5 is a requirement that an agency rendering a quasi-adjudicatory decision "set forth findings to bridge the analytic gap between raw evidence and the ultimate decision and order." (*Topanga*, *supra*, 11 Cal.3d at p. 515; see also *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1161 [explaining the same].)[3] The *Topanga* Court emphasized that these findings serve several functions:

> A findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will

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[3] The implicit requirement for express findings also applies in administrative mandamus actions in which a court exercises its independent judgment on an agency's decision, such as in cases involving fundamental vested rights. (*Hadley v. City of Ontario* (1974) 43 Cal.App.3d 121, 129.) Notably, even in such cases, the courts do not review the agency's findings de novo. Rather, in applying the independent judgment test under Code of Civil Procedure section 1094.5, subdivision (c), a court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 809, 810–824; see also *Eureka Teachers Assn. v. Bd. of Ed.* (1988) 199 Cal.App.3d 353, 366 ["[t]o allow the parties to challenge every administrative decision with another trial de novo would be a waste of both administrative and judicial resources, and the administrative hearings would be nothing more than perfunctory gestures"].)

> randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] [¶] Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

(11 Cal.3d at pp. 516–517.)

As indicated, EIRs provide similar benefits. (*Friends of Mammoth*, *supra*, 8 Cal.3d at p. 270, citing § 21100.) Like findings, EIRs must contain road signs linking evidence to action, so as to allow reviewing courts and the public to "fulfill their proper roles in the CEQA process." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 404.) Also like findings, EIRs serve a public relations function by helping foster informed decisionmaking and informed public participation. (*Ibid.*; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 445 (*Vineyard*) [because the EIR did not disclose the agency's analytic route, the EIR was not "sufficient to allow informed decisionmaking"].) By requiring agencies to "show their work" in EIRs, the substantial evidence standard of review helps ensure satisfaction of CEQA's goals of informed decisionmaking and informed public participation.

In *Laurel Heights I*, the Court explicitly drew a connection between the necessity of express findings under *Topanga* and the standard of review for EIRs under CEQA.[4] The *Laurel Heights I* Court explained that under Public Resources Code section 21168.5:

> "[a]buse of discretion is established if the agency has not proceeded in the manner required by law or if the determination or decision is not supported by substantial evidence." As a result of this standard, "[t]he Court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." [Ciation.]
>
> *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."* (Guidelines, § 15091, subd. (b).) In applying the substantial evidence standard, "the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." ([*Topanga*, *supra*, 11 Cal.3d at p. 514.].)

(*Id.* at p. 392, italics added.)[5]

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[4] Although *Laurel Heights I* involved review under Public Resources Code section 21168.5, which applies to quasi-legislative decisions brought in traditional mandamus (Code Civ. Proc., § 1085), while *Topanga* addressed review under administrative mandamus (Code Civ. Proc., § 1094.5), the *Laurel Heights I* Court explained that, for purposes of CEQA, the difference between traditional mandamus (§ 21168.5) and administrative mandamus (§ 21168) "is mostly academic because the standard of review is essentially the same under either section, i.e., whether substantial evidence supports the agency's determination." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 392, fn. 5; see also *Vineyard*, *supra*, 40 Cal.4th at p. 427, fn. 4 [same].)

[5] CBD cites the first paragraph quoted above and insists, without cogent argument, that in passing upon the sufficiency of an EIR as an informative document, the courts review the EIR de novo. (See e.g. CBD Brief pp. 4–7) CBD is mistaken. As is made clear by the very next paragraph in *Laurel Heights I* (quoted above): "[*t*]*his* standard of review" – i.e., the standard of

(Continued)

This deferential standard is appropriate because the administrative agency has technical expertise to aid it in arriving at its decisions. Because of this expertise, courts should not interfere lightly with the technical judgments made by the agency. (See *Laurel Heights I*, *supra*, 47 Cal.3d at p. 393.) The courts "have neither the resources nor scientific expertise" to weigh conflicting evidence. (*Ibid.*)

Based on *Topanga*, the Court in *Laurel Heights I* made clear that, like administrative findings, EIRs must include road signs linking the evidence supporting the EIRs to their analyses and conclusions. An EIR must disclose the "'analytic route the ... agency traveled from evidence to action.'" (*Laurel Heights I*, 47 Cal.3d at p. 404, quoting *Topanga*, *supra*, 11 Cal.3d at p. 515.) Stated more broadly, "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and consider meaningfully the issues raised by the proposed project." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 404; compare *Topanga*, *supra*, 11 Cal.3d. at p. 516 [explaining purposes of findings requirement].) To establish the agency's analytic route from evidence to action, the EIR "'must contain facts and analysis, not just the agency's bare conclusions[.]'

(Continued)
review under which the courts are only to pass upon the EIR's sufficiency as an "informational document" – "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.)

[Citations]." (*Laurel Heights I, supra*, 47 Cal.3d at p. 404; see also *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 249–250 [same]; *Environmental Protection & Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 516–517 [under the *Topanga* rule, "mere conclusory findings without reference to the record are inadequate"]; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171 ["[m]ere conclusions simply provide no vehicle for judicial review"].)

If the EIR does not satisfy these requirements implicit in the substantial evidence standard, the court should hold that the agency abused its discretion under that standard. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392–393.) If the abuse of discretion deprived decisionmakers or the public "substantial information relevant to approving the project," the court should hold the agency prejudicially abused its discretion under section 21005. (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 465 (*Neighbors*) [plur. opn.].) The existence of these analytic requirements implicit in the substantial evidence standard of review does not suggest, as NCRA and CBD would have this Court believe, that all claims challenging the sufficiency of an EIR's discussion must be reviewed de novo. Rather, as discussed below, such claims must be

reviewed under the substantial evidence standard, in light of the record as a whole.

2. In reviewing the sufficiency of an EIR's discussion of a required topic, the court should review the discussion in light of the whole record.

In determining what amount of detail and analysis is "sufficient" in an EIR to allow those who did not participate in the EIR's preparation to understand and evaluate the evidence, the court should review the record *as a whole* in order to assess the complexity of the issues and thus the extent of explanation necessary to support the EIR's factual conclusions. For very complex issues, as revealed in the administrative record, extensive explanation could be necessary to convey to the public, decisionmakers, and the courts the bases on which the EIR reaches the conclusions that it does. For relatively simple issues, in contrast, less extensive discussions could suffice. The amount of analysis and explanation that is required necessarily depends on the nature of the underlying issues and the facts and circumstances surrounding a proposed project.

In reviewing an administrative record to determine how much information is sufficient for a particular EIR's discussion of a particular required topic, a reviewing court should pay special attention both to the input submitted to the lead agency and to the lead agency's responses to such input. Input from other agencies and the public comes both during the

"scoping"[6] process and in comments on the draft EIR, while the lead agency's responses to such input takes the form of draft EIR text and responses to comments in a final EIR. (§§ 21168, 21068.5; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 569–570 (*Goleta II*).)

As ably discussed in the amicus brief of the League of California Cities et al., (collectively "League"), CEQA's public- and agency-consultation requirements act as a safeguard to ensure that lead agencies address agencies' and the public's concerns about the sufficiency of an EIR. (Amicus Curiae Brief of League of California Cities et al. [hereafter, "League Brief"], § IV.F, pp. 38–40.) If members of agencies or public are confused or require more information in order to be able to meaningfully understand the environmental impacts of a proposed project, such persons should let the lead agency know of such concerns in their comments on a draft EIR. (§ 21091, subd. (d); Guidelines, § 15088.) In its final EIR, the lead agency must then provide a good-faith, reasoned analysis in response to such comments. (Guidelines, § 15088, subd. (c); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1124 (*Laurel Heights II*).) If the new information added to the final EIR in

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[6] See Guidelines, §§ 15082 (Notice of Preparation requirement), 15083 (early public consultation); and Pub. Resources Code, § 21083.9 (statutory requirement for "scoping meetings").

response to comments is "significant," the agency must recirculate all or a portion of the EIR for another round of public and agency consultation. (§ 21092.1; Guidelines § 15088.5; *Laurel Heights II, supra*, 6 Cal.4th at pp. 1126-1130.)

This comment-and-response requirement not only provides a mechanism to ensure that lead agencies, in good faith, address in writing environmental concerns raised by other agencies and the public, the requirement also provides reviewing courts with insights into whether those who did not participate in the EIR's preparation believed themselves to be adequately informed. In determining whether an EIR provides sufficient information on a required topic, therefore, a court should review the public and agency comments on the draft EIR and the lead agency's responses. Such review will allow the court to determine whether substantial evidence—in light of the whole record—supports the agency's factual conclusions notwithstanding any complexities raised through input from the public and other agencies.

Finally, if substantial evidence, in light of the whole record, supports the agency's conclusion that the amount of information presented in the EIR is "sufficient," the court should uphold the EIR even if the court believes that additional information would have been helpful or informative. It is not for the courts to "design the EIR." (*Laurel Heights I, supra*, 47 Cal.3d at p. 415.)