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 and FRESNO COUNTY BOARD OF SUPERVISORS
Defendants and Respondents

FRIANT RANCH, L.P.
Real Party in Interest and Respondent

After a Published Decision by the Court of Appeal
Fifth Appellate District, Case No. F066798
Appeal from the Superior Court of California, County of Fresno
Honorable Rosendo A. Pena, Jr., Case No. 11CECG00726

Appellants' Supplemental Brief

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Introduction

Appellants respectfully submit a supplemental brief pursuant to Rule of Court 8.520 (d), to address the most relevant of the CEQA cases post-dating completion of their merits briefing in 2015.

This Court's unanimous ruling last year in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 is of prime importance. The Court applied the de novo standard of review to assess EIR adequacy, invoking *Vineyard Area Citizens for Responsible Growth, Inc., v. City of Rancho Cordova* (2007) 40 Cal.4th 412 (*Vineyard*) and *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236. (*Banning Ranch, supra*, 2 Cal.5th at 935 ["Whether an EIR has omitted essential information is a procedural question subject to de novo review."].) This year, *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465 also considered EIR adequacy de novo, consistent with all Supreme Court precedent.

Courts always conduct de novo review to adjudicate agencies' compliance with their mandatory duties. These are questions of law. No reduction in that standard judicial process is justifiable for actions brought to enforce CEQA's environmental mandates. Only after EIR content is adequate may an agency's fact-based findings be deferentially reviewed for substantial evidence.

As to the scope of review, appellants particularly note this Court's ruling in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514 (*Cleveland I*), which affirms that an EIR must evaluate not only the significance of impacts but "the nature and magnitude of the adverse effect."

In the Court of Appeal, a decision of the Fourth Appellate District, Division One, in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413, 441 (*Cleveland II*), could not be more relevant factually as it found an EIR inadequate for failing to include analysis correlating significant air quality with impacts to human health. A Second Appellate District case, *Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, is inconsistent with precedent as it found an EIR adequate based upon a technical report — outside of the EIR.

Appellants have reviewed the supplemental brief filed by real party Friant Ranch, which contends that California's housing problems should shape this Court's interpretation of CEQA. Instead, as held in *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 240, judicial review of CEQA compliance within an EIR process is guided not by the Court's estimations of a project's potential benefits but by "requirements for

informing the public and decision makers of adverse impacts, and for imposition of valid, feasible mitigation measures ..."

Invoking a *non-existent* policy that it contends somehow "favor[s] certainty in the CEQA process," Friant Ranch angles to escape accountability and deprive courts of essential jurisdiction. (Friant Ranch Supp. Brief at 15.) This Court has never and surely should not now rule, against all precedent, that agencies may adjudicate their own compliance with CEQA's statutory mandates.

Discussion

A. New Authority Supports the De Novo Standard of Judicial Review for Considering EIR Adequacy

Last year, when this Court interpreted and enforced CEQA in *Banning Ranch*, it explained at the outset that "the CEQA dispute centers on" what an EIR "*must*" do — as a matter of law — in terms of identifying and adequately analyzing project alternatives and mitigation measures. (*Banning Ranch, supra*, 2 Cal.5th at 924, italics added.) The Court's de novo ruling as to the Banning Ranch EIR inadequacy applied *CEQA's requirements for sufficient EIR analysis* to adjudicate whether the City of Newport Beach proceeded in the manner required by law. To wit:

- The Court began with Public Resources Code section 21168.5: "[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." The Court reinforced its holding in *Vineyard,* confirming that it must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)" (*Banning Ranch, supra,* 2 Cal.5th at 935.)

- The Court could not have more clearly explained that "[w]hether an EIR has omitted essential information is a procedural question subject to de novo review. (*Vineyard, supra,* 40 Cal.4th at p. 435; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215 ..." (*Banning Ranch, supra,* 2 Cal.5th at 935.) As to what information is essential, "CEQA requires every EIR to identify '[a]ll significant effects on the environment of the proposed project,' which would generally include effects on sensitive habitat areas. (§ 21100, subd. (b)(1); see Guidelines, § 15126.2.)." (*Id.* at 935-936.)

- The Court identified CEQA's statutory and regulatory requirements that elucidate the purpose and scope of the EIR process, and referenced the long-settled importance of EIR evaluation of "project alternatives and mitigation measures that are '[t]he core of an EIR.' (*Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at p. 564.)." (*Banning Ranch, supra,* 2 Cal.5th at 937.)

- The Court made clear that the city's claimed "justifications" for the EIR's truncated level of project analysis were not persuasive, based on what the city had characterized as the need for "legal determinations" that were within the sole purview of the Coastal Commission. EIRs need to identify resources affected by a proposed project "and their ramifications for mitigation measures and alternatives." But courts do not make scientific determinations in CEQA cases. "A reviewing court considers only the sufficiency of the discussion." (*Banning Ranch, supra*, 2 Cal.5th at 938.)

As with the Friant Ranch EIR, the Court's consideration of the Banning Ranch EIR adequacy involved no technical fact-finding. As always, environmental petitioners exhausted remedies and raised all issues relating to inadequate EIR analysis.

The *Banning Ranch* decision recognized gaps in information that resulted in materially-deficient EIR analysis. Without that analysis, the EIR could not satisfy CEQA's mandate that an EIR process assess significant environmental impacts and identify potentially feasible project alternatives and mitigation measures. (*See* Pub. Resources Code, § 21002 ["... [CEQA procedures ... 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."].)

Friant Ranch contends that there should be a distinction between the standard of review applied to whether an EIR fails entirely to analyze a certain subject versus whether the EIR's analysis fails to include essential information. This approach is unworkable and is also inconsistent with both *Banning Ranch* and *Vineyard,* which each discuss the sufficiency of environmental analysis. The *Banning Ranch* EIR discussed ESHA but did not do so satisfactorily; water supply was discussed inadequately in *Vineyard.* (*Vineyard, supra,* 40 Cal.4th at 444.) There is no meaningful distinction between a "legal" requirement and a "procedural requirement" as Friant Ranch argues: CEQA prescribes processes to achieve environmental protection.

Consistently, in *City of Long Beach v. City of Los Angeles, supra,* 19 Cal.App.5th 465, in telling readers that average air pollution emissions of a proposed new railyard project would be below thresholds of significance, an EIR failed to adequately address a report that worst-case concentrations of air pollution would be much higher, particularly along a certain stretch of freeway. The Second District Court of Appeal characterized the failure to include adequate analysis of the project's pollution as a "failure to proceed" in accordance with CEQA. (*Id.* at 482-88.)

EIR analysis and identification and comparison of

mitigations and alternatives are prescribed by statute and regulation. Judicial review involves statutory interpretation as to what CEQA requires, as a matter of law, when applied to a particular project. Whether the Friant Ranch EIR provided a good-faith effort at full disclosure and analysis of project impacts on human health is a legal question comparable to *Banning Ranch* which involved a failure to integrate EIR planning review among involved public agencies. The cases align.

B. New Authority Addresses Adequacy of EIR Analysis

1. Supreme Court Rulings Affirm Fundamental Principles Regarding the Adequacy of EIR Analysis.

Cleveland I, supra, 3 Cal.5th 497, 514, affirms that "an EIR's designation of a particular adverse environmental effect as 'significant' does not excuse the EIR's failure to reasonably describe the nature and magnitude of the adverse effect." Further, an "adequate description of adverse environmental effects is necessary to inform the critical discussion of mitigation measures and project alternatives at the core of the EIR." (*Id.* at 514-515.)

Both *Cleveland I, supra,* 3 Cal.5th at 516 and *Banning Ranch, supra,* 2 Cal.5th at 941, affirm that information buried in unreferenced appendices and reports cannot substitute for good-

faith reasoned analysis in the body of the EIR.

2. Appellate Rulings Warrant Clarification

Consistent with appellants' position in this case, *Cleveland II, supra,* 17 Cal.App.5th 413, holds that identifying adverse health impacts resulting from a project's significant air quality impacts "in a general manner" does not satisfy the requirements of Guidelines section 15162.2 (a).

> [T]he EIR failed to correlate the additional tons of annual transportation-plan-related emissions to anticipated adverse health impacts from the emissions. Although the public and decision makers might infer from the EIR the transportation plan will make air quality and human health worse, at least in some respects for some people, this is not sufficient information to understand the adverse impact.

(*Id* at. 441.) *Cleveland II* also properly rejects the agency's "bald assertion" that it was infeasible to provide more information. (*Ibid.*) But while correctly interpreting and applying Guidelines section 15126.2 (a), *Cleveland II* applies the substantial evidence standard rather than properly assessing EIR adequacy de novo. (*Id* at 440.)

In *Beverly Hills, supra,* 241 Cal.App.4th 627, petitioners argue that an EIR "was required to include an analysis showing how the actual construction emissions will specifically impact public health." (*Id.* at 667.) The Court acknowledges that "CEQA requires EIRs to

include any 'health and safety problems caused by the physical changes' in the environment as a result of the Project. (Guidelines, § 15126.2, subd. (a).)." (*Ibid.*) It concludes that the requirement was met because the "EIS/EIR in this case was circulated with an air quality technical report that identified the potential adverse health effects of exposure to each of the identified pollutants." (*Ibid.*)

The *Beverly Hills* opinion does not explain or describe the technical report's analysis of potential adverse health effects, or how it was referenced in the EIR, or whether the Court applied a de novo standard of review. Nor does the opinion explain the grounds for distinguishing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184 [EIR failed to identify and analyze health impacts resulting from the identified air quality impacts] and *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344 ["agency failed 'to do the necessary work to educate itself about the different methodologies [for assessing health risks] that are available.'"]. The Court merely concludes that the technical report was "specific enough to permit informed decision making and public participation." (*Beverly Hills, supra*, 241 Cal.App.4th at 667.)

Beverly Hills provides a helpful contrast with this case. The transit authority had approved construction of a nine-mile addition

to its rail transit subway system to connect Downtown Los Angeles to the Westside of Los Angeles. (*Beverly Hills, supra,* 241 Cal.App.4th at 632.) Measured against air district thresholds of significance, none of the proposed build alternatives would cause or exacerbate a violation of the standards. (*Id.* at 640.) Not surprisingly, the EIS/EIR concluded that the project — designed to remove vehicles from LA's congested roads and freeways — "would likely reduce regional emission levels." (*Ibid.*) With one exception for nitrous oxides, the construction-related emissions would be reduced to less than significant. (*Ibid.*)

Coincidentally, the Friant Ranch Project is proposed nine miles north of Fresno. (Administrative Record (AR) 1.) It would increase the population of Friant from about 800 people to as many as 7,000. (AR 1, 539, 5370.) The proposed project is so remote from the city that public transit would be economically infeasible. (AR 1041. 4677.) While construction-related emissions are not an issue, unlike the subway in *Beverly Hills* the project's *operational* emissions would greatly exceed air district thresholds of significance. (AR 824.) Yet the EIR provides no information regarding the extent to which emissions would be reduced by mitigation.

Primarily as the result of increased emissions associated with vehicle travel — measured in tons — emissions of reactive organic

gases (ROGs) associated with Friant Ranch would be 19 times the air district threshold of significance, nitrogen oxides (NOx) would be 10 times the threshold, and fine particulates (PM10) would be 7 times the threshold. (AR 802, 807, 818, 821, 4296, 4619.) Thus, even after mitigation, the project's air quality impacts would remain significant. (AR 826.)

Simply identifying the possible adverse health effects associated with increased nitrous oxide emissions in a technical report might arguably be sufficient for the subway project in *Beverly Hills*. However, the one-paragraph general description of potential adverse health effects associated with the Friant Ranch project does not qualify as a good-faith effort to provide decisionmakers and the public with the information needed to understand the magnitude of this project's potential impacts.

Conclusion

This Court's recent decisions continue its consistent applications of the dual standards of review in CEQA cases. It comes down to practicality: when there is a dispute as to what an EIR "*must*" do — as a matter of law — to analyze a proposed project's environmental impacts and identify and compare alternatives and mitigation measures, judicial review is de novo.

(*E.g., Banning Ranch, supra,* 2 Cal.5th at 924-925, italics added.)

Agencies cannot measure their own compliance with law. In CEQA cases, their decisions are entitled to deference only after an environmental review process provides sufficient information.

Here, as recognized by the Court of Appeal and consistent with recent case law, Fresno County's decisionmakers and the affected public must be provided with adequate information about the scope and magnitude of Friant Ranch impacts on human health, and the availability of feasible mitigation measures and alternatives, before project approval may be considered.

Counsel's Certificate of Word Count per Word:mac[2016]: 2736

September 22, 2018

Respectfully submitted,

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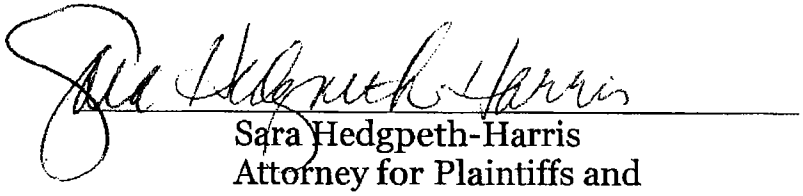

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Sierra Club, et al. v. County of Fresno, et al.
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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, CA 95442.

On September 22, 2018, I served one true copy of:

Supplemental Brief

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See attached Service List

I declare under penalty of perjury that the foregoing is true and is executed on September 22, 2018, at San Francisco, California.

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Supreme Court No. S219783

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