

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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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, Jr.

OPENING BRIEF ON THE MERITS

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I.
ISSUES PRESENTED

This Court granted review of the following issues that arise under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.):

1. Does the substantial evidence standard of review apply to a court's review of whether an environmental impact report (EIR) provides *sufficient information* on a topic required by CEQA, or is this a question of law subject to independent judicial review?
2. Is an EIR adequate when it identifies the health impacts of air pollution and quantifies a project's expected emissions, or does CEQA further require the EIR to *correlate* a project's air quality emissions to specific health impacts?
3. Does a lead agency impermissibly defer formulation of mitigation measures when it retains discretion to substitute the adopted measures with equally or more effective measures in the future as better technology becomes available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness?
4. Do mitigation measures adopted by a lead agency to reduce a project's significant and unavoidable impacts comply with CEQA when substantial evidence demonstrates that, on the

whole, the measures will be at least partially effective at mitigating the impact, or must such measures meet the same (or even heightened) standards of adequacy as those adopted to reduce an impact to a less-than-significant level?

II. **INTRODUCTION**

Judicial review of an agency's action under CEQA extends only to whether the agency prejudicially abused its discretion. Under this standard, the court independently reviews an agency's compliance with CEQA's procedural requirements, but defers to the agency's factual decisions if they are supported by substantial evidence. (Pub. Resources Code, §§ 21168, 21168.5¹; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*)). This deferential standard of review reflects constitutional separation of powers principles and an allocation of responsibility between the agencies charged with administering CEQA and the courts that is integral to the statutory scheme. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572–573 (*WSPA*)).

The first issue presented concerns the standard of review that applies to claims that an EIR lacks sufficient relevant information. Such claims are most properly thought of as raising mixed questions of fact and law. CEQA

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

and the CEQA Guidelines² set forth general subjects that all EIRs must address (in this case, the project's significant air quality impacts). If an agency fails to discuss one or more of these subjects in its EIR, the agency has failed to proceed in the manner required by CEQA.

Within CEQA's broad categories of required information, however, CEQA leaves to the discretion of lead agencies the determination of how best to fulfill CEQA's informational mandates on a project-by-project basis. Such determinations, which include decisions about the type, scope, and amount of analysis to include in EIRs, are inherently factual, so they should be reviewed under the substantial evidence standard.

The second issue presented concerns whether the EIR prepared for the Friant Community Plan Update and Friant Ranch Specific Plan project ("Friant Ranch") and certified by respondent County of Fresno (the "County") violates CEQA because it does not include an analysis *correlating* the project's increase in regional pollutants to specific health impacts within the air basin. The Court of Appeal impliedly acknowledged that such analysis was not specifically mandated by CEQA, but rather was created by the court's own decision in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.1184, 1219–1220 (*Bakersfield*). (Slip Opinion ["Opn."] 47.)

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

In invalidating the County's EIR based on a "correlation" requirement that the court itself created out of whole cloth, and that finds no support in any language in CEQA or the Guidelines, the Court of Appeal violated Public Resources Code section 21083.1, which prohibits courts from interpreting CEQA or the Guidelines in a manner that imposes new procedural or substantive requirements.

Moreover, if the court had applied the proper substantial evidence standard of review, the court would have upheld the County's air quality analysis, which quantifies the project's air emissions and discloses the general health impacts that exposure to those emissions can cause, but reflects the extreme difficulty (if not impossibility) of linking specific emissions from a single project in a large air basin to specific health effects afflicting particular persons or groups.

The third and fourth issues presented concern standards of adequacy of mitigation measures adopted to lessen a project's significant environmental effects. CEQA requires agencies to adopt feasible mitigation measures for the significant impacts of the projects they approve. In this case, the County acknowledges that there are no feasible mitigation measures to reduce Friant Ranch's operational air quality impact to less-than-significant levels. The County nevertheless adopted a feasible mitigation measure to at least minimize this significant impact. In doing so, the County complied with CEQA. As this Court has made clear, an

agency's mitigation measures must be upheld if substantial evidence supports the conclusion that, on the whole, the measures will minimize the impact. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 408 (*Laurel Heights I*). The mitigation measure at issue in this case meets this standard. The Court of Appeal, therefore, erred in holding the mitigation measure violates CEQA.

III. **FACTUAL AND PROCEDURAL SUMMARY**

A. The Friant Ranch Project

In recent years, Fresno County has experienced a dramatic increase in its senior age demographic as baby boomers reach retirement age. (Administrative Record ["AR"] 9773, 9816.) The County views this trend as driving the demand for an age-restricted, well-planned retirement community within the County. (AR 9241, 9816, 162.) In response to this demand, in 2005, after two years of coordinating with County planning staff, Real Party in Interest Friant Ranch, L.P. ("Real Party") submitted an application for the Friant Ranch Specific Plan, which will provide a framework for the development of the County's first "Active Adult" (ages 55+) community. (AR 5365, 160-165.)

The Friant Ranch Specific Plan area is a 942-acre site directly adjacent to the existing unincorporated community of Friant. (AR 736-739.) The plan is designed to accommodate the unique preferences of the

County's aging population, providing a "stay-in-place" retirement community that offers a variety of on-site social, health, and wellness activities. (AR 9770–9771.) The land use designations concentrate development near the existing community of Friant and will create a pedestrian-friendly village that connects neighborhoods with retail, medical-office, and recreational uses through trails, bicycle paths, and a Neighborhood Electric Vehicle network. (AR 164–165, 9773–9799.) As approved, the Specific Plan proposes up to 2,500 dwelling units (at least 80 percent of which will be occupied by at least one resident who is 55 years of age or older) and dedicates over half of the plan area to open space, which will be preserved in perpetuity as habitat conservation land. (AR 9772, 9773, 9767.) As a result of the approved land uses and age restrictions, the project will generate fewer automobile trips than a traditional single-family residential development. (AR 4543–4544, 162–165.)

The project also includes the Friant Community Plan Update, which expands the existing Community Plan's boundaries to encompass the Specific Plan area and adds new policies consistent with the Specific Plan and the County's General Plan. (AR 13–14.)

Future required approvals for Friant Ranch include tentative and final maps from the County, as well as approvals from the San Joaquin Valley Air Pollution Control District (the "Air District") to ensure

compliance with the Air District's emission reduction requirements. (AR 14, 747-763, 18282-18349, 18812-18831.)

B. The County's Environmental Review and Project Approval

In October 2009, the County circulated a Draft EIR for a 45-day comment period. (AR 10672-10673, 610-4223.) The EIR's air quality analysis is based on the Air District's "Guide for Assessing and Mitigating Air Quality Impacts." (AR 793-826, 4941-4970.) Additional facts demonstrating the substantial evidence supporting the air quality analysis and mitigation measure are set forth in Sections IV.B and IV.C, below. (See also Opn. 43-46.)

The County received numerous written comments on the Draft EIR and held a public hearing at which it received oral comments. (AR 11079-11107, 4224-4372.) The County prepared responses to each of the comments received and released a Final EIR in August 2010. (AR 4373-5158.)

On February 1, 2011, the Board of Supervisors ("Board") concluded its hearing on Friant Ranch and voted to certify the Final EIR and to approve Alternative 3, the environmentally superior alternative.³ (AR 9-15.) In approving Friant Ranch, the Board also made one or more of the

³ Compared to the project as originally proposed, Alternative 3 reduces the area proposed for development from 667 acres to 482 acres and reduces the number of residential units from 2,996 to 2,500, thereby reducing the project's air quality impacts and other impacts. (AR 1204, 624.)

findings set forth in Public Resources Code section 21081, subdivision (a), for each significant effect identified in the EIR. (See also Guidelines, § 15091.) Because the project will result in significant and unavoidable impacts, including air quality impacts, the Board adopted a Statement of Overriding Considerations. (AR 6, 160–165; § 21081, subd. (b); Guidelines, §§ 15093, 15043, subd. (b).) Finally, the Board adopted a mitigation monitoring and reporting program (MMRP) to ensure that the adopted mitigation measures are implemented and enforced. (AR 166–273; § 21081.6, subd. (a).)

C. The Instant Lawsuit

Three separate challenges to Friant Ranch were filed, including this case. The cases were consolidated for the purposes of briefing and hearing, but not for judgment. On December 14, 2012, the trial court delivered its ruling, denying the Petition for Writ of Mandate of Sierra Club et al. (“Appellants”) in full. Appellants appealed.

The Court of Appeal concluded that Appellants’ challenges to the sufficiency of the EIR’s discussions raised predominantly procedural issues subject to independent judicial review. (Opn. 23.) Applying this standard of review to the EIR’s air quality analysis, the court held that the analysis violates CEQA for failing to include an analysis *correlating* the project’s air emissions with the specific health impacts that the increase in those emissions in the air basin will cause. (Opn. 48–50.) The court also held that

the mitigation measure adopted to reduce the project's operational air quality impacts, but not to less-than-significant levels, violates CEQA because it is impermissibly deferred, vague, unenforceable, and uses the phrase "substantially reduce" without quantifying the emission reductions. (Opn. 58–63.) The court reversed and remanded the trial court's decision with directions to the trial court to enter a writ commanding the County to vacate its approval of Friant Ranch and not reapprove the project until the County prepares an EIR that complies with the Court of Appeal's decision. (Opn. 65.) For the reasons set forth below, the Court of Appeal incorrectly decided each of these issues, and this Court should reverse.

IV. ARGUMENT

A. The Deferential Substantial Evidence Standard of Review Applies to Claims Challenging the Sufficiency of an EIR's Discussion of a Required Topic.

An agency's decision to certify an EIR and approve a project is reviewed for prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded as required by law or its determinations are not supported by substantial evidence. (§§ 21168.5, 21168.) As emphasized by this Court in *Vineyard*, "[j]udicial review of these two types of errors differs significantly." (*Vineyard*, 40 Cal.4th at p. 435.)

While [the courts] determine de novo whether the agency has employed the correct procedures, "scrupulously

enforc[ing] all legislatively mandated CEQA requirements” [Citation], [the courts] accord greater deference to the agency’s substantive factual conclusions. In reviewing for substantial evidence, the reviewing court “may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,” for, on factual questions, [the court’s] task “is not to weigh conflicting evidence and determine who has the better argument.” (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.)

In evaluating an EIR for CEQA compliance then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency “failed to proceed in the manner prescribed by CEQA.” (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; [citation].) In contrast, in a factual dispute over “whether adverse effects have been mitigated or could be better mitigated” (*Laurel Heights I, supra*, 47 Cal.3d at p. 393), the agency’s conclusion would be reviewed only for substantial evidence. Thus, in *Laurel Heights I*, [the Court] rejected as a matter of law the agency’s contention that the EIR did not need to evaluate the impacts of the project’s foreseeable future uses because there had not yet been a formal decision on those uses (*id.* at pp. 393–399), but upheld as supported by substantial evidence the agency’s finding that the project impacts described in the EIR were adequately mitigated (*id.* at pp. 407–408).

(*Vineyard*, 40 Cal.4th at p. 435.)

This case involves a claim that frequently arises in CEQA cases: whether an EIR violates CEQA for failing to include sufficient relevant information. (Opn. 23.) The Court of Appeal correctly observed that such claims generally fall into two types:

The first type involves a situation where the EIR does not discuss a topic that [the statute or Guidelines⁴] says must be discussed. This type of claim is relatively easy to decide—either the required information was in the EIR or it was omitted. ...

The second type of claim, which is presented in this case, is more complex. It involves an EIR that has at least addressed the required topic and a claim by the plaintiff that the information provided about that topic is insufficient.

(Opn. 23.)

The question before this Court is whether this “second type of claim” – a claim that the EIR, while addressing a topic required by CEQA, fails to include sufficient information on that topic – is predominantly a claim of improper procedure, and therefore reviewed *de novo*, or predominantly a dispute of facts, and therefore reviewed for substantial evidence.

The Court of Appeal incorrectly held that this type of claim is predominantly procedural. (Opn. 23.) According to the court, “[c]onceptually, this type of claim involves the reviewing court’s drawing a line that divides *sufficient* discussions from those that are *insufficient*. Drawing this line and determining whether the EIR complies with CEQA’s information disclosure requirements presents a question of law subject to

⁴ Here, the court also listed “judicial opinion.” (Opn. 23.) In determining whether an agency has complied with CEQA, however, the courts may look to judicial opinion only to the extent that the opinion is consistent with the Act and the Guidelines, and does not impose new substantive or procedural requirements beyond those explicitly stated therein. (§ 21083.1.)

independent review by the courts.” (Opn. 23, italics original.) By this statement, the Court of Appeal inappropriately transformed its role from that of the judiciary reviewing the lead agency’s work to ensure it complies with CEQA’s procedures and is supported by substantial evidence to that of a final arbiter of what must be included in an EIR. In doing so, the Court of Appeal inappropriately substituted its judgment for that of the people and their elected representatives.

Furthermore, if left to stand, the judicial “line drawing” established by the court below would introduce significant and unnecessary uncertainty into the already arduous CEQA review process. Under the de novo standard of review applied by the Court of Appeal, a lead agency and project applicant will have no way of knowing whether their EIR includes sufficient information on a given topic until a reviewing court tells them it does or does not. The lack of predictability inherent in this non-deferential standard of review will lead to needless delay, expense, and waste in government. Agencies and project applicants need to know what is expected of them *when they prepare an EIR*, not years later after the litigation process has ended. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 468, 475–476 (*Neighbors*) (conc. & disc. Opn. of Baxter, J. [recognizing the important policy of predictability in the CEQA review process]).)

Real Party respectfully urges that the Court of Appeal reached the wrong conclusion. As demonstrated below, CEQA's framework, separation of powers principles, policies favoring certainty in the CEQA process, and this Court's decisions concerning EIR adequacy all mandate that claims challenging the sufficiency of an EIR's discussion of a required topic are to be reviewed under the deferential substantial evidence standard.

- 1. CEQA entrusts public agencies with the discretion to determine how best to implement CEQA's broad informational mandates, and agency decisions in this regard are inherently factual.**

CEQA and the Guidelines outline broad categories of information that all EIRs must include. (See Guidelines, §§ 15122–15132; §§ 21100, 21002.1, subd. (a), 21003, subds. (b)–(c), 21061.) In doing so, CEQA and the Guidelines allow lead agencies to ascertain what information *must* go in their EIRs. Specifically, an EIR is an informational document that must (i) provide agencies and the public with detailed information about the environmental effects of a proposed project, including direct, indirect, cumulative, and growth-inducing impacts, (ii) list ways in which the significant effects of the project might be minimized, and (iii) identify alternatives to the project that could meet the project's basic objectives while lessening its environmental effects. (*Laurel Heights I, supra*, 47 Cal.3d at p. 391; §§ 21061, 21100; Guidelines, §§ 15003, subds. (b)–(e), 15126.2; see also *id.* at §§ 15140–15151 [describing additional

considerations for preparing EIRs]; *id.* at Appendix G [setting forth questions lead agencies “should normally address” in initial studies (and therefore EIRs) if they are “relevant to a project’s environmental effects”].) As noted earlier, the failure to address in an EIR one or more of CEQA’s required topics constitutes a failure to proceed in the manner required by CEQA.⁵ If the omitted information is necessary to informed public participation and decisionmaking, the error is prejudicial. (§ 21005, subds. (a)–(b).)

Within CEQA’s general categories of required information, however, the statute and the Guidelines leave to the discretion of implementing agencies the determination of *how* the broad statutory mandates and Guidelines commands should be carried out for individual projects. EIRs must be prepared for widely divergent activities, each with a unique environmental setting. The virtually limitless variations in the types of projects, the circumstances under which they may be carried out, and the differing jurisdictional, legal, and policy contexts in which the agencies

⁵ See, e.g., *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236 (*Sierra Club*) (failure to undertake any analysis of timber harvesting impacts on special status species); *Laurel Heights I, supra*, 47 Cal.3d at pp. 399, 406 (failure to undertake any analysis of significant environmental impacts of a reasonably foreseeable future phase of the project and failure to discuss any alternatives to the project); *Vineyard, supra*, 40 Cal.4th at p. 447 (failure to follow CEQA’s procedures for tiering of environmental analysis, failure to properly incorporate mitigation measures into EIR, and failure to include any analysis of the significant environmental impacts of mitigation measures).

operate preclude rigid rules regarding the type, scope, and amount of information to include in EIRs. Instead, agencies must tailor the discussions and analyses in EIRs to fit varying conditions, so that the EIRs will be responsive, relevant, and informative. (See §§ 21061, 21003.1; Guidelines, § 15064, subds. (b)–(c).)

Importantly, in making these decisions about the contents of EIRs, lead agencies should be influenced by the interactive public and agency review process that CEQA compels. If, as is often said, the EIR is the heart of CEQA,⁶ this interactive review process is the soul. The CEQA review process involves early consultation with the public and other agencies regarding the scope and content of the draft EIR, preparation of the draft EIR, public and other agency review of the draft, and evaluation of and responses to comments received. (§§ 21153, 21080.3, 21080.4; Guidelines, §§ 15081–15088.) The purposes behind this review include sharing expertise, disclosing agency analyses, checking for accuracy, detecting omissions, discovering public concerns, and soliciting counter proposals. (Guidelines, § 15200; see also *id.* at § 15201 [“[p]ublic participation is an essential part of the CEQA process”]; § 21003.1, subds. (a)–(b).)

If the CEQA review process is working as intended, an EIR’s discussion and analysis will reflect, and be responsive to, the insights and

⁶ Guidelines, § 15003, subd. (a); *Laurel Heights I, supra*, 47 Cal.3d at p. 392.