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

SUPREME COURT
FILED

MAR - 5 2015

Frank A. McGuire Clerk

Deputy

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.

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ADDITIONAL FACTUAL BACKGROUND 5

A. Friant Ranch is Designed to Minimize Air Pollution 5

B. Friant Ranch is Subject to the Air District's Indirect Source Rule 8

III. ARGUMENT 9

A. The Substantial Evidence Standard Applies to Claims that an EIR Lacks Sufficient Information on a Required Topic 9

1. Appellants improperly conflate the standard of review under section 21168.5 with the standard for prejudice under section 21005 10

2. Whether an agency prejudicially abused its discretion under CEQA is a question of law; but this does not mean that a court applies its independent judgment to an agency's factual decisions 16

3. Appellants' attempt to distinguish this Court's decisions fails, and in fact helps to demonstrate that the substantial evidence standard applies to claims that an EIR lacks sufficient information on a required subject 18

4. "Independent judgment" of factual issues is not necessary to ensure CEQA is scrupulously followed; no case holds, or even suggests, this approach 19

B. The EIR's Air Quality Analysis Complies with Guidelines Section 15126.2, Subdivision (a) 22

1. Principles of Interpretation 22

2. The EIR's air quality analysis complies with the law and is supported with substantial evidence 24

C. The Project's Mitigation Measures Comply with CEQA 27

1. The air quality mitigation measures comply with legal standards and are enforceable 27

2. CEQA does not require Friant Ranch's air quality mitigation measures to include performance standards 32

IV. CONCLUSION 36

CERTIFICATE OF WORD COUNT 37

TABLE OF AUTHORITIES

California Cases

Page(s)

Association for Irritated Residents v. County of Madera
(2003) 107 Cal.App.4th 1383 12

Berkeley Hillside Preservation v. City of Berkeley
(Mar. 3, 2015, S20116) __Cal.4th__ [p. 24] 24

Bixby v. Pierno
(1971) 4 Cal.3d 130 2

California Building Industry Assn.
v. San Joaquin Valley Air Pollution Control District
(2009) 178 Cal.App.4th 120 8

Citizens for a Sustainable Treasure Island
v. City and County of San Francisco
(2014) 227 Cal.App.4th 1036 12

Citizens for Quality Growth v. City of Mt. Shasta
(1988) 198 Cal.App.3d 433 35

Citizens of Goleta Valley v. Board of Supervisors
(1990) 52 Cal.3d 553 8

Communities for a Better Environment
v. South Coast Air Quality Management Dist.
(2010) 48 Cal.4th 310 21

Endangered Habitats League, Inc. v. County of Orange
(2005) 131 Cal.App.4th 777 32

Fairview Neighbors v. County of Ventura
(1999) 70 Cal.App.4th 238 34

Federation of Hillside and Canyon Associations
v. City of Los Angeles
(2000) 83 Cal.App.4th 1252 30

California Cases (cont.)

Page(s)

Friends of Mammoth v. Board of Supervisors
(1972) 8 Cal.3d 247 .... 20, 23

Kings County Farm Bureau v. City of Hanford
(1990) 221 Cal.App.3d 692 12

Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.
(1988) 47 Cal.3d 376 .... passim

Lincoln Place Tenants Assn. v. City of Los Angeles
(2005) 130 Cal.App.4th 1491 29

Mani Brother Real Estate Group v. City of Los Angeles
(2007) 153 Cal.App.4th 1385 29

Mount Shasta Bioregional Ecology Center
v. County of Siskiyou
(2012) 210 Cal.App.4th 184 13

Napa Citizens for Honest Government
v. Napa County Board of Supervisors
(2001) 91 Cal.App.4th 342 .... 28, 29

Neighbors for Smart Rail
v. Exposition Metro Line Construction Authority
(2013) 57 Cal.4th 439 .... 11, 12, 15, 16

Ofsevit v. Trustees of Cal. State Univ. & Colleges
(1978) 21 Cal.3d 763 2

Picayune Rancheria of Chukchansi Indians v. Brown
(2014) 229 Cal.App.4th 1416 23

Rialto Citizens for Responsible Growth v. City of Rialto
(2012) 208 Cal.App.4th 899 .... 12, 34

Rominger v. County of Colusa
(2014) 229 Cal.App.4th 690 .... 16, 34

California Cases (cont.)

Page(s)

Sacramento Old City Assn. v. City Council of Sacramento
(1991) 229 Cal.App.3d 1011 34

San Francisco Tomorrow v. City and County of San Francisco
(2014) 229 Cal.App.4th 498 16

Save Cuyama Valley v. County of Santa Barbara
(2013) 213 Cal.App.4th 1059 16

Save Round Valley Alliance v. County of Inyo
(2007) 157 Cal.App.4th 1437 13

Sierra Club v. City of Hayward
(1981) 28 Cal.3d 840 17

Sierra Club v. County of San Diego
(2014) 231 Cal.App.4th 1152 31

Vineyard Area Citizens for Responsible Growth, Inc.
v. City of Rancho Cordova
(2007) 40 Cal.4th 412 21

Western States Petroleum Assn. v. Superior Court
(1995) 9 Cal.4th 559 .... 15, 17

Yamaha Corporation of America
v. State Board of Equalization
(1998) 19 Cal.4th 1 17

California Statutes

Page(s)

Gov. Code, § 56107, subd. (a) ... 12
Gov. Code, § 65010 ... 12
Gov. Code, § 65450 ... 6
Gov. Code, §§ 65450–65457 ... 6
Gov. Code, § 65451 ... 7

Pub. Resources Code, § 21000 et seq. ... 1, 23
Pub. Resources Code, § 21001 ... 23
Pub. Resources Code, § 21002 ... 33
Pub. Resources Code, § 21003, subd. (f) ... 14
Pub. Resources Code, § 21005 ... 10, 11, 15, 16
Pub. Resources Code, § 21005, subd. (a) ... 12
Pub. Resources Code, § 21005, subd. (b) ... 12
Pub. Resources Code, § 21080.4 ... 28
Pub. Resources Code, § 21081, subd. (a) ... 33
Pub. Resources Code, § 21081.6, subd. (a)(1) ... 30
Pub. Resources Code, § 21081.6, subd. (a)(2) ... 32
Pub. Resources Code, § 21081.6, subd. (b) ... 30
Pub. Resources Code, § 21082.2, subd. (c) ... 2
Pub. Resources Code, § 21083 ... 22
Pub. Resources Code, § 21083.1 ... 23
Pub. Resources Code, § 21166 ... 29
Pub. Resources Code, § 21168 ... 10, 16, 18
Pub. Resources Code, § 21168.5 ... passim

Stats. 1972, ch. 1154, § 16, p. 2277 ... 21

Federal Statutes

42 U.S.C. § 7409 ... 25

California Regulations

Page(s)

Cal. Code Regs., tit. 14, § 15000 et seq. ("CEQA Guidelines")
CEQA Guidelines, § 15000 et seq. 3
CEQA Guidelines, § 15003, subd. (f) 23
CEQA Guidelines, § 15003, subd. (g) 14
CEQA Guidelines, § 15003, subd. (j) 14
CEQA Guidelines, § 15005 22
CEQA Guidelines, § 15005, subd. (b) 4, 23
CEQA Guidelines, § 15082 28
CEQA Guidelines, § 15088 26
CEQA Guidelines, § 15126.2, subd. (a) 3, 22, 24, 27
CEQA Guidelines, § 15126.4 32
CEQA Guidelines, § 15126.4, subd. (a) 29
CEQA Guidelines, § 15126.4, subd. (a)(1)(B) 27, 32, 33
CEQA Guidelines, § 15144 26
CEQA Guidelines, § 15146 27
CEQA Guidelines, § 15162, subd. (a) 26
CEQA Guidelines, § 15204, subd. (a) 13
CEQA Guidelines, § 15370 33

I.
INTRODUCTION

This case presents the far-reaching question of whether the California Environmental Quality Act ("CEQA") (Pub. Resources Code,[1] § 21000 et seq.) allocates the responsibility to determine what information belongs in environmental impact reports ("EIRs") on required topics to the courts, rather than to the public agencies charged with administering CEQA. As this Court has held on numerous occasions, CEQA requires the courts to apply the substantial evidence standard of review to challengers' claims that EIRs lack sufficient information on a required subjects. (See Opening Brief on the Merits ["OB"], § IV, A.3, pp. 23–35.) Real Party in Interest Friant Ranch, LP ("Real Party") respectfully requests that this Court reaffirm this important legal principle.

Contrary to the statements made by Appellants Sierra Club et al. ("Appellants"), independent judicial review of claims that EIRs lack sufficient information on required subjects, is not necessary, or even advisable, to achieve CEQA's informational purposes. By ensuring that EIRs' discussions of required topics are supported by substantial evidence, reviewing courts safeguard the public's confidence in the CEQA environmental review process while maintaining the constitutional

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

separation of powers between the judiciary and the agencies entrusted with the administration of CEQA.

In contrast, independent judicial review of technical and scientific analyses would undermine the public's faith in the CEQA process by sending the message that lead agencies cannot be trusted to make sound decisions about the factual contents of their EIRs. As this Court has recognized, however, lead agencies can and should be trusted to make such decisions because the lead agencies, and not the courts, have the resources and technical expertise to enable them to weigh conflicting evidence and draw conclusions, based on public and other agency input, regarding the methodologies, scopes, types, and amounts of analyses to include in EIRs. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*).)

The substantial evidence standard of review is searching enough to ensure that agency determinations are reasonable and based on solid, credible evidence. (See § 21082.2, subd. (c) [substantial evidence "include[s] facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts"]; see also *Ofsevit v. Trustees of Cal. State Univ. & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9 ["'[s]ubstantial' evidence is evidence of 'ponderable legal significance ... reasonable in nature, credible, and of solid value'"]; and *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144 ["court

must … review the *entire administrative record* to determine whether the [agency's] findings are supported by substantial evidence"] [italics added].)

In the instant case, the Court of Appeal incorrectly applied its independent judgment in assessing the sufficiency of the EIR prepared by the County of Fresno ("County") for the Friant Community Plan Update and Friant Ranch Specific Plan ("Friant Ranch"). In doing so, the Court of Appeal wrongly held that the EIR's air quality analysis violates CEQA by failing to include an analysis "correlating" Friant Ranch's air pollutant emissions to specific health impacts.

Appellants implicitly agree that CEQA does not require a health correlation analysis, asserting that the Court of Appeal did not actually require such an analysis. (Answer Brief on the Merits ["AB"], pp. 27–28.) Appellants therefore urge this Court to ignore the Court of Appeal's holding and review Appellants' claims de novo. (*Ibid.*)

In particular, Appellants claim that the EIR violates section 15126.2, subdivision (a), of the CEQA Guidelines[2] by failing to address health problems that could be caused by air pollutant emissions associated with Friant Ranch. (*Ibid.*) As discussed below, however, the EIR's air quality discussion easily satisfies Guidelines section 15126.2, subdivision (a).[3]

[2] The CEQA Guidelines (hereafter, "Guidelines") are codified in California Code of Regulations, title 14, section 15000 et seq.
[3] As explained in Section III.B.1, *post*, the directive that EIRs *should* include "health and safety problems caused by the physical changes"

Lastly, Appellants misconstrue Real Party's arguments regarding CEQA's requirements for mitigation measures. Real Party does not suggest that CEQA's standards for mitigation are always less demanding when an impact cannot be mitigated to less-than-significant levels. Instead, Real Party emphasizes that the long-recognized purpose of *performance standards* is to provide evidentiary bases for agencies' conclusions that mitigation measures that are otherwise lacking in detail will reduce significant impacts to less-than-significant levels. When significant impacts cannot feasibly be mitigated to less-than-significant levels, it may not always be possible to tie the mitigation measures to performance standards, as is the case here. Moreover, most of the components of Friant Ranch's operational air quality mitigation measure (MM #3.3.2) are not deferred *at all*; and where they are, performance standards are identified. Therefore, the Court of Appeal erred in concluding that the measure as a whole was impermissibly deferred. Finally, substantial evidence demonstrates that the County will enforce all components of the measure.

In short, the Friant Ranch EIR complies with CEQA's procedures and is supported by substantial evidence.

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associated with a proposed project is purely *advisory*, and not mandatory. (See Guidelines, § 15005, subd. (b) [defining "should" as used in the Guidelines"].)

II.
ADDITIONAL FACTUAL BACKGROUND

A. Friant Ranch is Designed to Minimize Air Pollution.

As expected, Appellants repeatedly attempt to describe Friant Ranch as negatively as possible, often misrepresenting the record. They claim, for example, that the project has a "remote location" that is "far from employment centers," and make much of the fact that the project's emissions of reactive organic gases (ROG) will exceed the applicable significance threshold by 19 times. (See AB, p. 8.)

As Real Party explained in its Opening Brief (at pp. 5–7), however, Friant Ranch has been intentionally designed and planned to reduce overall vehicle miles traveled by its residents and users, which in turn, will reduce air pollutant emissions. (Administrative Record ["AR"] 9875, 9881–9882, 9886–9887.) Friant Ranch 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.) As an age-restricted community, Friant Ranch will generate far fewer vehicle trips (approximately 75 percent fewer during peak hours) than would a traditional single-family development, partly because retired residents will not travel to employment centers. (AR 4543–4544, 4754, 7797–7798, 18031–18035, 11035–11046.)

Friant Ranch incorporates smart growth principles, and thus includes a compact growth strategy, on-site commercial, retail, and recreational amenities, and Neighborhood Electric Vehicle paths on major interior roadways. (AR 9769, 9799, 7947, 163.) Friant Ranch will provide transportation alternatives such as carpooling and shuttle buses, pedestrian/bicycle facilities, neighborhood trails, and "local retail linkages." (AR 1157, 7788, 7947, 163, 9783–9786, 9794.) To facilitate use of mass transit, rights-of-way for two mass transit stops are set aside in the village center. (AR 9800, 9785, 9795.)

The fact that ROG emissions will substantially exceed the applicable significance threshold is purely a function of the size of the project, which, though not large compared with many land use plans, is large enough to allow for the use of the planning tool called a "specific plan." (See Gov. Code, §§ 65450–65457.)

A specific plan is an optional long-range planning tool prepared to implement an adopted general plan and provide for orderly community growth. (Gov. Code, § 65450.) Specific plans typically apply to substantial geographic areas and provide for buildout over extended time periods. As a result, implementation of an *entire* specific plan will generally result in greater environmental impacts than would a typical smaller subdivision or commercial project alone. (See AR 8867.) A local agency's adoption of a specific plan, however, is more environmentally effective land-use planning

than piecemeal approval of individual development projects. Among other things, specific plans provide a policy-based framework for orderly growth and development that ensures the adequate provision of infrastructure and provides standards for natural resource conservation. (See Gov. Code, § 65451; AR 9481, 9535.)

In this case, Friant Ranch will help implement the County's vision for the existing Friant area, and will invigorate that unincorporated community economically, socially, and aesthetically. (AR 160–165, 9816, 9770, 9817–9819, 9878–9889, 9768.) For instance, the project will provide much-needed wastewater treatment facilities with capacity sufficient to serve the existing residents of Friant. (AR 604, 9481, 162–163.) It will also help the County meet its senior housing demands. (AR 9816, 7748.)

As part of its effort to portray Friant Ranch in a negative light, Appellants cite statements made by Dan Barber of the San Joaquin Valley Air Pollution Control District ("Air District"), who had not commented on the Draft EIR during the public comment period, but who voiced concerns at the final hearing on the project. (AB, pp. 10–11.) Mr. Barber encouraged the County Board of Supervisors ("Board") to "give further consideration to requiring project specific design elements that will favorably reduce [vehicle miles traveled] related emissions." (AR 8863.) Mr. Barber did not, however, identify any additional feasible operational air quality mitigation measures. (AR 8862–8867.) Ultimately, the Board adopted the

environmentally superior alternative (Alternative 3), which reduces the amount of development proposed under Friant Ranch (and thereby reduces its air quality impacts), and increases the amount of permanent conservation land. (AR 24, 1200–1204.) In doing so, the Board acted consistently with Mr. Barber's suggestion that the Board modify the project's design to further reduce air pollutant emissions. In its Statement of Overriding Considerations, the Board explained why it believed that the project's many benefits outweighed its significant environmental effects, including air pollution. (AR 160–165.) Although Mr. Barber may disagree with the Board over the wisdom of approving Friant Ranch, that policy disagreement is not a basis to overturn the EIR. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.)

B. Friant Ranch is Subject to the Air District's Indirect Source Rule.

Relying further on Mr. Barber's comments, Appellants state that the Air District does not have any independent authority to impose mitigation measures. (AB, p. 11, citing AR 8862–8863.) The administrative record is clear, however, that the Air District will impose additional mitigation requirements on Friant Ranch through the District's Indirect Source Review ("ISR") program (Rule 9510).[4] (AR 18812–18831.) Through ISR, Friant

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[4] For a detailed discussion of the ISR rule see *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control District* (2009) 178 Cal.App.4th 120, 124–129.

Ranch will be required to reduce its operational emissions of nitrogen oxide (NO_x) (an ozone precursor) by one-third, and its emissions of course particulate matter (PM_{10}) by one-half. (AR 18823, 22287.) Individual projects under Friant Ranch will undergo ISR at the tentative map stage, when proposed development patterns and unit counts will become more concrete than they are in the Specific Plan. (AR 4790, 7783; Opn. 63–65.)

III.
ARGUMENT

A. The Substantial Evidence Standard Applies to Claims that an EIR Lacks Sufficient Information on a Required Topic.

Both parties agree that if an agency omits from its EIR information *required* by CEQA, the agency has failed to proceed in the manner required by CEQA. (AB, p. 13; OB, pp. 3, 14; see also Slip Opinion ["Opn."] 23.) The first question presented, however, addresses the legal gray area, recognized by the Court of Appeal, regarding the standard of review that applies when an EIR addresses all the topics required by CEQA but challengers still claim that the information provided in the EIR is insufficient. (OB, pp. 1, 11; Opn. 23.) As demonstrated in Real Party's Opening Brief, the substantial evidence standard applies to such claims, rather than the "failure to proceed" standard of review applied by the Court of Appeal. Rather than address this legal gray area, Appellants maintain that *all* questions regarding the sufficiency of an EIR are "legal questions" that must be reviewed independently – even where "the legal standard is

not explicit." (AB, § V.A.3, p. 18.) Appellants also assert that such use of courts' independent judgment is necessary to enforce CEQA policies favoring informed decision-making and meaningful public input. As demonstrated below, Appellants are mistaken.

1. Appellants improperly conflate the standard of review under section 21168.5 with the standard for prejudice under section 21005.

Appellants seem to urge that, when CEQA does not explicitly require certain information to be included in an EIR, the reviewing court must independently review the EIR to determine whether the omitted information is necessary to informed decision-making and informed public participation. (See AB, pp. 13, 19-20.) In so urging, Appellants improperly impute the standard used by the courts to determine *prejudice* under CEQA to the question of whether the agency abused its discretion in the first instance. If the Court were to accept Appellants' position, it would dramatically undermine regularity and predictability in the CEQA review process. Appellants' position is also contrary to the plain language of CEQA and the holdings of this Court.

Under CEQA, judicial review of an agency's action extends only to whether there was a prejudicial abuse of discretion. (§§ 21168.5, 21168.[5]) As this Court recognized in *Neighbors for Smart Rail v. Exposition Metro*

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[5] The "standard of review is essentially the same under either section" 21168 or 21168.5. (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 392, fn. 5.)

Line Construction Authority (2013) 57 Cal.4th 439, 463 (*Neighbors*), CEQA sets forth a two-part inquiry for determining whether there was a prejudicial abuse of discretion.[6] (See *ibid.*; see also §§ 21168.5, 21005.) First, the reviewing court asks whether the agency abused its discretion under CEQA, *at all*. (§ 21168.5.) Under section 21168.5, an "[a]buse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."[7] If the reviewing court is satisfied that the agency has *not* abused its discretion in that the agency followed CEQA's procedural requirements and supported its decisions with substantial evidence, the court's inquiry ends there; the agency has not abused its discretion, let alone prejudicially abused it. (§ 21168.5.)

If, on the other hand, the reviewing court determines that the agency *has* abused its discretion by failing to follow CEQA's procedures or failing to support its decisions with substantial evidence, then – and only then – does the court ask whether that abuse of discretion is *prejudicial*. (§§ 21168.5, 21005; *Neighbors, supra*, 57 Cal.4th at p. 463 [having determined that the respondent agency abused its discretion by applying the wrong

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[6] In his concurring and dissenting opinion in *Neighbors*, Justice Liu did not appear to disagree with the Court's *statement of the law* governing prejudice, though he clearly disagreed with his colleagues with respect to the *application* of prejudice principles under the facts of that case. (57 Cal.4th at pp. 478–481.)

[7] Section 21168.5 does not define "*prejudicial* abuse of discretion." A separate provision, section 21005, defines prejudice.

baseline, the Court, under a separate heading, considered whether such abuse of discretion was prejudicial].) "[T]here is no presumption that error is prejudicial." (§ 21005, subd. (b).) Rather, an abuse of discretion may be prejudicial if "noncompliance with the information disclosure provisions of [CEQA] ... precludes relevant information from being presented to the public agency." (§ 21005, subd. (a).)[8]

This standard for prejudice has been characterized by numerous courts as follows: "'A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Neighbors, supra*, 57 Cal.4th at p. 463, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 (*Kings County*); see also *Association for Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 [noting that "*[n]umerous* authorities have followed and applied this *prejudice* standard" (italics added) and listing several cases]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 926–927 (*Rialto*); *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046; *Mount Shasta Bioregional Ecology Center v.*

[8] In this respect, CEQA is similar to other statutory schemes in which the Legislature has declared what types of errors rise to the level of being prejudicial, and what types of errors are harmless. (See, e.g., Gov. Code, §§ 65010 [Planning and Zoning Law], 56107, subd. (a) [Cortese-Knox-Hertzberg Local Government Reorganization Act].)

County of Siskiyou (2012) 210 Cal.App.4th 184, 203; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1469.)

Appellants would have the Court borrow this prejudice standard and independently apply it to *all* claims that an EIR lacks sufficient information on required topics. (See AB, pp. 13, 19-20.) The problems with Appellants' approach are obvious and manifold.

First, under Appellants' view, CEQA would require that an EIR include all information deemed "relevant" by a reviewing court, regardless of whether CEQA explicitly requires that information or whether substantial evidence supports the breadth of the EIR's existing analysis on required topics. Such a result is inconsistent with CEQA's framework and this Court's precedents, which establish that lead agencies, not project opponents or the courts, determine the content of EIRs. As this Court has cautioned, "[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 … might be helpful does not make it necessary." (*Laurel Heights I*, *supra*, at p. 415; see also Guidelines, § 15204, subd. (a) ["CEQA does not require a lead agency to conduct every test … recommended or demanded by commentors"].)

Second, Appellants' proposed standard of review would introduce needless complexity and uncertainty into the environmental review process. For one thing, the ease by which project opponents can allege that

information is "relevant" or "necessary for informed decision-making" – and therefore, in Appellants' view, required by law – would allow for legal challenges any time project opponents dream up additional analyses that could be included in an EIR on a required subject. The mere threat of such challenges may prompt lead agencies, at great expense in treasure and time, to pack their EIRs with every study and piece of information suggested during the environmental review process, regardless of whether that information is expressly required by CEQA, or whether substantial evidence supports the agency's decision to reject the suggestion for additional analysis. Agencies and applicants would also be unable to predict whether their EIRs contain sufficient relevant information until a reviewing court independently decides whether they do or do not. These results would frustrate the declared state policy requiring that the review process be conducted efficiently and expeditiously to conserve financial and governmental resources so that those resources may be better applied toward the mitigation of actual significant impacts on the environment. (§ 21003, subd. (f); see also Guidelines, §§ 15003, subd. (j), 15003, subd. (g).)

Third, Appellants' proposed standard of review would interfere with constitutional separation of powers principles. Agencies charged with administering CEQA are the final arbiters of what information belongs in an EIR, provided that such EIRs comply with CEQA's procedural requirements and are supported by substantial evidence. (See *Laurel*

Heights I, *supra*, 47 Cal.3d at p. 393; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572 (*WSPA*).) The courts are only a *check* on the agencies' legislatively delegated discretion; courts must not exercise de facto legislative power through the guise of judicial review.

Finally, Appellants' proposed standard of review is contrary to the plain language of the relevant statutes. As discussed above, CEQA's actual standard of review is clear: an abuse of discretion is established only when the agency has failed to proceed in the manner required by law or lacks substantial evidentiary support for its decisions. (§ 21168.5.) It is only when an agency has abused its discretion that the question of prejudice comes into play. (§ 21005; *Neighbors*, *supra*, 57 Cal.4th at p. 463.) If the courts were to jump directly to the prejudice question as part of their review of the merits of substantive attacks on EIRs, such an approach would negate the statutory principle that an abuse of discretion is only established if the agency has not proceeded in the manner required by law or supported its decisions with substantial evidence. (§ 21168.5.)

The Court should therefore reject Appellants' attempt to conflate the standard of review under section 21168.5 with the standard for prejudice under section 21005. Instead, as demonstrated in Real Party's Opening Brief, when a challenger claims that an EIR lacks sufficient information on a required topic, the burden should be on the petitioner to demonstrate two things: first, that, viewing the record as a whole, the evidence supporting

the agency's determinations and actions – including the agency's choices regarding analytical methodologies – is not "substantial"; and second, if the evidence is not substantial, that any additional information the challenger insists should have been included was necessary for informed decision-making and public participation. Absent *both* of these showings, a court should refuse to hold that the agency prejudicially abused its discretion with respect to the EIR's discussion of a required topic. (OB, pp. 16–17; §§ 21168, 21168.5, 21005); *Neighbors, supra*, 57 Cal.4th at p. 463; see also *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 709–710; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 534–535.)

2. Whether an agency prejudicially abused its discretion under CEQA is a question of law; but this does not mean that a court applies its independent judgment to an agency's factual decisions.

In a novel, but confusing argument, Appellants urge that a reviewing court must apply its independent judgment to all claims regarding the sufficiency of EIRs' impact analyses, regardless of whether those claims raise predominantly procedural issues or predominantly factual issues, because the question of whether an agency has abused its discretion under CEQA presents a legal issue. (AB, pp. 12–13.) This argument rests on a fundamental misconception about administrative law.