[See fee exemption, Gov. Code § 6103]

Case No. S219783

IN THE SUPREME COURT OF CALIFORNIA

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

Petitioners and Appellants,

v.

COUNTY OF FRESNO

Defendant and Respondent;

FRIANT RANCH, L.P.

Real Party in Interest and Respondent.

APPLICATION OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION AND ASSOCIATION OF CALIFORNIA WATER AGENCIES FOR LEAVE TO FILE AMICUS BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

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

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

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[See fee exemption, Gov. Code § 6103]

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APPLICATION TO FILE

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("League"), the California State Association of Counties ("CSAC"), the California Special Districts Association ("CSDA") and the Association of California Water Agencies ("ACWA"), collectively "Amici," respectfully request leave to file the accompanying amicus brief in this proceeding, in support of Real Party in Interest/Respondent, the Friant Ranch, L.P.

This brief was drafted by Philip Seymour of The Sohagi Law Group, PLC on behalf the Amici, in consultation with Jennifer Henning, general counsel for CSAC; Koreen Kelleher, assistant general counsel for the League; David McMurchie, counsel for CSDA; Daniel S. Hentschke, chair of ACWA's Legal Affairs Committee; and Robert C. Horton, senior deputy general counsel for the The Metropolitan Water District of Southern California. No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund its preparation.

STATEMENT OF INTEREST AS AMICI CURIAE

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

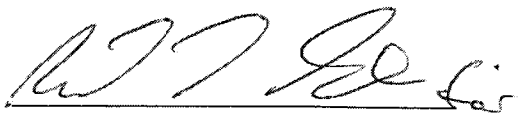
CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSDA is a California non-profit corporation consisting of in excess of 1,000 special district members throughout California. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA monitors litigation of concern to its members and identifies those cases that are of statewide significance. CSDA has identified this case as being of such significance as many of its members frequently serve as CEQA lead agencies.

ACWA is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 450 public water agencies, including cities, municipal water districts, county water districts, irrigation districts, municipal utility districts, public utility districts, California water districts, and special act districts. ACWA's member agencies frequently are CEQA lead agencies for water facilities and programs for the supply, production, conservation, treatment, storage, transportation, and distribution of water throughout

California. ACWA's Legal Affairs Committee, comprised of attorneys representing ACWA members from each of ACWA's 10 regional divisions throughout the State, monitors litigation and has determined that this case involves significant issues affecting ACWA's member agencies.

Amici's members have a strong interest in a clear and uniform standard of review in CEQA litigation, to ensure that reviewing courts properly defer to the expertise that lead agencies have in preparing CEQA documents and evaluating the environmental impacts of projects.

DATE: April 2, 2015 By: 

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I. INTRODUCTION AND ISSUES ADDRESSED

Amici curiae League of California Cities ("League"), California State Association of Counties ("CSAC"), California Special Districts Association ("CSDA") and Association of California Water Agencies ("ACWA"), collectively, "Amici," file this amicus brief in support of real party in interest Friant Ranch, L.P. Amici represent the vast majority of cities, counties, special districts and public water agencies throughout the State of California. This brief addresses one issue presented for review:

> 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 the California Environmental Quality Act ("CEQA"), or is this a question of law subject to independent judicial review?

(See Friant Ranch Opening Brief, p. 1, ¶ 1; Answer Brief of Sierra Club et al ("SC Brief"), p. 7, Issue No. 1.)

As the local public agencies which are collectively responsible for preparing and certifying the great majority of EIRs produced in California every year, Amici are vitally interested in and will be directly impacted by the answer to this question. As discussed in this brief, the process of preparing an EIR under the CEQA requires public agencies to undertake a myriad of subordinate decisions about the scope, analytical methods used and ultimate content of the EIR. The CEQA Guidelines promulgated by the State Resources Agency (Pub. Resources Code § 21083) and case law establish general principles and identify various factors which must be considered in determining the foci of discussion, nature of the information required, and the appropriate level of detail in an EIR. CEQA and the Guidelines, however, clearly require public agencies to exercise sound judgment and discretion in balancing the relevant factors and applying them to concrete factual situations. A majority of courts have recognized that

issues concerning the scope of analysis, methods used and the amount of information presented in an EIR must be reviewed under the substantial evidence test. (See, e.g., *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) These courts are correctly applying principles established by this Court in a long series of decisions governing the standard of review in CEQA cases.

Determining the appropriate scope of analysis and level of detail in an EIR cannot be equated to the mere following of correct procedures ordained by law. In every case where inadequacy is claimed, the threshold question must be whether the lead agency was required to assess and weigh facts, or apply technical expertise or judgment, in determining what information to include in the EIR. If so, the issue for review is whether the agency's determination is supported by substantial evidence. A respondent may be found culpable of "failing to proceed in the manner required by law" only in those relatively rare situations where the EIR on its face has completely failed to address a required topic, where the discussion of a required topic is hopelessly conclusory and devoid of substantive information, or where the lead agency has omitted or misrepresented significant information based on a mistake of law.

II. THE SUFFICIENCY OF AN EIR CANNOT BE DETERMINED AS A MATTER OF LAW OR PROCEDURE

A. *Vineyard Area Citizens* and the Dual Standards for Judicial Review

Although the standard for adjudicating claims concerning the adequacy of an EIR have always been a matter of debate, most current

litigation on the subject is reflected in differing interpretations of this Court's decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 ("*Vineyard*"). There, the Court held that "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 predominately one of improper procedure or a dispute over the facts." As an example of a predominately procedural issue, the Court cited *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236, in which the respondent failed to obtain certain required information from the applicant and to include that information in its environmental analysis. As an example of a predominately factual issue, reviewable under the substantial evidence test, the Court cited a typical dispute over "whether adverse effects have been mitigated or could be better mitigated." (*Vineyard,* 40 Cal.4th 412, 435, citing *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393.) Later in the *Vineyard* decision, the Court found that the EIR's failure to expressly incorporate certain critical information by reference, or tier from an earlier EIR containing that information, was a failure to proceed in the manner required by law. (*Vineyard, supra,* 40 Cal.4th 412, 444, 447.) The Court also concluded that the EIR's discussion of long term water supplies failed both procedurally and under the substantial evidence test because the discussion was based on inconsistent statements of fact and was essentially incoherent, leaving readers to rely on "inference and speculation" as to how water supplies and demands would be balanced. (*Id.* at 444-445, 447.)

In the wake of *Vineyard*, the dichotomy between "predominately procedural" and "predominantly factual" issues has been recognized by all

courts and most CEQA litigants. How the line between these two types of issues is drawn on a case-by-cases basis, however, remains a matter of intense debate.

B. Practical Consequences

The line-drawing prescribed by *Vineyard* has tremendous practical consequences for public agencies and CEQA litigants generally.

Predictably, CEQA petitioners now almost universally contend that any CEQA issue that can be framed as a question of inadequate information – in other words, most CEQA issues – implicates a "failure to proceed in the manner required by law." From this perspective, substantial evidence questions are limited to those which implicate purely factual issues, such as the accuracy of conclusions formally stated in an EIR, or found in the respondent's administrative findings. Even then, it can often be contended that the findings or conclusions are defective because the agency failed to consider relevant information or conduct a satisfactory analysis. The reason for this preference is obvious. Because procedural issues are reviewed under an independent judgment standard, petitioners have a much better chance of success if the issue is framed as procedural. Unlike substantial evidence questions, upon which the courts are bound to defer to agency judgment, all a petitioner must do to prevail on a procedural issue is convince the court that it "has the better argument." (Compare *Laurel Heights*, *supra*, 47 Cal.3d 376, 393.)

For exactly the same reasons, respondents and real parties prefer to see most CEQA issues addressed as substantial evidence questions, in which due deference is owed to agency judgment and discretion.

The practical implications of this question are enormous. Quite simply, if "sufficiency" or "adequacy" of an EIR is judged using an

independent judgment standard, respondents and real parties can seldom be certain that an EIR will be found legally adequate by a Court, particularly where novel or controversial issues are involved or existing scientific understandings or available analytical methodologies are in a state of flux.

One inevitable consequence of this legal uncertainty is increased costs and delays as lead agencies attempt to anticipate all manner of technical arguments and potential outcomes, and "bulletproof" the EIR by adding layers of information that may be merely cumulative, of marginal value, or even completely superfluous, merely to forestall potential legal claims. This practice greatly increases the time to prepare and costs of an EIR, often to produce little practical benefit and at the expense of readability and usefulness. While various provisions of CEQA and the Guidelines counsel that the EIR process should be focused, efficient and analytical rather than "encyclopedic," the size and complexity of EIRs has grown consistently over the years in response to litigation fears and ever changing legal arguments. (Pub. Resources Code § 21003(b), (f); Guidelines § 15006(n)-(u).) Guidelines § 15141 suggests that draft EIRs should "normally be less than 150 pages," or less than 300 pages for projects of "unusual scope or complexity." These suggestions sound distinctly quaint in an era when EIRs for even modest projects may run hundreds of pages, and EIRs for major or controversial projects to thousands of pages.

While most public agencies and more sophisticated project applicants have adjusted to the financial burdens and delay factors imposed by CEQA, there is still no easy cure for the problem of uncertainty. As the length and complexity of EIRs have grown, so also have the expectations placed on them by members of the public and many courts. Although one

may doubt the wisdom of this approach, under current law an EIR cannot be merely 95% or even 99% adequate. If any facet of the EIR, even one that seems minor in relation to the whole, is found legally inadequate, certification of the EIR may be overturned and project approvals rescinded. (See, e.g., *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 617 [failure to respond to single public comment invalidated EIR].) This "fatal flaw" effect is, in turn, a strong incentive for litigation by project opponents, since it means the project may effectively be brought down, or at least greatly delayed, by the equivalent of tripping over a shoe lace. The chance of success on such issues increases greatly where courts apply an independent judgment standard.

What critics of an EIR generally fail to acknowledge is that preparation of an EIR requires, at every step, a myriad of decisions and judgment calls affecting the ultimate content of the EIR. To give a non-exhaustive list, lead agency staff and consultants must consider and determine:

- what criteria will be used to evaluate potentially significant impacts;
- what relevant information is available from existing documentary or other sources, and what must be obtained through additional investigative efforts;
- what modeling tools or analytical methods are available, and what are their relative merits and demerits;
- the degree to which environmental effects can be assessed with reasonable certainty, and whether some potential impacts are too uncertain or speculative to permit evaluation;

- what mitigation measures and alternatives are technically, economically and otherwise feasible, and how effective these mitigation measures or alternatives would be in reducing environmental effects;
- what level of detail is appropriate given the nature of the project, number and severity of impacts and amount of relevant information available, and;
- when anecdotal information or inexpert public comments received during the process warrant further analysis or investigation, and when they do not.

As discussed below, the CEQA Guidelines establish certain general (and sometimes conflicting) principles to guide these determinations, but they do not and cannot provide specific answers to the day-to-day questions that arise in the course of preparing EIRs for the innumerable different types of projects in the almost infinite variety of factual circumstances faced by EIR preparers. (See Section III.A.) Every one of these decisions, however, may affect not only the ultimate conclusions of the EIR, but also the type and amount of information in the EIR, and what is left out as well as what is left in. If an independent judgment standard is applied by courts reviewing the sufficiency of an EIR, every one of these decisions may also be subject to second guessing. This was not intended by the Legislature. To the contrary, CEQA, the Guidelines and the majority of court cases recognize that CEQA vests lead agencies with broad discretion to determine precisely how they will meet CEQA's requirements in each particular circumstance.

The Guidelines also implicitly allow lead agencies to consider time, cost and efficiency factors in determining what degree of analysis is

"reasonably feasible" in each EIR. (Guidelines § 15151.) Since they are several steps removed from the process of preparing an EIR, however, courts are not always well positioned to understand the actual complexities and difficulties involved. In practice, some courts are sensitive to these considerations, but others are not. (Compare *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.3d 1341, 1364 to *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74 ["expediency should play no part in an agency's efforts to comply with CEQA."].)

As also discussed below, certainty and predictability are legitimate and important public concerns in the CEQA context. (See Section IV.G.) The degree to which these exist, however, is critically affected by the standards courts apply in adjudicating claims concerning the adequacy of EIRs.

C. This Court's Post-*Vineyard* Decisions are Helpful But Do Not Establish Many Clear Sign-Posts for Distinguishing Predominately Procedural and Predominately Factual Issues

This Court's decisions since *Vineyard* have addressed a wide array of significant CEQA issues, but have not elaborated greatly on the standard of review issue presented in this case. Nevertheless, the cases support broad application of the substantial evidence test to review of all issues that implicate the exercise of lead agency judgment or discretion concerning the content of an EIR.

In *Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936 ("*Ebbetts Pass*") the Court found that "questions of what analytical procedure is required under the Forest