Supreme Court Case No.: S219783

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SIERRA CLUB,
Plaintiff/Appellant,

vs.

COUNTY OF FRESNO,
Defendant/Respondent

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

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT
CASE NO. F066798

SUPERIOR COURT OF THE COUNTY OF FRESNO
CASE NOS. 11CECG00726, 11CECG00706 AND 11CECG00709
HON. ROSENDO PENA, JR., JUDGE

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF FRIANT RANCH, L.P. ON BEHALF OF CALIFORNIA ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER; PROPOSED AMICUS CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF FRIANT RANCH, L.P.

The California Association of Environmental Professionals ("AEP") and the California Chapter of the American Planning Association ("APA") request leave to file an amicus curiae brief in support of Real Party in Interest and Respondent Friant Ranch, L.P. As explained below, APA and AEP represent urban planning and environmental science professionals that frequently prepare California Environmental Quality Act ("CEQA") documents, review them, and recommend their approval by decisionmakers, and whose expertise has been traditionally recognized by the courts as warranting deference via the substantial evidence standard. As further explained in the Proposed Amicus Brief, AEP and APA believe that the opinion of the Court of Appeal below undermines this deference and threatens to make the CEQA process more burdensome and unpredictable by allowing independent judicial review of factual determinations.

No counsel for any party authored the Proposed Amicus Brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

State Cases

TABLE OF AUTHORITIES
(continued)

Page

State Statutes

PROPOSED AMICUS CURIAE BRIEF

I. INTRODUCTION

The California Association of Environmental Professionals ("AEP") and the California Chapter of the American Planning Association ("APA") respectfully submit this Amicus Curiae Brief to the Court in order to bring to its attention the widespread, undesirable consequences that will result from the Court of Appeal's holdings in *Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704 (the "Opinion"). The Opinion's holdings, if endorsed by the Court, would represent a rolling back of the deference traditionally accorded to public agencies when making factual determinations and would negate the benefit of public agencies commissioning and relying upon the work of technical experts. Such an arrangement, in addition to conflicting with well-established California Environmental Quality Act ("CEQA") case law, would have negative consequences with regard to informed decisionmaking, rendering the holding of the Court of Appeal bad public policy. For these reasons, AEP and APA request that the Court overrule the Court of Appeal's Opinion as it pertains to the standard of review and its application to the air quality and health effects analysis of the Environmental Impact Report ("EIR") at issue.

II. STATEMENT OF INTEREST

The membership of the American Planning Association California Chapter consists of more than 5,000 persons, including professional planners working in public agencies and private firms, citizen planners who serve on planning

commissions and other elected and appointed officials who work to build public and political support for planning decisions that improve the quality of life for all Californians. The mission of APA's California chapter (hereinafter, the "APA" or the "Chapter"), the largest of the National American Planning Association's 47 chapters, is to foster better planning by providing vision and leadership in addressing important planning issues. To that end, the Chapter's Amicus Curiae Committee, made up of experienced planners and land use attorneys, monitors litigation of concern to California planners and participates in cases of statewide or nationwide significance that may have implications for planning practice in California.

AEP is a non-profit organization representing over 1,600 of California's environmental professionals. AEP members are involved in every stage of the evaluation, analysis, assessment, and litigation of projects subject to CEQA. For over thirty years, AEP has dedicated itself to improving the technical expertise and professional qualifications of its membership, as well as educating the public on the value of California's laws protecting the environment, managing California's natural resources, and promoting responsible land use and urban growth. AEP's membership is broad and diverse, incorporating representatives from public agencies, the private sector and non-governmental organizations. They include biologists, air quality and sound technicians, archaeologists and historians, land use planners, transportation engineers, and environmental attorneys, among others.

AEP and APA members regularly provide expert technical services and analysis in compliance with CEQA's requirements. In addition, APA members working as public agency planners often review CEQA documents and advise city or county decisionmakers on whether those documents comply with CEQA's requirements and should therefore be adopted or certified. AEP and APA's CEQA practitioners therefore have an interest in the preservation of rules that are well-established by case law and delineate the scope of judicial review of CEQA documents, as those rules enshrine the principle that lead agencies and their environmental consultants' technical judgment and expertise are not to be second-guessed by the courts.

III. STATEMENT OF FACTS

AEP and APA hereby adopt and incorporate by reference the Statement of Facts contained in Friant Ranch, L.P.'s Opening Brief as if fully set forth herein.

IV. ARGUMENT

AEP and APA, via their membership, bring a unique perspective to this case. Their members include professionals highly trained in technical subjects, such as the environmental sciences, engineering, and urban planning. Their members use this knowledge to prepare technical reports and CEQA documents on which lead and responsible agencies rely, in order to comply with that statute. AEP and APA's members are charged with preparing and reviewing objective documents that are supported by science and facts, and thus have no interest in whether a particular project is approved or disapproved. Rather, AEP and APA's

members are responsible for creating informative documents that are accurate and further CEQA's goals of public participation, disclosure, and informed decisionmaking.

As the authors of CEQA documents, AEP and APA members are on the front lines with regard to CEQA analysis and compliance. They have a keen understanding of the CEQA process as it operates in the real world, as well as the technical limitations on environmental analyses, beyond which results and conclusions can become speculative and of questionable value to the public and decisionmakers. This is based on the experience of participating in dozens, if not hundreds, of projects involving negative declarations or environmental impact reports ("EIR") during their careers, including hotly contested projects where (like this one) opponents are determined to object to every aspect of an EIR.

Given this experience, AEP and APA have grave concerns regarding both the Opinion's formal legal effect, which would significantly narrow the scope of the substantial evidence standard, as well as the practical consequences for its members, whose scientific and expert work could be subjected to second-guessing by judges. In addition, CEQA practitioners and lead agencies would be made to conduct unneeded or even infeasible, speculative, and ultimately unsound analyses by well-intentioned but unqualified courts. These concerns, which are discussed in further detail below, demonstrate that the Court of Appeal's Opinion should be reversed in order to preserve the existing structure of CEQA, retain certainty about

CEQA's requirements, and prevent future CEQA processes from taking a detour into analytic dead-ends mandated by the courts.

A. The Court of Appeal's Formulation of the Standard of Review Would Frustrate the Fundamental Public Policy of Keeping Factual Determinations in the Hands of Agencies and Their Experts.

The portion of the Opinion that AEP and APA take issue with the most, and believe presents the greatest threat to the continued operation of CEQA in an organized, well thought-out manner consistent with legislative policies and intent, deals with the appropriate standard of review. As amply noted in the briefing, the prejudicial abuse of discretion standard in CEQA cases is itself composed of two distinct standards. An abuse of discretion may be found if an agency has not proceeded in the manner required by law or if its determinations are not supported by substantial evidence. (Pub. Res. Code §§ 21168.5; 21168.) This Court explained that the "failure to proceed in the manner required by law" standard applies to instances where either the procedural requirements of CEQA have not been met, or there has been a wholesale failure to include information required by CEQA (for instance, an entire significant impact or analysis is omitted). (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) Other than the latter scenario involving the wholesale omission of any information on a topic, all issues dealing with factual determinations are reviewed under the "substantial evidence" standard. (*Ibid.*)

Application of the substantial evidence standard when reviewing lead agency factual determinations is important for public policy reasons. Separation of powers considerations dictate that "excessive judicial interference with [agency actions] would conflict with the well-established principle that the legislative branch is entitled to deference from the courts...." (*Western States Petroleum Assn. v. Superior Court* ("*Western States*") (1995) 9 Cal.4th 559, 572.) Respect for the decisionmaking authority of legislative bodies, such as the County of Fresno Board of Supervisors in the instant case, extends to questions of whether decisions were supported by scientific evidence. "The propriety or impropriety of a particular legislative decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters are not appropriate for the judiciary." (*Ibid.*; *Citizens of Goleta Valley v. Bd. of Sups.* (1990) 52 Cal.3d 553, 564 [courts may not substitute their judgment for that of public agencies].)

The substantial evidence standard incorporates the uncontested principle that lead agencies are best equipped to address often complex factual issues and that the courts are oftentimes ill-suited to do so. For instance, in *Western States* this Court noted that agencies that have been delegated decisionmaking authority become experts in the matters with which they deal. (*Western States*, *supra*, 9 Cal.4th at 572; compare *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393 [the courts do not have the resources or expertise to reweigh evidence].) These agencies have professional

planners and engineers on staff and on contract—professionals whose education and careers are dedicated to their craft. (See *Greenbaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413 [city planning departments are experts, as "this type of analysis is their business."].)

Furthermore, this principle of deference to agency expertise has been fleshed out by numerous decisions applying the substantial evidence standard. For instance, when the substantial evidence standard applies, an agency is entitled to agree with the reasonable conclusions of its own experts, regardless of disagreements by others. (*Laurel Heights I*, *supra*, 47 Cal.3d at 409; *Save Cuyama Valley v. Cnty. of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1069; *Greenbaum v. City of Los Angeles*, *supra*, 153 Cal.App.3d at 413.) Lead agencies are also entitled to adopt the methodologies and scope of analysis recommended by its experts, to the exclusion of alternative approaches. (*Eureka Citizens for Responsible Govt. v. City of Eureka* (2007) 147 Cal.App.4th 357, 372-73 [substantial evidence existed notwithstanding disagreement over expert's choice of methodology]; *City of Fremont v. San Francisco Bay Area Rapid Transit Dist.* (1995) 34 Cal.App.4th 1780, 1787 [an analysis need not be exhaustive or include all possible information on an issue].) Lastly, a lead agency is not required to conduct every study suggested as long as the studies prepared by its own experts, as well as the justification for not preparing more studies, are supported by substantial evidence. (*Society for Cal. Archaeology v. Cnty. of Butte* (1977) 65

Cal.App.3d 832, 838; *National Parks & Conserv. Assn. v. Cnty. of Riverside* (1999) 71 Cal.App.4th 1341, 1361.)

In short, the case law on the substantial evidence standard and its preferential treatment of the methodologies, analysis, judgment, and conclusions of both lead agencies and their experts make it clear that the courts view keeping factual determinations in the hands of those agencies and experts as good public policy, such as AEP and APA's members, as opposed to allowing non-expert courts to independently review the evidence and judge its quality.

With this background, AEP and APA object to the Court of Appeal's precarious application of the incorrect standard of review in the Opinion. Rather than apply the appropriate substantial evidence standard to the disputes over the air quality and health effects of the project, the Court of Appeal applied the "failure to proceed in the manner required by law" standard.[1] There, it noted that while some cases involve a clear failure to discuss a topic that is required to be discussed, a second group of cases involve a determination of whether a CEQA document's discussion is sufficient or insufficient with regard to CEQA's information disclosure requirement, and that this presents a question of law

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[1]Indeed, while only the air quality/health effects and mitigation measure issues are presently before the Court, it is noteworthy that the Court of Appeal did not apply the substantial evidence standard to the issue of the project's wastewater impacts, as well. In short, the Court of Appeal treated all of the CEQA issues before it as issues arising under the "failure to proceed in the manner required by law" standard, and thus none of the portions of the EIR at issue were accorded any deference by the Court of Appeal, despite much of the contested issues being factual in nature.

reviewed *de novo* by the courts. (*Sierra Club*, *supra*, 226 Cal.App.4th at 725-726.) Without precedent, the Court of Appeal expanded *de novo* review to the latter group of cases, and in so doing undermines long standing legal precedent.

This approach is clearly contrary to existing case law regarding the nature of disputes that are to be judged according to each of the two distinct and separate prongs of the "prejudicial abuse of discretion" standard. This Court holds that the "failure to proceed" standard applies only to situations in which (1) improper procedure was alleged, or (2) where an agency wholly failed to include required information in its environmental document. (See *Vineyard*, *supra*, 40 Cal.4th at 435; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1236-37 [agency failed to collect any information regarding on-site endangered species]; *Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1370-71 [involving total absence of health risk assessment]; *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus* (1994) 27 Cal.App.4th 713, 729-30 [EIR lacked any analysis of project's wastewater treatment plant].) The Court of Appeal's approach erroneously reads into the "failure to proceed" standard the ability to conclude that failing to include *enough or different* information precludes informed decisionmaking. Contrary to the above cited authority, the Court of Appeal's decision suggests that the barometer for determining whether there is enough information in the record is the reviewing court's subjective judgment. The Court of Appeal also failed to explain why it abandoned the substantial evidence standard when reviewing these factual issues.

The likely consequence of the Opinion is that courts would have authority to substitute their independent judgment for the judgment of agencies and their experts on factual, scientific, and technical matters. Application of the "failure to proceed" standard under the reasoning that a failure to conduct additional analysis or otherwise agree with the factual assertions and preferences of parties with alternate opinions overturns countless precedent.. In this way, the substantial evidence standard would be substantially narrowed, depending upon the subjective opinion of a reviewing court. APA and AEP are concerned that in allowing such an erosion of the substantial evidence standard of review, the important public policy underlying the substantial evidence test would be lost. These foundational public policies include, (1) having the expertise and judgments of experts that is found to be reliable by the agency decisionmakers stand undisturbed by courts that lack technical expertise, (2) safeguarding a CEQA process that promotes certainty for approving agencies and the public, and (3) ensuring that the CEQA process does not become a means for oppression via project opponents endlessly suggesting, and courts requiring, additional impacts and studies for inclusion in an EIR. The Court of Appeal's holding therefore would have severe negative public policy implications.

B. Application of the Court of Appeal's Incorrect Standard of Review to the Air Quality/Health Effects Issue Demonstrates the Potential for Bad Outcomes When Expert Judgment is not Given Deference.

The Court of Appeal's application of the incorrect standard of review has the potential to cause much mischief with regard to the substitution of courts' independent judgments, the imposition of new analytical requirements (whether technically feasible or not), and the general uncertainty that comes from agencies not being able to tell whether their documents are compliant with CEQA until a court tells them so (most likely, years in the future). While independent review of factual determinations may have negative effects with regard to any of the issues commonly addressed in EIRs, in the Opinion the Court of Appeal applied its independent judgment to the issue of air quality impacts, and in particular, the "right" technical approaches for correlating air pollutant emissions with public health effects. This new, judicially-required technical methodology highlights the problems associated with letting non-expert judges resolve technical issues, and why the substantial evidence standard exists and is good policy.

None of the parties dispute that there is a relationship between air pollution and health effects. What is in dispute is, under CEQA's statute and Guidelines, how specifically the EIR was required to articulate and analyze that relationship in the specific context of the project's air pollutant emissions. The Court of Appeal stated that "there must be some analysis of the correlation between the Project's emissions and human health impacts." It then navigated to uncharted waters by insisting that the correlation analysis should have been more than a description of how each pollutant affects human health; rather, it should have correlated the

magnitude of the air quality impacts to health effect outcomes. (*Sierra Club*, *supra*, 226 Cal.App.4th at 746.)

This requirement is scientifically problematic and impractical for CEQA analysts to implement. Under the Clean Air Act, the Environmental Protection Agency ("EPA") has established health-based standards for a number of "criteria pollutants." These health-based standards are called the National Ambient Air Quality Standards ("NAAQS"),[2] and they are expressed in terms of a maximum pollutant *concentration* in the atmosphere, i.e., a given mass of the pollutant within a given volume, whereby public health can be assured within a reasonable margin.

Thus, if the Court of Appeal wishes an EIR to specifically correlate, in isolation, the magnitude of a project's air emissions with the magnitude of its health effects, the EIR will need to compare pre-project criteria pollutant concentrations with post-project concentrations. There are a number of obstacles to preparing such a fine-tuned analysis. In evaluating potential health effects from criteria pollutants such as NOx, PM_{10}, or $PM_{2.5}$, a project can cause increased concentrations both near the source of the emissions (i.e., localized concentrations are higher because pollutants have not yet dispersed into the larger air basin) and regionally (i.e., after pollutants disperse from their source, they still contribute, to a miniscule extent, to the overall background concentrations existing within the

[2]A parallel set of ambient air quality standards exist under California law, known as the "CAAQS."

regional air basin). The difficulties in preparing the type of correlation analysis the Court of Appeal required arise because it was not possible to take the data that was known (the rate of emissions) and translate that into either localized or regional concentration data.

First, the lead agency explained that a localized impact analysis could not be conducted at the present time because an assessment of localized concentrations required information relating to the specific locations of sources, and that level of detail was not present within the update to the Friant Community Plan or the new Friant Ranch Specific Plan approved at this stage of the project. (Opening Brief, pp. 42-43, citing AR 4602, 4553.) In short, the Project was simply too early in the planning process to allow localized concentrations to be calculated.

Second, with regard to regional concentrations, the issue on which the Opinion focused, the Court of Appeal failed to understand that attempting to identify a change in background pollutant concentrations that can be attributed to a single project, even one as large as the entire Friant Ranch Specific Plan, is a theoretical exercise. The volumes of air contained in a regional air basin are immense, and even the largest project's emissions are the proverbial "drop in the bucket." The situation is further complicated by the fact that background concentrations of regional pollutants are not uniform either temporally or geographically throughout an air basin, but are constantly fluctuating based upon meteorology and other environmental factors.

Under these circumstances, an analysis attempting to take "tons per year" regional mass emissions data and directly translate that into precise pollutant concentrations, and hence project-specific health effects, would not be practical or meaningful. If the substantial evidence standard had been applied, the lead agency would be entitled to rely upon its experts in describing the general health effects and the reasoned decision as to why they are refraining from preparing such an ineffective, impossible, and ultimately questionable analysis.[3] (*Society for Cal. Archaeology*, *supra*, . 65 Cal.App.3d at 828.) However, because the Court of Appeal exercised its independent judgment, none of this was taken into consideration. If this Court affirms the Opinion, lead agencies and their experts, including APA and AEP members, will in the future feel compelled to engage in speculative and misleading analyses in order to identify the theoretical, yet ultimately meaningless, increase in health effects caused by a project's regional emissions. Such a state of affairs would do nothing to foster public disclosure and informed decisionmaking, but rather would just perpetuate bad science and waste agency resources. In the extreme, such misleading analysis could improperly

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[3]The Administrative Record on this issue is somewhat clouded by the fact that, as quoted in the Opening Brief, the comment from the City of Fresno that the Court of Appeal cited to as satisfying exhaustion requirements as to the regional emissions/health effects actually deals with health effects from *localized* concentrations of toxic pollutants. (Opening, pp. 42-43, citing to AR 4602, 4553.) This is an entirely separate analysis. The comment was not asking for the specific correlation of the magnitude of regional project criteria pollutant emissions with health effects. Had the comment been more specific in this regard, much more detail as to the infeasibility and lack of value of that analysis would likely have been provided in the EIR or the Administrative Record.

influence decisionmakers' conclusions regarding a project's environmental consequences.

This demonstrates the bad outcomes that would result when expert judgment is not given deference and instead a court employs its own independent judgment on matters in which it does not have expertise. Because of the potential for future results like this, AEP and APA, on behalf of their members, ask the Court to reaffirm the applicability of the substantial evidence standard and the importance of fostering and protecting the use of experts in the CEQA process as a matter of good public policy.

V. CONCLUSION

For the reasons stated above, AEP and APA respectfully request that the Court find that the Court of Appeal's application of the standard of review pertaining to factual determinations is contrary to existing precedent and public policy, and that CEQA does not require, as a matter of law, a project-specific analysis of the magnitude of health impacts caused by a project's emissions of pollutants.

Dated: May 6, 2015

BEST BEST & KRIEGER LLP

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this AMICUS CURIAE BRIEF contains 3,652 words, according to the word counting function of the word processing program used to prepare this brief.

Dated: April 6, 2015

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I, Azucena Garibay, declare:

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3390 University Avenue, 5th Floor, Riverside, California 92501. On May 6, 2015, I served a copy of the within document(s):

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Executed on May 6, 2015, at Riverside, California.

Azucena Garibay

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