SUPREME COURT COPY

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
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After a 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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT IN SUPPORT OF DEFENDANT AND RESPONDENT, COUNTY OF FRESNO AND REAL PARTY IN INTEREST AND RESPONDENT, FRIANT RANCH, L.P.

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APPLICATION

Pursuant to California Rules of Court 8.520(f)(1), proposed Amicus Curiae San Joaquin Valley Unified Air Pollution Control District hereby requests permission from the Chief Justice to file an amicus brief in support of Defendant and Respondent, County of Fresno, and Defendant and Real Parties in Interest Friant Ranch, L.P. Pursuant to Rule 8.520(f)(5) of the California Rules of Court, the proposed amicus curiae brief is combined with this Application. The brief addresses the following issue certified by this Court for review:

> 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?

As of the date of this filing, the deadline for the final reply brief on the merits was March 5, 2015. Accordingly, under Rule 8.520(f)(2), this application and brief are timely.

1. Background and Interest of San Joaquin Valley Unified Air Pollution Control District

The San Joaquin Valley Unified Air Pollution Control District ("Air District") regulates air quality in the eight counties comprising the San Joaquin Valley ("Central Valley"): Kern, Tulare, Madera, Fresno, Merced, San Joaquin, Stanislaus, and Kings, and is primarily responsible for attaining air quality standards within its jurisdiction. After billions of dollars of investment by Central Valley businesses, pioneering air quality regulations, and consistent efforts by residents, the Central Valley air basin has made historic improvements in air quality.

The Central Valley's geographical, topographical and meteorological features create exceptionally challenging air quality

conditions. For example, it receives air pollution transported from the San Francisco Bay Area and northern Central Valley communities, and the southern portion of the Central Valley includes three mountain ranges (Sierra, Tehachapi, and Coastal) that, under some meteorological conditions, effectively trap air pollution. Central Valley air pollution is only a fraction of what the Bay Area and Los Angeles produce, but these natural conditions result in air quality conditions that are only marginally better than Los Angeles, even though about ten times more pollution is emitted in the Los Angeles region. Bay Area air quality is much better than the Central Valley's, even though the Bay Area produces about six times more pollution. The Central Valley also receives air pollution transported from the Bay Area and northern counties in the Central Valley, including Sacramento, and transboundary anthropogenic ozone from as far away as China.

Notwithstanding these challenges, the Central Valley has reduced emissions at the same or better rate than other areas in California and has achieved unparalleled milestones in protecting public health and the environment:

- In the last decade, the Central Valley became the first air basin classified by the federal government under the Clean Air Act as a "serious nonattainment" area to come into attainment of health-based National Ambient Air Quality Standard ("NAAQS") for coarse particulate matter (PM10), an achievement made even more notable given the Valley's extensive agricultural sector. Unhealthy levels of particulate matter can cause and exacerbate a range of chronic and acute illnesses.
- In 2013, the Central Valley became the first air basin in the country to improve from a federal designation of "extreme" nonattainment to

actually attain (and quality for an attainment designation) of the 1-hour ozone NAAQS; ozone creates "smog" and, like PM10, causes adverse health impacts.

- The Central Valley also is in full attainment of federal standards for lead, nitrogen dioxide, sulfur dioxide, and carbon monoxide.
- The Central Valley continues to make progress toward compliance with its last two attainment standards, with the number of exceedences for the 8-hour ozone NAAQS reduced by 74% (for the 1997 standard) and 38% (for the 2008 standard) since 1991, and for the small particulate matter (PM2.5) NAAQS reduced by 85% (for the 1997 standard) and 61% (for the 2006 standard).

Sustained improvement in Central Valley air quality requires a rigorous and comprehensive regulatory framework that includes prohibitions (e.g., on wood-burning fireplaces in new residences), mandates (e.g., requiring the installation of best available pollution reduction technologies on new and modified equipment and industrial operations), innovations (e.g., fees assessed against residential development to fund pollution reduction actions to "offset" vehicular emissions associated with new residences), incentive programs (e.g., funding replacements of older, more polluting heavy duty trucks and school buses)[1], ongoing planning for continued air quality improvements, and enforcement of Air District permits and regulations.

The Air District is also an expert air quality agency for the eight counties and cities in the San Joaquin Valley. In that capacity, the Air District has developed air quality emission guidelines for use by the Central

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[1] San Joaquin's incentive program has been so successful that through 2012, it has awarded over $ 432 million in incentive funds and has achieved 93,349 tons of lifetime emissions reductions. *See* SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DISTRICT, 2012 PM2.5 PLAN, 6-6 (2012) *available at* http://www.valleyair.org/Workshops/postings/2012/12-20-12PM25/FinalVersion/06%20Chapter%206%20Incentives.pdf.

Valley counties and cities that implement the California Environment Quality Act (CEQA).[2] In its guidance, the Air District has distinguished between toxic air contaminants and criteria air pollutants.[3] Recognizing this distinction, the Air District's CEQA Guidance has adopted distinct thresholds of significance for *criteria* pollutants (i.e., ozone, PM2.5 and their respective precursor pollutants) based upon scientific and factual data which demonstrates the level that can be accommodated on a cumulative basis in the San Joaquin Valley without affecting the attainment of the applicable NAAQS.[4] For *toxic air* pollutants, the District has adopted different thresholds of significance which scientific and factual data demonstrates has the potential to expose sensitive receptors (i.e., children, the elderly) to levels which may result in localized health impacts.[5]

The Air District's CEQA Guidance was followed by the County of Fresno in its environment review of the Friant Ranch project, for which the Air District also served as a commenting agency. The Court of Appeal's holding, however, requiring correlation between the project's criteria

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[2] *See, e.g.*, SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DISTRICT, PLANNING DIVISION, GUIDE FOR ASSESSING AND MITIGATING AIR QUALITY IMPACTS (2015), *available at* http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf ("CEQA Guidance").

[3] Toxic air contaminants, also known as hazardous air pollutants, are those pollutants that are known or suspected to cause cancer or other serious health effects, such as birth defects. There are currently 189 toxic air contaminants regulated by the United States Environmental Protection Agency ("EPA") and the states pursuant to the Clean Air Act. 42 U.S.C. § 7412. Common TACs include benzene, perchloroethylene and asbestos. *Id.* at 7412(b).

In contrast, there are only six (6) criteria air pollutants: ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide and lead. Although criteria air pollutants can also be harmful to human health, they are distinguishable from toxic air contaminants and are regulated separately. For instance, while criteria pollutants are regulated by numerous sections throughout Title I of the Clean Air Act, the regulation of toxic air contaminants occurs solely under section 112 of the Act. Compare 42 U.S.C. §§ 7407 – 7411 & 7501 – 7515 with 42 U.S.C. § 7411.

[4] See, e.g., CEQA Guidance at http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf, pp. 64-66, 80.

[5] See, e.g., CEQA Guidance at http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf, pp. 66, 99-101.

pollutants and local health impacts, departs from the Air District's Guidance and approved methodology for assessing criteria pollutants. A close reading of the administrative record that gave rise to this issue demonstrates that the Court's holding is based on a misunderstanding of the distinction between toxic air contaminants (for which a local health risk assessment is feasible and routinely performed) and criteria air pollutants (for which a local health risk assessment is not feasible and would result in speculative results).[6] The Air District has a direct interest in ensuring the lawfulness and consistent application of its CEQA Guidance, and will explain how the Court of Appeal departed from the Air District's long-standing CEQA Guidance in addressing criteria pollutants and toxic air contaminants in this amicus brief.

2. How the Proposed Amicus Curiae Brief Will Assist the Court

As counsel for the proposed amicus curiae, we have reviewed the briefs filed in this action. In addition to serving as a "commentary agency" for CEQA purposes over the Friant Ranch project, the Air District has a strong interest in assuring that CEQA is used for its intended purpose, and believes that this Court would benefit from additional briefing explaining the distinction between criteria pollutants and toxic air contaminants and the different methodologies employed by local air pollution control agencies such as the Air District to analyze these two categories of air pollutants under CEQA. The Air District will also explain how the Court of Appeal's opinion is based upon a fundamental misunderstanding of these two different approaches by requiring the County of Fresno to correlate the project's *criteria* pollution emissions with *local* health impacts. In doing

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[6] CEQA does not require speculation. *See, e.g., Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 6 Cal. 4th 1112, 1137 (1993) (upholding EIR that failed to evaluate cumulative toxic air emission increases given absence of any acceptable means for doing so).

so, the Air District will provide helpful analysis to support its position that at least insofar as criteria pollutants are concerned, CEQA does not require an EIR to correlate a project's air quality emissions to specific health impacts, because such an analysis is not reasonably feasible.

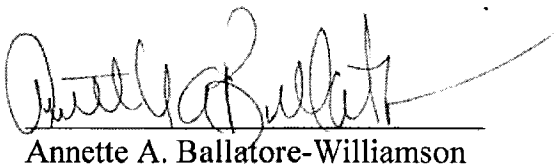
Rule 8.520 Disclosure

Pursuant to Cal. R. 8.520(f)(4), neither the Plaintiffs nor the Defendant or Real Party In Interest or their respective counsel authored this brief in whole or in part. Neither the Plaintiffs nor the Defendant or Real Party in Interest or their respective counsel made any monetary contribution towards or in support of the preparation of this brief.

CONCLUSION

On behalf of the San Joaquin Valley Unified Air Pollution Control District, we respectfully request that this Court accept the filing of the attached brief.

Dated: April 2, 2015



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AIR POLLUTION CONTROL
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I. INTRODUCTION.

The San Joaquin Valley Unified Air Pollution Control District ("Air District") respectfully submits that the Court of Appeal erred when it held that the air quality analysis contained in the Environmental Impact Report ("EIR") for the Friant Ranch development project was inadequate under the California Environmental Quality Act ("CEQA") because it did not include an analysis of the correlation between the project's criteria air pollutants and the potential adverse human health impacts. A close reading of the portion of the administrative record that gave rise to this issue demonstrates that the Court's holding is based on a misunderstanding of the distinction between toxic air contaminants and criteria air pollutants.

Toxic air contaminants, also known as hazardous air pollutants, are those pollutants that are known or suspected to cause cancer or other serious health effects, such as birth defects. There are currently 189 toxic air contaminants (hereinafter referred to as "TACs") regulated by the United States Environmental Protection Agency ("EPA") and the states pursuant to the Clean Air Act. 42 U.S.C. § 7412. Common TACs include benzene, perchloroethylene and asbestos. *Id.* at 7412(b).

In contrast, there are only six (6) criteria air pollutants: ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide and lead. Although criteria air pollutants can also be harmful to human health,

they are distinguishable from TACs and are regulated separately. For instance, while criteria pollutants are regulated by numerous sections throughout Title I of the Clean Air Act, the regulation of TACs occurs solely under section 112 of the Act. *Compare* 42 U.S.C. §§ 7407 – 7411 & 7501 – 7515 *with* 42 U.S.C. § 7411.

The most relevant difference between criteria pollutants and TACs for purposes of this case is the manner in which human health impacts are accounted for. While it is common practice to analyze the correlation between an individual facility's TAC emissions and the expected localized human health impacts, such is not the case for criteria pollutants. Instead, the human health impacts associated with criteria air pollutants are analyzed and taken into consideration when EPA sets the national ambient air quality standard ("NAAQS") for each criteria pollutant. 42 U.S.C. § 7409(b)(1). The health impact of a particular criteria pollutant is analyzed on a regional and not a facility level based on how close the area is to complying with (attaining) the NAAQS. Accordingly, while the type of individual facility / health impact analysis that the Court of Appeal has required is a customary practice for TACs, it is not feasible to conduct a similar analysis for criteria air pollutants because currently available computer modeling tools are not equipped for this task.

It is clear from a reading of both the administrative record and the Court of Appeal's decision that the Court did not have the expertise to fully

appreciate the difference between TACs and criteria air pollutants. As a result, the Court has ordered the County of Fresno to conduct an analysis that is not practicable and not likely yield valid information. The Air District respectfully requests that this portion of the Court of Appeal's decision be reversed.

II. THE COURT OF APPEAL ERRED IN FINDING THE FRIANT RANCH EIR INADEQUATE FOR FAILING TO ANALYZE THE SPECIFIC HUMAN HEALTH IMPACTS ASSOCIATED CRITERIA AIR POLLUTANTS.

Although the Air District does not take lightly the amount of air emissions at issue in this case, it submits that the Court of Appeal got it wrong when it required Fresno County to revise the Friant Ranch EIR to include an analysis correlating the criteria air pollutant emissions associated with the project with specific, localized health-impacts. The type of analysis the Court of Appeal has required will not yield reliable information because currently available modeling tools are not well suited for this task. Further, in reviewing this issue de novo, the Court of Appeal failed to appreciate that it lacked the scientific expertise to appreciate the significant differences between a health risk assessment commonly performed for toxic air contaminants and a similar type of analysis it felt should have been conducted for criteria air pollutants.

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A. Currently Available Modeling Tools are not Equipped to Provide a Meaningful Analysis of the Correlation between an Individual Development Project's Air Emissions and Specific Human Health Impacts.

In order to appreciate the problematic nature of the Court of Appeals' decision requiring a health risk type analysis for criteria air pollutants, it is important to understand how the relevant criteria pollutants (ozone and particulate matter) are formed, dispersed and regulated.

Ground level ozone (smog) is not directly emitted into the air, but is formed when precursor pollutants such as oxides of nitrogen (NOx) and volatile organic compounds (VOCs) are emitted into the atmosphere and undergo complex chemical reactions in the process of sunlight.[1] Once formed, ozone can be transported long distances by wind.[2] Because of the complexity of ozone formation, a specific tonnage amount of NOx or VOCs emitted in a particular area does not equate to a particular concentration of ozone in that area. In fact, even rural areas that have relatively low tonnages of emissions of NOx or VOCs can have high levels of ozone concentration simply due to wind transport.[3] Conversely, the San Francisco Bay Area has six times more NOx and VOC emissions per square mile than the San Joaquin Valley, but experiences lower

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[1] *See* United States Environmental Protection Agency, *Ground-level Ozone: Basic Information*, available at: http://www.epa.gov/airquality/ozonepollution/basic.html (visited March 10, 2015).
[2] *Id.*
[3] *Id.*

concentrations of ozone (and better air quality) simply because sea breezes disperse the emissions.[4]

Particulate matter ("PM") can be divided into two categories: directly emitted PM and secondary PM.[5] While directly emitted PM can have a localized impact, the tonnage emitted does not always equate to the local PM concentration because it can be transported long distances by wind.[6] Secondary PM, like ozone, is formed via complex chemical reactions in the atmosphere between precursor chemicals such as sulfur dioxides (SOx) and NOx.[7] Because of the complexity of secondary PM formation, the tonnage of PM-forming precursor emissions in an area does not necessarily result in an equivalent concentration of secondary PM in that area.

The disconnect between the *tonnage* of precursor pollutants (NOx, SOx and VOCs) and the *concentration* of ozone or PM formed is important because it is not necessarily the tonnage of precursor pollutants that causes human health effects, but the concentration of resulting ozone or PM. Indeed, the national ambient air quality standards ("NAAQS"), which are statutorily required to be set by the United States Environmental Protection

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[4] *San Joaquin Valley Air Pollution Control District 2007 Ozone Plan*, Executive Summary p. ES-6, available at: http://www.valleyair.org/Air_Quality_Plans/docs/AQ_Ozone_2007_Adopted/03%20Executive%20Summary.pdf (visited March 10, 2015).

[5] United States Environmental Protection Agency, *Particulate Matter: Basic Information*, available at: http://www.epa.gov/airquality/particlepollution/basic.html (visited March 10, 2015).

[6] *Id.*

[7] *Id.*

Agency ("EPA") at levels that are "requisite to protect the public health," 42 U.S.C. § 7409(b)(1), are established as concentrations of ozone or particulate matter and not as tonnages of their precursor pollutants.[8]

Attainment of a particular NAAQS occurs when the concentration of the relevant pollutant remains below a set threshold on a consistent basis throughout a particular region. For example, the San Joaquin Valley attained the 1-hour ozone NAAQS when ozone concentrations remained at or below 0.124 parts per million Valley-wide on 3 or fewer days over a 3-year period.[9] Because the NAAQS are focused on achieving a particular concentration of pollution region-wide, the Air District's tools and plans for attaining the NAAQS are regional in nature.

For instance, the computer models used to simulate and predict an attainment date for the ozone or particulate matter NAAQS in the San Joaquin Valley are based on regional inputs, such as regional inventories of precursor pollutants (NOx, SOx and VOCs) and the atmospheric chemistry and meteorology of the Valley.[10] At a very basic level, the models simulate future ozone or PM levels based on predicted changes in precursor

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[8] See, e.g., United States Environmental Protection Agency, *Table of National Ambient Air Quality Standards*, available at: http://www.epa.gov/air/criteria.html#3 (visited March 10, 2015).

[9] *San Joaquin Valley Unified Air Pollution Control District 2013 Plan for the Revoked 1-Hour Ozone Standard*, Ch. 2 p. 2-16, available at: http://www.valleyair.org/Air_Quality_Plans/OzoneOneHourPlan2013/02Chapter2ScienceTrendsModeling.pdf (visited March 10, 2015).

[10] *Id.* at Ch. 2 p. 2-19 (visited March 12, 2015); *San Joaquin Valley Unified Air Pollution Control District 2008 PM2.5 Plan*, Appendix F, pp. F-2 – F-5, available at: http://www.valleyair.org/Air_Quality_Plans/docs/AQ_Final_Adopted_PM2.5/20%20Appendix%20F.pdf (visited March 19, 2015).

emissions Valley wide.[11] Because the NAAQS are set levels necessary to protect human health, the closer a region is to attaining a particular NAAQS, the lower the human health impact is from that pollutant.

The goal of these modeling exercises is not to determine whether the emissions generated by a particular factory or development project will affect the date that the Valley attains the NAAQS. Rather, the Air District's modeling and planning strategy is regional in nature and based on the extent to which *all* of the emission-generating sources in the Valley (current and future) must be controlled in order to reach attainment.[12]

Accordingly, the Air District has based its thresholds of significance for CEQA purposes on the levels that scientific and factual data demonstrate that the Valley can accommodate without affecting the attainment date for the NAAQS.[13] The Air District has tied its CEQA significance thresholds to the level at which stationary pollution sources permitted by the Air District must "offset" their emissions.[14] This "offset"

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[11] *Id.*

[12] Although the Air District does have a dispersion modeling tool used during its air permitting process that is used to predict whether a particular project's directly emitted PM will either cause an exceedance of the PM NAAQS or contribute to an existing exceedance, this model bases the prediction on a worst case scenario of emissions and meteorology and has no provision for predicting any associated human health impacts. Further, this analysis is only performed for stationary sources (factories, oil refineries, etc.) that are required to obtain a New Source Review permit from the Air District and not for development projects such as Friant Ranch over which the Air District has no preconstruction permitting authority. *See* San Joaquin Valley Unified Air Pollution Control District Rule 2201 §§ 2.0; 3.3.9; 4.14.1, available at: http://www.valleyair.org/rules/currntrules/Rule2201041l.pdf (visited March 19, 2015).

[13] *San Joaquin Valley Unified Air Pollution Control District Guide to Assessing and Mitigating Air Quality Impacts*, (March 19, 2015) p. 22, available at: http://www.valleyair.org/transportation/CEQA%20Rules/GAMAQI%20Jan%202002%20Rev.pdf (visited March 30, 2015).

[14] *Id.* at pp. 22, 25.

level allows for growth while keeping the cumulative effects of all new sources at a level that will not impede attainment of the NAAQS.[15] In the Valley, these thresholds are 15 tons per year of PM, and 10 tons of NOx or VOC per year. *Sierra Club*, *supra*, 172 Cal.Rptr.3d at 303; AR 4554. Thus, the CEQA air quality analysis for criteria pollutants is not really a localized, project-level impact analysis but one of regional, "cumulative impacts."

Accordingly, the significance thresholds applied in the Friant Ranch EIR (15 tons per year of PM and 10 tons of NOx or VOCs) are not intended to be indicative of any localized human health impact that the project may have. While the health effects of air pollution are of primary concern to the Air District (indeed, the NAAQS are established to protect human health), the Air District is simply not equipped to analyze whether and to what extent the criteria pollutant emissions of an individual CEQA project directly impact human health in a particular area. This is true even for projects with relatively high levels of emissions of criteria pollutant precursor emissions.

For instance, according to the EIR, the Friant Ranch project is estimated to emit 109.52 tons per year of ROG (VOC), 102.19 tons per year of NOx, and 117.38 tons per year of PM. Although these levels well

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[15] [15] *San Joaquin Valley Unified Air Pollution Control District Environmental Review Guidelines* (Aug. 2000) p. 4-11, available at: http://www.valleyair.org/transportation/CEQA%20Rules/ERG%20Adopted%20_August%202000_.pdf (visited March 12, 2015).

exceed the Air District's CEQA significance thresholds, this does not mean that one can easily determine the concentration of ozone or PM that will be created at or near the Friant Ranch site on a particular day or month of the year, or what specific health impacts will occur. Meteorology, the presence of sunlight, and other complex chemical factors all combine to determine the ultimate concentration and location of ozone or PM. This is especially true for a project like Friant Ranch where most of the criteria pollutant emissions derive not from a single "point source," but from area wide sources (consumer products, paint, etc.) or mobile sources (cars and trucks) driving to, from and around the site.

In addition, it would be extremely difficult to model the impact on NAAQS attainment that the emissions from the Friant Ranch project may have. As discussed above, the currently available modeling tools are equipped to model the impact of *all* emission sources in the Valley on attainment. According to the most recent EPA-approved emission inventory, the NOx inventory for the Valley is for the year 2014 is 458.2 tons per day, or 167,243 tons per year and the VOC (or ROG) inventory is 361.7 tons per day, or 132,020.5 tons per year.[16] Running the photochemical grid model used for predicting ozone attainment with the

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[16] *San Joaquin Valley Unified Air Pollution Control District 2007 Ozone Plan*, Appendix B pp. B-6, B-9,
available at:
http://www.valleyair.org/Air_Quality_Plans/docs/AQ_Ozone_2007_Adopted/19%20Appendix%20B%20April%202007.pdf (visited March 12, 2015).

emissions solely from the Friant Ranch project (which equate to less than one-tenth of one percent of the total NOx and VOC in the Valley) is not likely to yield valid information given the relative scale involved.

Finally, even once a model is developed to accurately ascertain local increases in concentrations of photochemical pollutants like ozone and some particulates, it remains impossible, using today's models, to correlate that increase in concentration to a specific health impact. The reason is the same: such models are designed to determine regional, population-wide health impacts, and simply are not accurate when applied at the local level.

For these reasons, it is not the norm for CEQA practitioners, including the Air District, to conduct an analysis of the localized health impacts associated with a project's criteria air pollutant emissions as part of the EIR process. When the accepted scientific method precludes a certain type of analysis, "the court cannot impose a legal standard to the contrary." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 717 n. 8. However, that is exactly what the Court of Appeal has done in this case. Its decision upends the way CEQA air quality analysis of criteria pollutants occurs and should be reversed.

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B. The Court of Appeal Improperly Extrapolated a Request for a Health Risk Assessment for Toxic Air Contaminants into a Requirement that the EIR contain an Analysis of Localized Health Impacts Associated with Criteria Air Pollutants.

The Court of Appeal's error in requiring the new health impact analysis for criteria air pollutants clearly stems from a misunderstanding of terms of art commonly used in the air pollution field. More specifically, the Court of Appeal (and Appellants Sierra Club et al.) appear to have confused the health risk analysis ("HRA") performed to determine the health impacts associated with a project's toxic air contaminants ("TACs"), with an analysis correlating a project's criteria air pollutants (ozone, PM and the like) with specific localized health impacts.

The first type of analysis, the HRA, is commonly performed during the Air District's stationary source permitting process for projects that emit TACs and is, thus, incorporated into the CEQA review process. An HRA is a comprehensive analysis to evaluate and predict the dispersion of TACs emitted by a project and the potential for exposure of human populations. It also assesses and quantifies both the individual and population-wide health risks associated with those levels of exposure. There is no similar analysis conducted for criteria air pollutants. Thus, the second type of analysis (required by the Court of Appeal), is not currently part of the Air District's process because, as outlined above, the health risks associated

with exposure to criteria pollutants are evaluated on a regional level based on the region's attainment of the NAAQS.

The root of this confusion between the types of analyses conducted for TACs versus criteria air pollutants appears to stem from a comment that was presented to Fresno County by the City of Fresno during the administrative process.

In its comments on the draft EIR, the City of Fresno (the only party to raise this issue) stated:

> [t]he EIR must disclose the human health related effects of the Project's air pollution impacts. (CEQA Guidelines section 15126.2(a).) The EIR fails completely in this area. The EIR should be revised to disclose and determine the significance of TAC impacts, and of human health risks due to exposure to Project-related air emissions.

(AR 4602.)

In determining that the issue regarding the correlation between the Friant Ranch project's criteria air pollutants and adverse health impacts was adequately exhausted at the administrative level, the Court of Appeal improperly read the first two sentences of the City of Fresno's comment in isolation rather than in the context of the entire comment. *See Sierra Club v. County of Fresno* (2014) 172 Cal.Rptr.3d 271, 306. Although the comment first speaks generally in terms of "human health related effects" and "air pollution," it requests only that the EIR be revised to disclose "the significance of TACs" and the "human health risks due to exposure."

The language of this request in the third sentence of the comment is significant because, to an air pollution practitioner, the language would only have indicated only that a HRA for TACs was requested, and not a separate analysis of the health impacts associated with the project's criteria air pollutants. Fresno County clearly read the comment as a request to perform an HRA for TACs and limited its response accordingly. (AR 4602.)[17] The Air District submits that it would have read the City's comment in the same manner as the County because the City's use of the terms "human health risks" and "TACs" signal that an HRA for TACs is being requested. Indeed, the Air District was also concerned that an HRA be conducted, but understood that it was not possible to conduct such an analysis until the project entered the phase where detailed site specific information, such as the types of emission sources and the proximity of the sources to sensitive receptors became available. (AR 4553.)[18] The City of Fresno was apparently satisfied with the County's discussion of human health risks, as it did not raise the issue again when it commented on the final EIR. (AR 8944 – 8960.)

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[17] Appellants do not challenge the manner in which the County addressed TACs in the EIR. (Appellants' Answer Brief p. 28 fn. 7.)

[18] Appellants rely on the testimony of Air District employee, Dan Barber, as support for their position that the County should have conducted an analysis correlating the project's criteria air pollutant emissions with localized health impacts. (Appellants Answer Brief pp. 10-11; 28.) However, Mr. Barber's testimony simply reinforces the Air District's concern that a risk assessment (HRA) be conducted once the actual details of the project become available. (AR 8863.) As to criteria air pollutants, Mr. Barber's comments are aimed at the Air District's concern about the amount of emissions and the fact that the emissions will make it "more difficult for Fresno County and the Valley to reach attainment which means that the health of Valley residents maybe [sic] adversely impacted." Mr. Barber says nothing about conducting a separate analysis of the localized health impacts the project's emissions may have.

The Court of Appeal's holding, which incorrectly extrapolates a request for an HRA for TACs into a new analysis of the localized health impacts of the project's criteria air pollutants, highlights two additional errors in the Court's decision.

First, the Court of Appeal's holding illustrates why the Court should have applied the deferential substantial evidence standard of review to the issue of whether the EIR's air quality analysis was sufficient. The regulation of air pollution is a technical and complex field and the Court of Appeal lacked the expertise to fully appreciate the difference between TACs and criteria air pollutants and tools available for analyzing each type of pollutant.

Second, it illustrates that the Court likely got it wrong when it held that the issue regarding the criteria pollutant / localized health impact analysis was properly exhausted during the administrative process. In order to preserve an issue for the court, '[t]he "exact issue" must have been presented to the administrative agency....' [Citation.] *Citizens for Responsible Equitable Environmental Development v. City of San Diego*, (2011) 196 Cal.App.4th 515, 527 129 Cal.Rptr.3d 512, 521; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535, 78 Cal.Rptr.3d 1, 13. "'[T]he objections must be sufficiently specific so that the agency has the

opportunity to evaluate and respond to them.' [Citation.]" *Sierra Club v. City of Orange*,163 Cal.App.4th at 536.[19]

As discussed above, the City's comment, while specific enough to request a commonly performed HRA for TACs, provided the County with no notice that it should perform a new type of analysis correlating criteria pollutant tonnages to specific human health effects. Although the parties have not directly addressed the issue of failure to exhaust administrative remedies in their briefs, the Air District submits that the Court should consider how it affects the issues briefed by the parties since "[e]xhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199, 22 Cal.Rptr.3d 203.

III. CONCLUSION

For all of the foregoing reasons, the Air District respectfully requests that the portion of the Court of Appeal's decision requiring an analysis correlating the localized human health impacts associated with an individual project's criteria air pollutant emissions be reversed.

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[19] *Sierra Club v. City of Orange*, is illustrative here. In that case, the plaintiffs challenged an EIR approved for a large planned community on the basis that the EIR improperly broke up the various environmental impacts by separate project components or "piecemealed" the analysis in violation of CEQA. In evaluating the defense that the plaintiffs had failed to adequately raise the issue at the administrative level, the Court held that comments such as *"the use of a single document for both a project-level and a program-level EIR [is] 'confusing',"* and *"[t]he lead agency should identify any potential adverse air quality impacts that could occur from all phases of the project and all air pollutant sources related to the project,"* were too vague to fairly raise the argument of piecemealing before the agency. *Sierra Club v. City of Orange*, 163 Cal.App.4th at 537.

correlating the localized human health impacts associated with an individual project's criteria air pollutant emissions be reversed.

Respectfully submitted,

Dated: April 2, 2015

Catherine T. Redmond
Attorney for Proposed Amicus Curiae

SAN JOAQUIN VALLEY
UNIFIED
AIR POLLUTION CONTROL
DISTRICT

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204 of the California Rules of Court, I hereby certify that this document, based on the Word County feature of the Microsoft Word software program used to compose and print this document, contains, exclusive of caption, tables, certificate of word count, signature block and certificate of service, 3806 words.

Dated: April 2, 2015

Annette A. Ballatore-Williamson
District Counsel (SBN 192176)

Sierra Club et al, v. County of Fresno, et al
Supreme Court of California Case No.: S219783
Fifth District Court of Appeal Case No.: F066798
Fresno County Superior Court Case No.: 11CECG00726

PROOF OF SERVICE

I am over the age of 18 years and not a p[arty to the above-captioned action; that my business address is San Joaquin Valley Unified Air Pollution Control District located at 1990 E. Gettysburg Avenue, Fresno, California 93726.

On April 2, 2015, I served the document described below:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT IN SUPPORT OF DEFENDANT AND RESPONDENT, COUNTY OF FRESNO

On all parties to this action at the following addresses and in the following manner:

PLEASE SEE ATTACHED SERVICE LIST

(XX) **(BY MAIL)** I caused a true copy of each document(s) to be laced in a sealed envelope with first-class postage affixed and placed the envelope for collection. Mail is collected daily at my office and placed in a United State Postal Service collection box for pick-up and delivery that same day.

( ) **(BY ELECTRONIC MAIL)** I caused a true and correct scanned image (.PDF file) copy to be transmitted via electronic mail transfer system in place at the San Joaquin Valley Unified Air Pollution Control District ("District"), originating from the undersigned at 1990 E. Gettysburg Avenue, Fresno, CA, to the address(es) indicated below.

( ) **(BY OVERNIGHT MAIL)** I caused a true and correct copy to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I executed this document on April 2, 2015, at Fresno, California.

Esthela Soto

SERVICE LIST

Sierra Club et al, v. County of Fresno, et al
Supreme Court of California Case No.: S219783
Fifth District Court of Appeal Case No.: F066798
Fresno County Superior Court Case No.: 11CECG00726

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