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

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

Practice Rules, and whether [the applicant] followed that procedure, is a predominately procedural question of which we exercise our independent legal judgment." (*Id*. at 949.) Conversely, the Court found that a disagreement over whether future potential impacts were too speculative to permit detailed analysis was a "predominately factual question" which the Court reviewed under the substantial evidence test. (*Id*. at 955.) The Court's full analysis of these respective issues, however, is more complex and instructive.

The first question addressed in *Ebbetts Pass* involved interpretation of regulations, that required the California Department of Forestry & Fire Protection ("CDF") "to follow a set analytical procedure in assessing cumulative impacts on a given species of animal or plant" in a set of three Timber Harvest Management Plans ("THP's") that served as the functional equivalents of a CEQA document. (*Id*. at 949.) Specifically,

> [i]n this assertedly mandated procedure, a timber harvest plan's preparer must, for each species, separately identify a geographic area over which impacts will be assessed, discuss related activities occurring or expected to occur in the selected assessment area, and then assess the cumulative impacts of the proposed timber harvest and the related activities on the species.

(*Ibid*.)

Citing *Vineyard*, the Court applied its independent judgment to the alleged a failure to proceed in the manner prescribed by law. (*Ibid*.) Even so, the Court rejected petitioners' claim: "Despite initially designating particular state planning watersheds as the cumulative-impacts assessment areas for all species, the THP's in fact devoted ample discussion to cumulative impacts on the two species at issue, on a much broader geographic scale . . . ." (*Ibid*.) "By doing so, the THP's avoided any violation of the pertinent provision of the Forest Practice Rules (Cal. Code

Regs., tit. 14, § 898) and its associated Technical Rule Addendum No. 2 (*id*., foll. § 952.9)." (*Ibid*.) Thus, even if the petitioners were correct "[i]n a formalistic sense" that the respondent had failed to comply with certain specific requirements of the applicable regulations, the regulations as a whole provided the respondent discretion to shape the analysis based on relevant facts. (*Id.* at 945, 949-950.) The Court went on to reject a claim that the THP failed to discuss the relevant subject matter at a sufficient level of detail. The Court found that this deficiency was "at most, one of insufficient evidence to support CDF's findings, an issue outside the scope of our review." (*Id*. at 950-951.) In effect, the Court held that once the threshold legal issue of what *type* of information the regulations required was resolved, the sufficiency of information produced by the lead agency was subject to review under the substantial evidence test. Thus, although the petitioners in this case contend that the *Ebbetts Pass* Court "independently reviewed the sufficiency of the discussion to determine whether it satisfied CEQA's information disclosure requirements," this characterization is not accurate. (SC Brief, p. 23.)

On the second major issue in *Ebbetts Pass*, the Court found that the substantial evidence test applied to the respondent's assessment of predicate facts which determined the extent of analysis required. (*Id*. at 954-955.) The Court consequently rejected a claim that the relevant analysis of potential future herbicide impacts was insufficiently detailed, holding that the respondent's determination that more detailed analysis would be speculative was supported by substantial evidence. (*Id*. at 955.) Thus, *Ebbetts Pass* illustrates how courts should apply the rule in *Vineyard*: Where CEQA provides a clear procedural rule, courts must exercise their independent judgment to determine if it was followed; where CEQA

delegates discretion to the lead agency to decide how to comply with CEQA's general requirements, a challenge must be reviewed for substantial evidence in the record of proceedings.

In *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439 ("*Smart Rail*"), the Court confronted the issue of what baseline or baselines a lead agency may use as the foundation for an EIR's environmental analysis. At first blush, the issue would seem to be predominately procedural, since the CEQA Guidelines provide very specific direction as to what temporal baseline should normally be used for measuring impacts. (Guidelines §§ 15125(a), 15126.2(a).) An agency's choice of baseline also necessarily may have a profound effect upon the content and conclusions of the EIR. Nevertheless, both the plurality opinion and concurring and dissenting opinions make it clear that the choice of baseline involves issues of agency judgment, and is therefore reviewed under the substantial evidence test. (*Smart Rail, supra,* 57 Cal.4th 439. 457, 470.) This holding follows the Court's prior decision in *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 ("*CBE v. SCAQMD*"), 328 where the Court concluded "[A]n agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence."

While *Smart Rail* and *CBE v. SCAQMD* do not directly address the divergent standards of review for "predominately procedural" and "predominantly factual" questions, they do strongly affirm that issues involving the exercise of factual judgment or discretion by a lead agency must necessarily be reviewed as substantial evidence questions.

D. **The Majority of Existing Appellate Decisions Treat Allegations of Insufficient Information as Substantial Evidence Questions**

Although the dichotomy between predominately factual and predominately procedural issues is now recognized in theory by all courts, there is a remarkable lack of uniformity in the manner in which these distinctions are applied. Indeed, even within individual appellate districts, seemingly conflicting statements or applications of these rules can be found. Consistent with *Vineyard* and *Sierra Club*, 7 Cal.4th 1215, all courts appear to agree that certain major facial inadequacies in an EIR may rise to the level of a failure to proceed in the manner required by law, i.e., errors involving a *complete* omission of required information, or analysis that is hopelessly conclusory on its face. Beyond this, however, there is a lack of unanimity as to how alleged errors involving the amount or quality of information in an EIR are reviewed.

Some decisions state that omission of required information from an EIR constitutes a failure to proceed in the manner required by law, without delving into the subtler question of what quantity or quality of information may be "required." Others implicitly suggest that alleged errors of omission in an EIR should be reviewed as procedural errors, without distinguishing between complete omissions and lesser deficiencies. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923-924; *Ballona Wetlands Land Trust v. City of Los Angeles* (2012) 201 Cal.App.4th 455, 468.)

The decision under review here, from the Fifth Appellate District, is perhaps the most explicit in recognizing the distinction between complete

omissions of information and less drastic alleged inadequacies. The court expressly distinguished cases "where the EIR does not discuss a topic that a statute, regulation or judicial opinion says must be discussed," from claims that the information presented on a mandatory subject is simply insufficient. (*Sierra Club v. County of Fresno,* Opn. at p. 23.) The court nevertheless concluded that an independent review standard applies to both types of claims. In the court's words, where the issue is a claim is one of *insufficient* information, "Drawing this line and determining whether the EIR complies with CEQA's information disclosure requirements presents a question of law subject to independent review by the courts." (*Id*.) As support for this proposition, the court cited its prior decision in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102 and its pre-*Vineyard* decision in *Associated of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 ("*A.I.R.*"). Other Fifth District decisions also treat the sufficiency of an EIR as a procedural issue, without distinguishing between complete omissions of information and lesser inadequacies. (See, e.g., *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 382.)

Other appellate decisions state a range of differing views.

At one end of the spectrum, some decisions hold that the adequacy of an EIR is inherently a fact-based question that is reviewed under the substantial evidence test. This view is summarized in *Tracy First v. City of Tracy* (2010) 177 Cal.App.4th 912, as follows:

> An EIR is an informational document which provides detailed information to the public and to responsible officials about significant environmental effects of a proposed project. It must contain substantial evidence on those effects and a reasonable range of alternatives, but the decision whether or not to approve a project is up to the agency. Review is confined to whether an EIR is sufficient as an informational

> document. '*The court must uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA*'. (177 Cal.App.4th at 934, emphasis added, quoting *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1265.)

Additional decisions stating this broad-brush rule include *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1059 and *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.

Other courts take a more nuanced approach. While most would find that a complete failure to address a mandatory topic amounts to procedural error subject to independent review, a majority expressly disagree that less drastic alleged deficiencies should normally be reviewed as procedural errors. As one court has stated it: "However, where the agency includes the relevant information, but the *adequacy* of the information is disputed, the question is one of substantial evidence." (*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 12 (emphasis in original); see also *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243 ["Disagreements regarding the adequacy of an EIR's impact analysis will be resolved in favor of the lead agency if substantial evidence supports the lead agency's determination."].)

Many other decisions expressly recognize that many or most types of disputes concerning the adequacy of an EIR ultimately turn on predominantly factual questions, and hold that such issues are reviewed under the substantial evidence test. These issues include "the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied." (*City of Long Beach, supra*, 176 Cal.App.4th 889, 898; accord, *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 349;

Save Panoche Valley v. San Benito County (2013) 217 Cal.App.4th 503, 514; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1230; *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, 642; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 596.) Ironically, this view is also stated in some previous decisions of the Fifth District. (See *Bakersfield Citizens, supra* 124 Cal.App.4th 1184, 1198 ["The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions."]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 [same].)

Other courts have explicitly held that challenges to an EIR concerning "the *amount or type* of information contained in the EIR, the scope of the analysis, or choice of methodology are factual determinations reviewed for substantial evidence." (*Santa Monica Baykeeper, supra,* 193 Cal.App.4th 1538, 1546 (emphasis added); *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986.)[1]

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[1] The court in *CNPS v. Santa Cruz* also acknowledged that "An EIR may be found legally inadequate – and subject to independent review for procedural error – where it omits information that is both *required* by CEQA and necessary to informed decisionmaking. (177 Cal.App.4th 957, 986, emphasis added.) The court's subsequent statement that disputes over "the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology" are subject to the substantial evidence test (*Id.*) thus clarifies that what information is *required* in an EIR is typically dependent upon a lead agency's interpretation of relevant facts.

An early statement of this broad view is found in *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1616-1620. After an extended discussion of prior case law, the *Barthelemy* court concluded by quoting with approval a leading treatise:

> 'Challenges to an EIR's adequacy usually involve questions such as the proper scope of the analysis, the appropriate methodology for studying an impact, the reliability or accuracy of the data, the validity of technical opinions, and the feasibility of further studies. These determinations are ultimately based on factual issues. . . . The question for a reviewing court should then be limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence." (1 *Kostka & Zischke, Practice Under the Cal. Environmental Quality Act* (CEB 1995) § 12.5, at pp. 464-465.) The failure to include information in an EIR normally will rise to the level of a failure to proceed in the manner required by law only if the analysis in the EIR is clearly inadequate or unsupported. (*Id*. at 1620.)

(See also *National Parks & Conservation Assn., supra,* 71 Cal.App.4th 1341, 1353.)

Barthelemy relies in part on *Laurel Heights, supra,* 47 Cal.3d 376, 407-408 and 421-422, where this Court expressly warned that judicial review of an EIR was not to extend to fine judgments about the thoroughness or accuracy of studies relied on in an EIR. (*Barthelemy, supra,* 38 Cal.App.4th 1609, 1619-1620.)

Other decisions state generally that failures to satisfy the informational requirements of CEQA constitute a failure to proceed in the manner required by law, but actually apply a substantial evidence test to critical questions concerning the scope and content of the EIR. (See, e.g., *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2011) 190 Cal.App.4th 316, 327-328, 348-356 [upholding adequacy of EIR discussion of mitigation measures and alternatives based substantial evidence]; *see also Barthelemy, supra,* 38 Cal.App.4th 1609, 1617-1618 [discussing *Kings*

County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 722-724.].)

E. **Judicial Review of Adequacy Must Focus on the Validity of Agency Judgments and Determinations Concerning the Content of the EIR; These Determinations are Reviewed Under the Substantial Evidence Test**

Given this patchwork of existing judicial decisions, the standard of review applicable to individual claims of EIR inadequacy is a matter of acknowledged uncertainty. (See, e.g., 2 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (CEB 2014), § 23.35, p. 23-44.) Nevertheless, a correct principle can be discerned from the majority appellate opinions discussed above, from this Court's prior decisions, and from principles codified in CEQA itself concerning the standard of review applicable to legislative and administrative decisions generally. The correct principle to apply to most types of disputes concerning the adequacy of an EIR, i.e., disputes concerning "the amount or type of information contained in the EIR, the scope of the analysis, or choice of methodology," must be reviewed under the substantial evidence test because such disputes necessarily turn on underlying facts and matters of judgment and informed opinion. (*Santa Monica Baykeeper, supra*, 193 Cal.App.4th 1538, 1546; *City of Long Beach, supra*, 176 Cal.App.4th 889, 898.) This principle is consistent with this Court's recognition that where the content of an EIR depends upon factually based predicate determinations by the lead agency, the predicate determination is reviewed "only for substantial evidence." (*Ebbetts Pass, supra*, 43 Cal.4th 936, 954.) This is in turn consistent with this Court's longstanding rule that courts may not overturn certification of an EIR "on the ground that an opposite conclusion would have been equally

or more reasonable." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

Those courts that would routinely evaluate adequacy of an EIR as a question of law or proper procedure simply fail to recognize the extent to which almost every determination affecting the content of an EIR turns on predicate factual questions and the exercise of informed judgment by the lead agency.

In following sections, this brief will review the CEQA Guidelines and related decisional law which establish general principles governing preparation of EIRs. It is apparent that the Guidelines and case law cannot be reduced to clear standards that dictate particular results in particular cases as a matter of law. Instead, the Guidelines recognize that virtually every step in the preparation of an EIR involves the exercise of informed judgment by the lead agency and its staff, based on relevant facts, technical knowledge, experience and practical considerations tailored to the specific project under review. Historically and for important public policy reasons, administrative decisions of this type have always been reviewed by courts only for support by substantial evidence. The discretion vested in public agencies by CEQA should not be usurped by courts under guise of independently reviewing the "sufficiency" or "adequacy" of an EIR that addresses all the mandatory elements required by statute or by the Guidelines.

Judicial review therefore must focus on whether a lead agency's predicate judgments and determinations affecting the scope and content of the EIR are supported by substantial evidence. The beginning point of

judicial inquiry in every case must be the question of whether the determination to include or exclude allegedly relevant information depended upon resolution of factual issues or the exercise of informed judgment by the lead agency. If the answer to either of these questions is yes, the agency's determination is reviewed only for support by substantial evidence. In other words, "The question for a reviewing court should then be limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence." (*Barthelemy*, *supra*, 38 Cal.App.4th 1609, 1620.) The court should conclude that the agency has failed to proceed in the manner required by law only in those relatively few cases in which (1) a subject clearly required to be discussed by CEQA or the Guidelines is not discussed at all; (2) the discussion of a required subject is so vague, conclusory or incoherent that it "fails to disclose the 'analytic route the … agency traveled from evidence to action;'" (*Vineyard*, *supra*, 40 Cal.4th 412, 445[2]; see also *Laurel Heights*, *supra*, 47 Cal.3d 376, 403-405 [conclusory discussion of alternatives]; or (3) the EIR excludes or misrepresents relevant information based on an erroneous legal premise

[2] In *Vineyard*, this Court condemned an analysis which consisted of "a jumble of seemingly inconsistent figures for total area demand and surface water supply, with no plainly stated, coherent analysis of how the supply is to meet the demand." (*Vineyard*, *supra*, 40 Cal.4th 412, 445.) A discussion that is entirely self-contradictory might well be of as little usefulness as one that is patently conclusory. However, caution should be exercised in such cases. Lead agencies are often faced with conflicting data when preparing an EIR, and reporting of conflicting data is not inconsistent with CEQA's informational purposes. It is the responsibility of a lead agency to reach some ultimate conclusion about the severity of impacts and the need for mitigation, unless the available information is too speculative. (Guidelines § 15145.) However, the fact that a reader may find the discussion of conflicting data confusing or the EIR inartful in expressing its conclusions should not rise to the level of a failure to proceed in the manner required by law.

(*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 355-356).

The foregoing judicial determinations must, of course, take place within the larger context of settled rules governing adjudication of CEQA claims. The relevant issue must first have been timely raised, and the respondent given an opportunity to respond, during the administrative proceedings. (Pub. Resources Code § 21177(a); *North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th 614, 623-624.) The EIR is presumed adequate, and the petitioner bears the burden of establishing otherwise. (*San Diego Citizenry*, *supra*, 219 Cal.App.4th 1, 11; *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740.) The reviewing court may not impose requirements going beyond those explicitly stated in CEQA and the CEQA Guidelines. (Pub. Resources Code § 21083.1; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 (2015 WL 858265 at p. 12.) Finally, the error must be shown to be prejudicial. (*Smart Rail*, *supra*, 57 Cal.4th 439, 516; Pub. Resources Code § 21005(b).)

III. CEQA, THE CEQA GUIDELINES AND CASE LAW DO NOT PROVIDE CLEAR AND UNAMBIGUOUS STANDARDS THAT ALLOW ISSUES OF "SUFFICIENCY" OR ADEQUACY OF AN EIR TO BE RESOLVED AS QUESTIONS OF LAW

The conclusion stated above is reinforced by a review of the Guidelines and case law that public agencies must rely on when preparing an EIR. If public agencies are to be held accountable for proceeding "in the manner required by law," there must be some clear law or procedure to follow. This cannot be said of the complex realities involved in preparing

an EIR. Instead, CEQA, the CEQA Guidelines and case law contain a mass of very general, and sometimes conflicting, directives concerning the proper focus and level of detail required in an EIR. Lead agencies are affirmatively *required* to exercise judgment in determining what information is relevant, important and appropriate for inclusion in an EIR based on the facts and circumstances unique to each EIR. In this context, it cannot reasonably be held that correctly determining the amount or quality of analysis performed and information offered in an EIR is simply a matter of following correct procedure.

A. <u>The Guidelines and Case Law Inherently Require Lead Agencies to Exercise Judgment and to Balance Competing Directives Regarding the Scope and Content of an EIR</u>

The required contents of an EIR are stated in CEQA and extensively elaborated in the Guidelines. (Pub. Resources Code § 21100; Guidelines §§ 15120-15190.5.) Although the list of required topics is clear, CEQA and the Guidelines provide few fixed mandates as to how these topics are to be addressed. Instead, the Guidelines state general principles which must be adopted to the specific circumstances of each EIR, based on a lead agency's best judgment. For example, Guidelines § 15151 – the Guideline most commonly cited as the basic standard for sufficiency of EIRs – provides as follows:

> An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have not looked for perfection but for adequacy, completeness and a good faith effort at full

disclosure.

The foregoing language necessarily invites a host of subjective judgments as to what constitutes a "sufficient degree of analysis," what level of analysis is "reasonably feasible" in specific circumstances, and where one draws the line between "exhaustive" analysis or "perfection" versus analysis that is merely adequate, complete and a "good faith effort at full disclosure." Such questions cannot be answered as questions of law.

Guidelines § 15151 must, of course, be read together with other Guidelines and CEQA itself. No provisions of these, however, provide clear and explicit direction as to how a lead agency must proceed or precisely what quality and quantity of information must be produced in any given situation. Indeed, many provisions identify competing considerations that must be balanced by the agency in preparing the EIR.

Many CEQA Guidelines seem to favor informative but concise discussion over expansive analysis.

Public Resources Code § 21003(f) directs that "All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical and social resources with the objective that these resources may be better applied toward the mitigation of actual significant effects on the environment."

Consistent with this approach, Guidelines § 15006 catalogues an extensive range of measures which agencies should use to reduce delay and paperwork in the environmental review process. Among these are:

(1) Complying with the page limits recommended in Guidelines § 15141 (Guidelines § 15006(n));

(2) “Preparing analytic rather than encyclopedic environmental impact reports” (Guidelines § 15006(o));

(3) “Mentioning only briefly issues other than significant ones in EIRs” (Guidelines § 15006(p)); and

(4) “Emphasizing the portions of the environmental impact report that are useful to decision-makers and the public and reducing emphasis on background material.” (Guidelines § 15006(s).)

As noted previously, Guidelines § 15141 suggests that an EIR should typically be limited to 150 pages in length, or 300 pages for projects “of unusual scope or complexity.” (Guidelines § 15141.)

Other provisions of the Guidelines affirmatively require lead agencies to exercise judgment as to the level of detail included in an EIR. Guidelines § 15146 directs that the “degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity. . . ” (See, e.g., *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1048, 1051.) Guidelines § 15204(a) provides that “the adequacy of an EIR is determined in terms of what is reasonably feasible, in light of factors such as the magnitude of the project at issue, the severity of its likely environmental impacts, and the geographic scope of the project.” (Guidelines § 15204(a).) There are, however, no more precise standards for applying these general principles. Cumulative impacts, growth-inducing impacts, impacts associated with alternatives, and collateral impacts caused by proposed mitigation measures must all be considered, but in less detail than impacts of the proposed project itself. (Guidelines §§ 15126.2(d), 15126.4(a)(1)(D), 15126.6(d), 15130(b).) The precise level of detail required, however, still varies upon a wide range of factors. (See, e.g., *Banning Ranch*, *supra*, 211

Cal.App.4th 1209, 1229; *City of Long Beach, supra*, 176 Cal.App.4th 889, 904; Guidelines § 15130(b).) The problem of judging the level of detail required, and whether some issues may be left for more in-depth future study, becomes acute when the lead agency is preparing a program EIR or otherwise employing CEQA's tiering principles. (Pub. Resources Code §§ 21093, 21094; Guidelines § 15152; *In re Bay-Delta, supra,* 43 Cal.4th 1143, 1170-1173; *Town of Atherton, supra,* 228 Cal.App.4th 314, 344-347.)

Consistent with concerns for preparing EIRs "that are useful to decision-makers and the public," and for "reducing emphasis on background material" (Guidelines § 15006(s)), technical information must be summarized in the EIR, with more complete data or specialized analysis relegated to technical appendices attached to the EIR. (Guidelines § 15147.) However, an agency that relegates too much supporting information to appendices may be accused of improperly burying its analysis. (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955-956.)

Much case law also supports a deferential approach to judging the adequacy of an EIR. "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." (*Citizens of Goleta Valley, supra*, 52 Cal.3d 553, 564.) Consistent with this viewpoint, some decisions advise that "an EIR need not include all information available on a subject." (*A.I.R., supra,* 107 Cal.App.4th 1383, 1397; *Al Larson Boat Shop, supra,* 18 Cal.App.4th 729, 748.) The Guidelines and case law also provide that "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commenters. The fact

that additional studies might be helpful does not mean that they are required." (*Clover Valley, supra,* 197 Cal.App.4th 200, 245; *A.I.R., supra,* 107 Cal.App.4th 1383, 1396; Guidelines § 15204(a).)

The reliability of these directives as a guide to action, however, is severely undermined by other provisions of the Guidelines and case law. The words undoubtedly most frequently quoted by challengers to an EIR, and by some courts finding fault with an EIR, is the directive found within Guidelines § 15144 that "an agency must use its best efforts to *find out and disclose all that it reasonably can*." (Guidelines § 15144 (emphasis added); *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 96; *Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431.) As originally formulated, Guideline § 15144 was intended to codify a rule of reason relating to the specific subject of forecasting of future impacts. (See *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 107.) Specifically, forecasting is required only to the extent that could be "reasonably expected under the circumstances." (*Id.*) However, Guideline § 15144 has often been interpreted more expansively. Taken literally, the above-italicized language in Guidelines § 15144 does indeed suggest that all arguably relevant information that *can* be obtained *must* be obtained and placed in an EIR, subject only to some vague boundary of reason. Such a standard provides a rationale for finding almost any EIR inadequate, since imaginative challengers can almost always think of some additional information that might be considered helpful, even if others might regard the information as merely cumulative, redundant or inconsequential.

As this Court has recognized, forecasting of impacts can be a highly problematic. "However sophisticated and well-designed a model is, its

product carries the inherent uncertainty of the long-term prediction, uncertainty that tends to increase with the period of projection. For example, if future population in the project area is projected using an annual growth multiplier, a small error in that multiplier will itself be multiplied and compounded as the projection is pushed further into the future." (*Smart Rail*, *supra*, 57 Cal.4th 439, 455.) Lead agencies are authorized to forego discussion of unduly speculative subject matter. (Guidelines § 15145.)[3] Such a decision obviously requires some technical understanding of the reliability of available data and available forecasting methods. However, if lead agencies are not able to rely on their own judgment and expertise on such matters, they may only guess when their cut-off points for investigation and analysis of various issues in an EIR might be deemed reasonable by a court.

There is also, at times, tension between the actual language of CEQA, the Guidelines and judicial decisions. For example, Public Resources Code § 21003(c) directs that "Environmental reports omit unnecessary descriptions of projects and emphasize feasible mitigation measures and feasible alternatives to projects." This is consistent with case law stating that the "core" of an EIR is its discussion of mitigation measures and alternatives. (*Citizens of Goleta Valley*, *supra*, 52 Cal.3d 553, 564.) Guidelines § 15143 advises, however, that "The EIR shall focus on the

[3] Guidelines § 15145 provides that "If, after a thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate the discussion of the impact." (Guidelines § 15145.) While obviously intended to limit the reach of Guidelines § 15144, this language also begs the questions of how "thorough" the investigation must be before concluding that further analysis would be speculative, and what standard courts might employ in determining whether the impact is "*too* speculative" for further discussion.

significant effects on the environment." Guidelines § 15125(a) provides that "The description of the environmental setting shall be no longer than necessary to an understanding of the significant effects of the proposed project and its alternatives." Some courts have stated, however, "If the description of the environmental setting of the project site and surrounding area is *inaccurate, incomplete or misleading*, the EIR does not comply with CEQA." (*Clover Valley, supra,* 197 Cal.App.4th 200, 219 (emphasis added), citing *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729.) This judicial command for completeness not only seems directly at odds with the command of Guidelines § 15125(a), but also suggests that in the reviewing court may independently determine factual questions concerning the "accuracy" or correctness of the discussion of the environmental setting rather than applying the substantial evidence test.

It also is not always possible to tell when statements in case law should be construed as legal standards governing review of EIRs, or mere observations or advisory statements. For example, in *Smart Rail, supra,* 57 Cal.4th 439, this Court made it clear that review of a lead agency's choice of a baseline for measuring environmental effects is governed by the substantial evidence test. (*Id*. at 449 and 470-471 (concurring and dissenting opinion).) However, the Court also noted "The public and decision makers are entitled to the most accurate information on project impacts practically possible …." (*Id*. at 455.) Although no one questions that lead agencies should strive for accuracy in an EIR to the extent possible, this statement appears to be advisory in nature. There is no indication that the Court intended to abrogate the longstanding rule that courts do not pass on the "correctness" – or, presumably, "accuracy" -- of

an EIR's environmental conclusions. (*Citizens of Goleta Valley*, *supra*, 52 Cal.3d 553, 564; *Laurel Heights*, *supra*, 47 Cal.3d 376, 392.) Nevertheless, the quoted passage is now widely cited by petitioners to suggest that courts should independently evaluate the accuracy of information or methodologies employed in preparing an EIR.

B. Lead Agencies are Entitled to Consider Costs, Delays and Other Feasibility Considerations

Guidelines §§ 15151, 15204(a) and some case law indicate that lead agencies may consider such feasibility factors as costs, delay, the sheer mass of data or analysis involved, and the limitations of existing data sources and methodologies in determining what degree of analysis is necessary and "reasonably feasible" in the EIR. (Guidelines §§ 15151, 15204(a), 15364; *National Parks*, *supra*, 71 Cal.App.4th 1341, 1364.) Lead agencies are also required to consider efficiency, and make constant determinations as to when past studies or reports may be relied on, and when updated investigation and analysis is required. (Pub. Resources Code § 21003.) Clearly these are factors which require a high degree of judgment based on specific facts. Such judgments also clearly cannot be reviewed as questions of law. The difficulty of reasonably weighing and balancing feasibility and efficiency considerations increases immeasurably if lead agencies must anticipate that a court may weigh these factors differently when reviewing an EIR. (See, e.g., *San Franciscans for Reasonable Growth*, *supra*, 151 Cal.App.3d 61, 74 ["However, expediency should play no part in an agency's efforts to comply with CEQA."].)

C. **Whether an EIR Adequately Informs Decisionmakers and the Public Goes to the Issue of Prejudice, Not Abuse of Discretion; Such a Test is Too Inherently Subjective to be Used as a Legal Standard for Judging the Initial Question of Adequacy of the EIR**

An additional area of confusion exists in the oft-invoked statement that a prejudicial abuse of discretion may be found where the omission of information in an EIR "precludes informed public decisionmaking or informed public participation." Properly construed, this language and its variations go to the question of whether the error at issue is *prejudicial*. (See, e.g., *Smart Rail*, *supra*, 57 Cal.4th 439, 463, quoting *Kings County Farm Bureau, supra,* 221 Cal.App.3d 692, 712; *A.I.R.*, *supra*, 107 Cal.App.4th 1383, 1391-1392; Pub. Resources Code § 21005(a).) Error alone, whether procedural or substantive, is not sufficient to invalidate an EIR. (Pub. Resources Code § 21005(b); *Smart Rail*, *supra*, 57 Cal.4th 439, 463-464 [use of baseline unsupported by substantial evidence, although erroneous, did not substantively affect EIR's impact analysis]; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073-1074; *Rialto Citizens, supra*, 208 Cal.App.4th 899, 926-927.) As the real party in interest in this case has noted, the test for prejudice cannot be conflated with the question of legal adequacy itself. (Friant Ranch Reply Brief, pp. 10-15.) To do so would be to inject yet another essentially subjective and unpredictable element into the standard of review.

Human expectations and human experience vary widely as to what quantity of information and what level of reliability and detail is required to permit truly "informed" decisionmaking. From a project opponent's perspective, there may be no end to information that is deemed essential, at

least if there is any possibility that additional information will show the project in an unfavorable light.[4] Others, however, may recognize a point of diminishing returns far earlier in the information gathering process, and feel adequately informed with far less exhaustive analysis or detail. This is particularly true where additional investigation or analysis may trend towards informational dead-ends, guesswork or speculation rather than hard facts, or where feasibility considerations of cost and delay come into play.

This Court has previously recognized that lead agencies bear the primary responsibility for determining what information is best suited to realistically informing the public and decisonmakers about a project's impacts. (*Smart Rail*, *supra*, 57 Cal.4th 439, 457, 470 (concurring and dissenting opinion). Such exercises in judgment and discretion are reviewable under the substantial evidence test. (*Id.*)

[4] Another problem arising from use of a subjective standard is that issues that appeared minor or even trivial to all concerned during the administrative process may be credited with unwarranted significance when reviewed in the hothouse atmosphere of adversary litigation, and with hindsight influenced by extensive briefing. It is not unusual for determined project opponents to deluge a lead agency with last minute comments asserting innumerable alleged technical flaws in an EIR, allowing little time to determine which alleged flaws are trivial, and which might qualify as substantive. Typically such comments focus on perceived weak points in an EIR's analysis, even where these issues may well be tangential or even irrelevant to previously identified issues of public concern. The incentive to engage in such tactics is obviously all the greater if petitioners believe they are entitled to independent judicial review on the significance of allegedly omitted information.

D. Conclusion – Determining the Appropriate Scope and Level of Detail in an EIR is Not a Matter of Merely Following Correct Procedure; Such Questions Must Be Reviewed Under the Substantial Evidence Test

The point of the foregoing discussion is not to criticize the CEQA Guidelines or decisional law for failure to develop clear, unambiguous and easily-followed rules for preparing EIRs, but to demonstrate that because of the innumerable different types of projects and the infinite array of variable factual backgrounds that must be addressed in EIRs, this would be an impossible task. Consequently, application of the general rules stated in CEQA, the Guidelines and case law inherently depends upon analysis and interpretation of facts, circumstances and technical considerations, and may lead to conclusions that are subject to reasonable debate. For these very reasons, it cannot be held that preparing an "adequate" EIR is merely a matter of following procedure. To suggest that courts should routinely treat questions of EIR adequacy of sufficiency as alleged procedural errors subject to independent judicial review is to carry reviewing courts far out of their traditional role of interpreting and applying laws, and thrust them into the roles of factfinders, expert witnesses and policymakers all in one. This should not and cannot be done.

IV. EXISTING PRINCIPLES OF LAW AND SOUND PUBLIC POLICY MANDATE RELIANCE ON THE SUBSTANTIAL EVIDENCE TEST

The petitioners in this case, and undoubtedly many other advocates, contend that there are sound public policy reasons for applying an independent judgment standard when reviewing the adequacy of EIRs. In their view, independent judicial review is necessary to ensure that CEQA is

"scrupulously followed," and that the public will thus be "fully informed" as to the basis for the lead agency's decision. (SC Brief at p. 18, citing *Laurel Heights, supra*, 47 Cal.3d 376, 392.)

This argument is not well founded. To begin with, the argument presupposes a level of distrust, if not outright disrespect, for the competence and integrity of public agencies that is inconsistent with the presumption of regularity, and also not supported by fact nor any statutory provision or discernable policy found in CEQA. Beyond this, it runs afoul of a variety of additional considerations discussed below.

A. **The Court Reviews a Lead Agency's Decision to Certify an EIR – That Decision is Entitled to the Same Deference as Any Other Decision Involving Agency Discretion and Judgment**

As an initial matter, many litigants and some courts appear to forget that the issue being litigated in the challenge to an EIR is not the sufficiency or adequacy of the EIR *per se*, but rather whether the lead agency abused its discretion *in certifying* the EIR. (Pub. Resources Code §§ 21100, 21151(a); Guidelines § 15090(a).) This is consistent with the express language of Pub. Resources Code § 21168 and 21168.5, which provide for review only of a "determination, finding or decision" of a public agency. Reviewing courts thus do not sit as editorial boards deciding how the EIR should have been written. The decision to certify an EIR is therefore entitled to the same level of deference as the agency's decision on the merits of the project. (See, e.g., *Citizens of Goleta Valley, supra*, 52 Cal.3d 553, 564 ["We may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable."]; *In re Bay-Delta, supra*, 43 Cal.4th 1143, 1161-1162.) The reviewing court

"must resolve reasonable doubts in favor of the administrative finding and decision." (*Laurel Heights, supra*, 47 Cal.3d 376, 393.) It necessarily follows that all the subordinate decisions and determinations involved in determining the scope and content of an EIR are entitled to similar deference, i.e., should be reviewed under the substantial evidence test.

B. Substantial Evidence Review is Consistent with the Statutory Standard of Review Specified in CEQA

Application of substantial evidence review to most questions concerning the adequacy of an EIR is also consistent with the "abuse of discretion" standard expressly prescribed by Pub. Resources Code § 21168 and 21168.5, and applied in mandamus actions challenging virtually all other types of agency decisions that involved elements of judgment and discretion. For reasons already discussed, review for "failure to proceed in the manner required by law" is appropriate only where the governing law affords the respondent no genuine discretion in the matter, and the court can conclude that a specific procedural mandate has been violated on the basis of undisputed facts.

The Legislature has discretion to alter the applicable standard of review for policy reasons when it wishes to do so. For example, Code of Civil Procedure § 1094.5(c) recognizes that courts may apply an independent judgment standard in certain classes of administrative mandamus actions, such as those involving vested property rights. (See, e.g., *Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 63-64.) However, despite the importance petitioners attach to "scrupulous" enforcement of CEQA, the Legislature has made no provision for heightened judicial scrutiny concerning the adequacy of EIRs.

C. Separation of Powers

As this Court has previously noted, a deferential standard of review is generally mandated by separation of powers considerations that constrain judicial oversight of legislative bodies and duly empowered administrative agencies generally. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572.) To allow courts to conduct independent review of the "sufficiency" of a certified EIR would in practice empower courts to determine "not whether the administrative decision was rational in light of the evidence before the agency, but whether it was the wisest decision given all the available scientific data." (*Id*.) This is precisely the type of inquiry which the law forbids. (*Id*.)

D. Courts Lack the Technical Expertise and Complete Knowledge of Background Facts Necessary to Independently Evaluate Lead Agency Determinations Made in Preparation of an EIR

To allow courts to independently review questions of sufficiency of an EIR also inevitably invites courts to substitute their own non-expert judgments for those of qualified public agencies on any number of the predicate decisions which go into determining the content of an EIR. This Court has long cautioned against precisely this type of second guessing. (*Western States Petroleum, supra*, 9 Cal.4th 559, 572-573.) As noted in *Laurel Heights, supra*, 47 Cal.3d 376, 393: "We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so."

Notwithstanding that our society is now well into the Internet age, these cautionary statements remain valid. Questions of adequacy of an EIR ultimately boil down to what additional information, or different

information, should have been provided. For a court exercising independent judgment, it may be tempting to assume that existing methodologies or data sources could easily have been used to provide additional information. Often, however, this is simply not true. Technical expertise includes knowing the capabilities of available models and methodologies, and also what their limitations are. It also means understanding relevant limitations on the quantity, quality and reliability of data sources and potential investigative techniques. Technical expertise also may be required to understand counter-intuitive cause and effect relationships, and consequently what information or avenues of investigation should be pursued, and which are unlikely to produce significant information. In technical matters, a lay-person's supposedly logical assumptions or "common sense" may prove woefully incorrect. Courts that apply independent judgment where such questions are implicitly involved not only exceed their judicial mission, but also risk rendering decisions that are simply wrong on the facts.

E. Review Under the Substantial Evidence Test is Not Inconsistent with Vigorous Enforcement of CEQA's Basic Mandates

Although petitioners in this case contend that independent judicial review is desirable and necessary to ensure that CEQA is "scrupulously followed," they also concede that many types of claims concerning the adequacy of EIRs are governed by the substantial evidence test. (SC Brief at p. 15.) In view of the case law discussed previously, this concession is well taken. Indeed, even the most vociferous advocate must concede that review of many of the most critical determinations affecting the content of an EIR are governed by the substantial evidence test. For example, there

can be no dispute that an agency's determination that a particular environmental effect is less than significant is reviewed for substantial evidence only. (*Eureka Citizens for Responsible Development v. City of Eureka* (2007) 147 Cal.App.4th 357, 372-373.) This determination, however, has a profound effect on the content of an EIR, since detailed study and consideration of mitigation measures are required only where an impact is determined to be significant. (*Id*. at 376; Guidelines §§ 15126.2(a), 15126.4(a)(3), 15128.) Similarly, determinations as to whether potential mitigation measures or alternatives are feasible and should be evaluated in depth the EIR are governed by the substantial evidence test. (See, e.g., *San Diego Citizenry*, *supra*, 219 Cal.App.4th 1, 16-17; *Cherry Valley*, *supra*, 190 Cal.App.4th 316, 350.) So also are questions of environmental baseline, as noted above. (*Smart Rail*, *supra*, 57 Cal.4th 439, 457, 471; *CBE v. SCAQMD*, *supra*, 48 Cal.4th 310, 328.) Where a prior EIR has been prepared, an agency's determination that no supplemental EIR or other additional environmental review is required at later stages of a project is also normally reviewed under the substantial evidence test, although this may result in curtailed discussion of allegedly important new information. (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 797-798; *Treasure Island*, *supra*, 227 Cal.App.4th 1036, 1049-1050.)[5]

[5] This Court is currently reviewing a subsidiary issue as to whether the substantial evidence test or independent review standard applies where it is contended that a previously approved project has been so substantially changed as to constitute a new project altogether for purposes of further CEQA review. (*Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.*, No. S135892.)

To date, this Court and other courts have not found the deference afforded to these types of agency determinations under the substantial evidence test to be an obstacle to enforcement of CEQA. It would thus seem highly inconsistent to hold that the independent judgment standard is nevertheless necessary to effectively review other, less far-reaching agency determinations concerning the content of an EIR, such as whether additional discussion of one particular type of noise impact was required or additional soil testing should have been performed. Having such a patchwork system of review would also do little to promote clarity in the law. Instead, it would merely complicate debates over which sorts of alleged deficiencies in an EIR are reviewed as failures to proceed in the manner required by law, and which are reviewed under the substantial evidence test.

The substantial evidence test also is not, as some advocates fear, entirely toothless or a rubber stamp for agency decisions. This Court and other courts have had no difficulty finding an abuse of discretion under the substantial evidence standard where agency determinations were based on faulty logic, unsupported rationalizations or clear misinterpretation of the law. (See, e.g., *Smart Rail*, *supra*, 57 Cal.4th 439, 460-462 [rejecting agency choice of baseline]; *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230, 238-239 [rejecting conclusion that potential mitigation measure for agricultural impacts was infeasible]; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1117.)[6] What the

[6] Petitioners suggest that disputes involving "interpretation" of CEQA's requirements are fundamentally legal in nature, and therefore subject to independent review. Amici do not disagree with this proposition. However, disputes that turn solely on interpretation of specific CEQA
Footnote continued on next page

substantial evidence test *does* preclude is courts exercising independent judgment on matters over which they have no inherent advantage in knowledge, experience or technical understanding over the respondent lead agency that actually prepared the EIR. That is as it should be.

F. **The Public Comment Function of CEQA Provides an Adequate Means of Ensuring that Public Concerns are Addressed**

There is no question that application of an independent judgment standard encourages CEQA litigation. Petitioners simply have a better chance of success on such claims. Judicial enforcement of CEQA, however, is not an end in itself, nor should it be a preferred way of ensuring achievement of CEQA's informational purposes. Members of the public who feel that an EIR is ignoring or understating relevant information have a built-in remedy within CEQA itself other than litigation. This remedy is the public comment and response procedure mandated by Public Resources Code § 21091(d) and Guidelines § 15088. (See *Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 678-679.) This procedure requires that the draft EIR be circulated for public review and comment for at least 30 days, and often longer, before being finalized. (Pub. Resources Code § 21091(a).) The lead agency must respond to these comments in writing in the final EIR. (Guidelines § 15088(d).) ". . . [T]he major environmental issues raised when the lead agency's position is at variance with recommendations or objections raised in comments must be addressed in detail giving reasons why specific comments and suggestions

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provisions or the Guidelines, rather than on how much or what quality of information is required, are relatively rare.

were not accepted. There must be good faith, reasoned analysis in response." (Guidelines § 15088(c); *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1124 ("*Laurel Heights II*"); *Flanders Foundation*, *supra*, 202 Cal.App.4th 603, 615.) Where the comments or responses themselves add significant new information to the EIR, a revised draft EIR (or portions thereof) must prepared and recirculated for further public comment before the EIR is finalized. (Pub. Resources Code § 21092.1; Guidelines § 15088.5; *Laurel Heights II*, *supra*, 6 Cal.4th 1112, 1126-1130.)

This comment-and- response requirement is a statutory fail-safe intended to help assure that environmental issues are fully and openly addressed. (*City of Long Beach*, *supra*, 176 Cal.App.4th 889, 904-905.) Project opponents or other interested persons who believe that important information is missing from an EIR can and should call this to the attention of the lead agency through the procedures specifically included in CEQA for that purpose. As stated in Public Resources Code § 21003(f) (emphasis added), "*All* persons … involved in the environmental process [are] responsible for carrying out the process in the most efficient, expeditious manner …." Consequently, comments from public "shall be made as soon as possible in the review of environmental documents ..." (Pub. Resources Code § 21003.1(a).) Indeed, failure to make timely requests or objections raises legitimate questions about whether the allegedly missing information is as important to informed public decisionmaking as objectors may claim in subsequent litigation. If a respondent agency fails to make the required good faith responses, then judicial intervention may indeed be warranted. If the agency provides a response that is still unsatisfactory to the challenger, the court will at least have an explanation of the agency's reasons for

rejecting the request for additional information, and may judge whether the agency's decision is adequately supported.

G. **Application of the Substantial Evidence Test is Most Consistent with Public Policies Favoring Certainty and Predictability**

As a final matter, the use of a substantial evidence standard rather than an independent review standard for most challenges to EIRs promotes certainty and rationality. Certainty and predictability in CEQA litigation are an important public policy concern, and one on which the Legislature has taken a clear position. As discussed in *Berkeley Hillside Preservation, supra*, 60 Cal.4th 1086, Pub. Resources Code § 21083.1 specifically directs that courts "shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." (*Id*., 2015 WL 858265 at p. 12.) The legislative history of this section discloses that its express purpose was to "limit judicial expansion of CEQA requirements'" and "'*to reduce the uncertainty and litigation risks facing local governments and project applicants* by providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law." (*Id*. quoting Assembly Committee on Natural Resources, Analysis of Sen. Bill No. 722 (1993-1994 Reg. Sess.) (emphasis added).) This Court and lower courts have also frequently noted the potential hardships and disruption imposed by CEQA litigation, and corresponding Legislative concern for certainty. (*Id*.; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 50; *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado*

(2011) 200 Cal.App.4th 1470, 1491; *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12-13.)

Permitting judicial review of the "sufficiency" of an EIR to be conducted de novo as a question of law is inimical to certainty or predictability during either the preparation of an EIR or in litigation on its merits. As discussed previously, CEQA and the Guidelines contain few explicit directives that can be uniformly applied in all situations. Instead, the statute and Guidelines generally identify factors which must be considered, but require the lead agency to balance these various factors based on the specific facts of the case.

It is, of course, not too much to demand that public agencies support their decisions with substantial evidence. Public agencies can and should be held responsible for assuring that there is some reasonable basis for their actions. It is entirely another matter, however, to suggest that courts should routinely be able to revisit decisions as to what is left in and what is left out in an EIR using their own independent judgment. This not only precludes certainty and predictability, but provides a strong incentive for petitioners to initiate and pursue CEQA claims on the eternal hope that the reviewing court may simply disagree with the lead agency. This is a sure invitation to use of CEQA litigation as a tool for "the oppression and delay of social, economic or recreational development and advancement," rather than for genuine vindication of the law. (*Citizens of Goleta Valley*, *supra*, 52 Cal.3d 553, 576.)

V. CONCLUSION

For the reasons discussed in this brief, this Court should find that the substantial evidence standard of review generally governs issues of sufficiency or adequacy of an EIR. The focus of judicial inquiry should be

on the predicate decisions and determinations that a lead agency must inevitably make in determining the contents of an EIR. Where these determinations are supported by relevant facts, technical expertise or reasonable balancing of factors specified in CEQA and the CEQA Guidelines, courts should not second guess the lead agency by applying an independent judgment standard. Omissions of significant information from an EIR may rise to the level of a failure to proceed in the manner required by law in limited situations, i.e., where an EIR completely omits discussion of a required subject; where purported discussion is so conclusory, internally contradictory or unsupported that it "fails to disclose the 'analytic route the … agency traveled from evidence to action.'" (*Vineyard*, 40 Cal.4th 412, 445); or where the omission or misrepresentation is clearly based on an erroneous interpretation of the law.

DATE: April 2, 2015 By:

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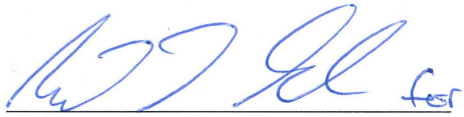
CERTIFICATION OF WORD COUNT

The text of the BRIEF OF AMICUS CURIAE consists of 11,788 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2013 Word processing program to generate this brief. (Cal. Rules of Court, Rule 8.204(c)(1).)

DATE: April 2, 2015 By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On April 2, 2015, I served true copies of the following document(s) described as **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** on the interested parties in this action as follows:

☒ BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with The Sohagi Law Group, PLC's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 2, 2015, at Los Angeles, California.

Cheron J. McAleece
Printed Name

Signature

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