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August 7, 2014

Justices Cantil-Sakauye, Kennard, Baxter, Werdegar, Chin, Corrigan, and Liu
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Letter In Support of Real Party in Interest's Petition for Review in *Sierra Club, et al. v. County of Fresno* (Supreme Court Case No. S219783)

Dear Justices Cantil-Sakauye, Kennard, Baxter, Werdegar, Chin, Corrigan, and Liu:

On behalf of the League of California Cities (the "League") and the California State Association of Counties ("CSAC"), we request that the Supreme Court grant Real Party in Interest's ("Friant Ranch") Petition for Review in *Sierra Club, et al. v. County of Fresno* (Supreme Court Case No. S219783; Petition for Review filed July 8, 2014; [the "Opinion"]). This amicus curiae letter is submitted pursuant to the Rules of Court, Rule 8.500(g).

I. INTERESTS OF THE LEAGUE AND CSAC

The League is an association of 473 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.

II. WHY REVIEW BY THE SUPREME COURT IS WARRANTED

Similar to most Environmental Impact Reports ("EIR"), the Friant Ranch Project (the "Project") EIR analyzed the Project's air quality impacts utilizing a combination of quantitative and qualitative analyses. The EIR provided a qualitative description of the health effects associated with the project's air pollutants, and relied upon quantitative thresholds developed by the local Air Quality Management District ("AQMD"). (Slip Opinion, p 45.) Indeed, the Court noted that "...the Friant Ranch EIR has identified, in a general manner the adverse health impacts that could result from the project's effect on air quality." (Slip Opinion, p. 48.) Nevertheless, the Court ruled that the EIR's air quality analysis was inadequate as a matter of law because "...it failed to correlate adverse air quality impacts to resulting adverse health impacts." (Slip opinion, p. 46.)

The EIR utilized significance thresholds of 15, 10, and 10 tons per year for PM10, ROG, and NOx, respectively, as set by the San Joaquin Valley Air Pollution Control District. (Slip Opinion, p 45.) The Draft EIR disclosed that the Project would emit approximately 117.38, 109.52, and 102.19 tons per year of PM10, ROG, and NOx in the San Joaquin Valley air basin. CEQA Guidelines § 15064.7 defines a threshold of significance as "...an identifiable quantitative, *qualitative,* or performance level of a particular environmental effect, non-compliance, with which means the effect will normally be determined to be significant by the agency, and non-compliance with which means the effect normally will be determined to be less than significant." (Emphasis added; Slip Opinion, p 44, fn20.) As also discussed under CEQA Guidelines § 15064(b) "An iron clad definition of significant effect is not always possible because the significance of the activity may vary with the setting."

Public agencies have traditionally had considerable discretion in selecting the thresholds and methodology for determining whether a project would have a significant impact on the environment. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523; 545 ["The mere fact plaintiff disagrees with the methodology employed by defendant to measure the project's potential traffic impacts on Santiago Canyon Road does not require invalidation of the SEIR/EIR, if it provides accurate information."]; see also CEQA Guidelines §§ 15146(b), 15151, 15204(a).)

In determining the validity of the EIR's Air Quality analysis, the Court of Appeal acknowledged that Petitioners' did not assert that essential information was omitted from the environmental analysis, but instead argued there was an insufficient level of detail in the EIR's air quality analysis. However, consistent with past cases in the Fifth District, the Court concluded that the sufficiency of the EIR's analysis was a "question of law subject to independent review by the Courts." (Slip Opinion at 23; citing previous Fifth

District opinions in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102; relying upon *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.) Under this 'independent review' standard, the Court gave no deference to the Lead Agency's decisions regarding the scope, contents, or methodology utilized in the EIR, contrary to Supreme Court precedent, and the standards of review utilized in the First, Second, Fourth, and Sixth Districts Courts of Appeal.

The Supreme Court has warned that "A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR." (*Laurel Heights Improvement Association of San Francisco v. The Regents of the University of California* (1988) 47 Cal.3d 376, 415.) Nonetheless, the Fifth District's Opinion ruled that qualitative analysis of air quality health impacts, in combination with quantitative air quality thresholds, was inadequate as a matter of law. (Slip Opinion p. 47-50.)

Most courts outside of the Fifth District have recognized that where the sufficiency of the environmental analysis is alleged to be inadequate, the courts apply the substantial evidence test; that is deferential to the public agencies. (See *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, 1616-1621 [4th Dist.]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1258 [4th Dist.]; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986; *Baykeeper* [2nd Dist.]; *North Coast Rivers Alliance v. Municipal Water Dist. Bd. Of Directors* (2013) 216 Cal.App.4th 614, 637 [1st Dist.]; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986-987 [6th Dist.].)

The deferential, substantial evidence test applied by the other Appellate Districts has historically provided public agencies with a last line of defense against project opponents alleging their choice of methodology, significance thresholds, or conclusions are more appropriate than that of the Lead Agency. The Fifth District's independent review of the EIR's methodology and analysis eviscerates this line of defense. Furthermore, the Court's conclusion that a qualitative discussion of health effects is inadequate essentially eliminates the use of a qualitative impact analysis, even though it is expressly permitted by CEQA Guidelines § 15064.7. The Opinion even casts doubt on whether an EIR can ever include mitigation measures in the absence of showing a quantitative reduction. (Slip Opinion, p 58.) Under the Opinion's standard of review, public agencies and project applicants have no way of ascertaining what type information or analysis the Court will conclude is appropriate, nor is the judicial system well equipped to handle these types of judgment calls. (See *Laurel Heights* (supra) 47 Cal.3d

at 393 [Judges "have neither the resources nor scientific expertise to engage in such analysis."].)

Despite concluding the "EIR has identified, in a general manner the adverse health impacts" (Slip Opinion, p. 48), the Court nevertheless held that the analysis was inadequate, and proceeded to suggest its own methodology: (1) whether "people with respiratory difficulties [have] to wear filtering devices when they go outdoors, and (2) providing an "estimate of the project's impacts on 'days exceeding'" the federal and state air quality attainment standards. (Slip Opinion, p. 49.) The League and CSAC are concerned that this creates a new analytical requirement which is not grounded in any regulatory or statutory requirements. (See Pub. Resources Code § 21083.1 ["It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA] in a manner which imposes procedural or substantive requirements beyond those explicitly state in [CEQA]"].)

The League and CSAC urge the Court to accept Friant Ranch's Petition for Review, as it would finally address the split of authority between the Fifth District and the First, Second, Fourth, and Sixth District Courts of Appeal on the proper standard of review. Accepting review of this case would also provide this Court an opportunity to address the necessity for public agencies to provide an air quality analysis that has a specifically quantified "correlation" to health impacts.

Very truly yours,

R. TYSON SOHAGI (SBN 254235)
On behalf of the League of California Cities and the California State Association of Counties

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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 August 7, 2014, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF REAL PARTY IN INTEREST'S PETITION FOR REVIEW IN *SIERRA CLUB, ET AL. V. COUNTY OF FRESNO* (SUPREME COURT CASE NO. S219783)** 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 August 7, 2014, at Los Angeles, California.

Cheron J. McAleece
Printed Name

Cheron J. McAleece
Signature

SERVICE LIST

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