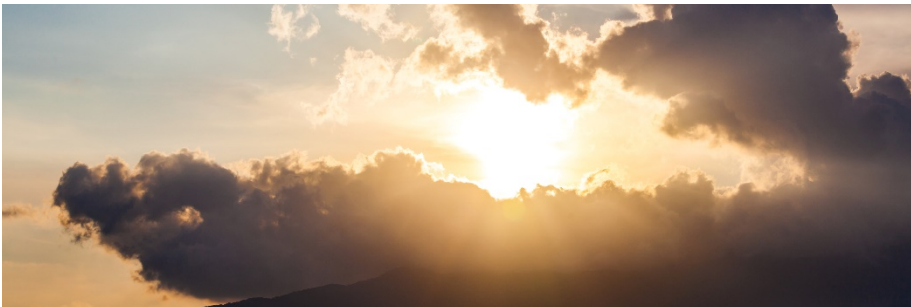


## California Supreme Court Finds Fresno County EIR Deficient



A recent California Supreme Court decision reminds project proponents and lead agencies of the need for substantive analysis in an Environmental Impact Report (EIR). On Christmas Eve 2018, the California Supreme Court published its opinion in *Sierra Club et al. v. County of Fresno et al.* (Dec. 24, 2018) \_\_Cal.5th\_\_ (Case No. S219783). The Sierra Club challenged the adequacy of Fresno County's EIR for failing to comply with the California Environmental Quality Act (CEQA). The EIR analyzed the Friant Ranch project, a 942-acre master-planned community in north-central Fresno County. The Project includes a specific plan covering five phases constructed over 10 years containing up to 2,500 single and multi-family active adult 55+ homes, 250,000 sq. ft. of commercial property and 460 acres of open space.

In taking up the case, the High Court answered four important questions.

### Questions

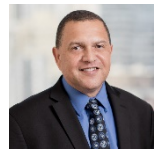
#### How Should Courts Determine the Adequacy of an EIR's Analysis; What Standard of Review Should the Court Apply?

To comply with CEQA requirements, the EIR must adequately analyze potential impacts. A court will evaluate whether the lead agency analysis complies with CEQA's procedural requirements

January 22, 2019

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using its independent judgment, not the more agency-friendly “substantial evidence” standard where the court defers to agency fact determinations.

## **Does CEQA Require an EIR to Connect a Project’s Air Quality Impacts to Specific Health Consequences?**

When discussing a significant impact, the EIR “must provide an adequate analysis to inform the public how its bare numbers translate to create potential adverse impacts or it must adequately explain what the agency *does* know and why, given existing scientific constraints, it cannot translate potential health impacts further.” Fresno County’s failure to tie potential health impacts from air emissions with the amount of air emissions from the proposed project, or to explain why such an analysis was not included, rendered the EIR deficient.

## **Did the County Incorrectly Defer Mitigation When it Kept the Discretion to Substitute Later Measures That May Be Technically Superior?**

Fresno County identified mitigation measures and included a substitution clause that allowed the County to “substitute different air pollution control measures for individual projects, that are equally effective or superior to those proposed [in the EIR], as new technology and/or other feasible measures become available [during] build-out with the [Project].” Furthermore, the County stated that many of the identified mitigation measures would be partially effective in reducing the significant impacts.

The Court found that allowing substitutions for equal or more efficient technology is not an impermissible deferral of mitigation because it “promotes CEQA’s goal of environmental protection...it is a recognition that substitutions of adopted mitigation measures may be implemented to further minimize the Project’s environmental impacts.” Note that the County did identify mitigation measures it adopted, which the public did have a chance to review and comment upon.

## **May a Lead Agency Adopt Mitigation Measures That Do Not Reduce the Significant and Unavoidable Impacts to a Less than Significant Level?**

An EIR may include mitigation measures that do not reduce an impact below less than significant levels so long as they are “partially effective” and “as long as the public is able to identify any adverse health impacts clearly, and the EIR’s discussion of those impacts includes relevant specifics about the environmental changes attributable to the project.” The Court turned to established case law stating that agencies must adopt feasible mitigation. If after feasible mitigation measures are implemented and significant effects still exist, a project may still be approved with a statement of overriding considerations.

## **Implications**

The court clearly lays out the fundamental review criteria: the “ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail to enable those who did not participate in

**The ultimate inquiry is whether the EIR includes enough detail to enable those who did not participate in its preparation to understand the issues.**

its preparation to understand and to consider meaningfully the issues raised by the proposed project.” The analysis in the EIR must provide substantive information to the decision-maker and the public and not just generalities. Should the lead agency not provide a substantive analysis, the court will not defer to the lead agency. As the Court stated, “whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question.” The court reviews this scenario as a failure to comply with CEQA’s procedural requirements.

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