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November 30, 2020

Fifth District Holds Defects in EIR's Air Quality Impact Analysis Require Decertification of Entire EIR

On remand from the California Supreme Court's decision in *Sierra Club v. County of Fresno*, 6 Cal.5th 502 (2018) ("*Friant Ranch I*"), a court of appeal has held that CEQA requires full decertification, not partial decertification - of an EIR that has been adjudged inadequate even if partial decertification were ever allowed, here the project approvals, so decertification of the entire EIR was

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F079904 (5th Dist., Nov. 24, 2020) ("*Friant Ranch II*").

In

Friant Ranch I, the California Supreme Court ruled that an EIR's analysis of air quality impacts and its characterization of the effectiveness of mitigation for those impacts were defective. When the case was remanded to the lower courts, the project proponent argued that the EIR should be decertified only as to the defects the Supreme Court identified and should otherwise remain certified. In *Friant Ranch II*, the court of appeal, following its own precedent and rejecting contrary precedent from other courts, held that because CEQA requires certification of an EIR that is "complete," partial decertification of an EIR is never permitted. The court also considered, however, the factors other courts have analyzed when considering partial decertification of an EIR. These focus on whether the EIR's defects are severable from the decisions or activities the project proponent seeks to preserve while the EIR's defects are being corrected. Here, the court ruled that the EIR's defects were not severable because the County relied on its defective air quality analysis in making the statement of overriding considerations that supported approval of the project. Finally, the court concluded that even with decertification of the entire EIR, the project proponent would not be forced to relitigate the adequacy of sections of the EIR other than its air quality analysis. Instead, the project proponent would be protected from new challenges to the EIR's other analyses by principles of res judicata and collateral estoppel, and the requirement for exhaustion of administrative remedies. *Friant Ranch II* demonstrates that some courts of appeal continue to reject the concept of partial decertification of an EIR. In taking this view, the court did not explain how any part of a project subject to CEQA could proceed - as section 21168.9 of the statute clearly allows under specified circumstances - if the entire EIR upon which the project depends must be decertified. Nor did the court explain why the language in section 21168.9 which states that a court may order that "any" determination, finding, or decision found to violate CEQA be voided "in whole or in part" does not provide the answer. .

Authors