S251709

No. _____

IN THE SUPREME COURT OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

vs.

STANISLAUS COUNTY et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal, Fifth Appellate District
Case No. F073634

Appeal from the Stanislaus County Superior Court, Case No. 2006153
The Honorable Roger M. Beauchesne, Judge, Presiding

DEFENDANTS AND RESPONDENTS' PETITION FOR REVIEW

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To the Honorable Tani G. Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

Defendants and Respondents Stanislaus County et al. petition this Court for review of the decision of the Court of Appeal, Fifth Appellate District (Poochigian, Acting P.J., and Franson and Peña, J.J.), filed on August 24, 2018, reversing the judgment of the superior court. The decision became final on September 23, 2018. This petition is timely filed under California Rule of Court 8.500(e)(1). A copy of the Court of Appeal's opinion ("Opinion") reflecting its date of filing is attached hereto as Attachment 1.

The County is simultaneously filing a petition for review in *Coston v. Stanislaus County* (Fifth District Court of Appeal No. F074209), which was decided on the same day as this case. The two cases were set for concurrent briefing and argument below, and the Court of Appeal's decisions in the two cases are identical in all respects relevant to the issue presented here.

ISSUE PRESENTED FOR REVIEW

The state Department of Water Resources publishes construction standards for wells to ensure they will not contaminate

groundwater. Many counties, including Defendant Stanislaus County, implement those standards by requiring permits for well construction. These permits cannot be denied or modified to address any environmental impact other than to adjust a well's distance from a potential source of contamination. The Court of Appeal concluded that this represents sufficient discretion to trigger application of the California Environmental Quality Act ("CEQA").

Was the Court of Appeal here correct, or was the Second District Court of Appeal in *California Water Impact Network v. San Luis Obispo County* (2018) 25 Cal.App.5th 666 correct in holding that the same state standards are not discretionary because they provide insufficient authority to require mitigation for environmental impacts that might be revealed by CEQA review?

PRELIMINARY STATEMENT

A Stanislaus County ordinance requires landowners to obtain a permit for construction of groundwater wells. Through those permits, the County Department of Environmental Resources ("DER") regulates the design and construction of wells to ensure that they do not introduce contaminants to groundwater. The state Department of Water Resources ("DWR") has published and

periodically updated a set of statewide model standards for such permits, and since 1986, section 13801(c) of the Water Code has required each city, county, and water agency in the state to implement a similar permitting program. The County's program, like other counties', implements the DWR standards.

Since the program's inception, the County has considered DER's approval of well-construction permits to be *ministerial* actions. Because CEQA requires environmental impact analysis only for *discretionary* actions, the County has identified the permits as exempt from CEQA in its local CEQA implementing procedures since 1983.

In the last several years, plaintiffs have begun suing counties alleging that these well-construction permits are discretionary and thus that counties must comply with CEQA before issuing them. Those suits have now led to a split of authority. The Fifth District Court of Appeal in this case held that the County's permits are discretionary actions, but the Second District Court of Appeal in *California Water Impact Network v. San Luis Obispo County* (2018) 25 Cal.App.5th 666 ("*California Water*") held that identical permits issued by San Luis Obispo County were ministerial. The *California Water* court was correct, but because counties largely

apply the same statewide standards, the split leaves the remaining counties wondering how to proceed.

The Fifth District concluded here that the well-construction permits are discretionary because the permitting agency—here, the County Department of Environmental Resources ("DER")—has authority under the standards to require wells to be moved farther away from potential sources of groundwater contamination. As the court acknowledged, DER is powerless to reject a permit or impose conditions on its issuance to address any other issue. DER cannot control the use of the well in any way, including the amount of water pumped, or affect the use of that water or the land uses it serves.

The Court of Appeal's Opinion would therefore require the County—and any other county worried about being sued—to perform pointless environmental review. Under basic CEQA principles, DER would be required to evaluate all reasonably foreseeable environmental impacts of construction and operation of the well, direct or indirect, including the impacts arising from the use of water from the well. Yet the DER lacks any authority to require a permit applicant to avoid or minimize those impacts.

The Court of Appeal could have avoided this result if it had properly applied the test for discretion. The difference between ministerial and discretionary actions is a spectrum, not a dichotomy. Consequently, courts apply a "functional" test to determine whether an agency has sufficient discretion to trigger CEQA. That test asks whether the agency has sufficient authority to alter a proposed project in a way that will meaningfully address environmental impacts identified in the course of CEQA review. This is the test that courts have applied for decades, and it was the test that the court in *California Water* correctly applied to conclude that the identical well-construction permits in San Luis Obispo County are ministerial.

By contrast, the Court of Appeal here effectively applied a formal test. It latched on to the word "adequate" in a single standard for requiring wells to be located at a distance from potential sources of groundwater contamination. Based solely on DER's ability to require a permit applicant to move a well farther from such a potential source, the court concluded that CEQA compliance was required. It recognized that DER has no ability to reject or otherwise modify a proposed well in response to any evidence of any

other environmental impacts of a well that might be revealed by CEQA analysis.

In fact, the Court of Appeal here conceded that its ruling could impose a substantial burden with little benefit. It suggested its hands were tied and pointed to the Legislature for a solution. But the functional test for discretion provides a solution already in place.

The County does not object to having to comply with CEQA. The significant problem created by the Opinion is instead that DER has no authority to *do anything* to modify or reject a proposed well to mitigate the impacts that might be revealed by CEQA analysis. The County objects to having to perform such *useless* analysis. This Court should grant review and apply the functional test to ensure that the many counties that require similar well-construction permits are not required to undertake fruitless CEQA analysis.

STATEMENT OF THE CASE

I. Counties regulate groundwater well construction, largely by applying state standards.

For 50 years, the state Department of Water Resources ("DWR") has published technical standards for the construction

and destruction of wells. Those standards are designed to prevent wells from contaminating groundwater. The current *Bulletin No. 74: Water Well Standards* provides at least 16 separate sets of technical specifications to govern each of three types of wells—domestic and agricultural groundwater, monitoring, and decommissioned wells. (Appellants' Appendix ("AA") 3:521, 536-37, 541-601; see also AA 3:447-81.)[1] These standards include minimum distances between wells and potential pollutant sources (AA 3:450-53, 3:542-43); minimum depths of well seals below the ground and appropriate sealing materials (AA 3:453-460, 3:543-52); requirements to protect well openings (AA 3:460-64, 3:552-54); and materials and installation methods for well casings (AA 3:465-470, 3:554-56). Since 1986, Water Code section 13801(c) has required that local governments adopt well construction ordinances that "meet[] or exceed[] the standards contained in" Bulletin No. 74.

The County adopted such an ordinance—now codified as Chapter 9.36 of the County Code ("Ordinance" or "Chapter 9.36")—

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[1] Citations to the Appellants' Appendix are in the format "[volume]:[page]."

in 1973.[2] According to the California State Association of Counties' amicus brief supporting the County in the Court of Appeal, at least seven other county ordinances "closely resemble" Chapter 9.36. (Amicus Curiae Brief in Support of County by the Cal. State Assn. of Counties at 8 & fn. 1).

To construct, repair, or destroy a groundwater well, a property owner must first obtain a permit from the County Department of Environmental Resources. (See AA 3:664-72, 1:148-51; § 9.36.030.) DER issues hundreds of these permits each year. (AA 3:716 [Stipulated Fact 11].) Unless an applicant requests a variance, DER applies the "standards for the construction, repair, reconstruction or abandonment of wells . . . as set forth in Chapter II" of Bulletin No. 74, except as expressly modified or supplemented in Chapter 9.36. (§ 9.36.150.) If an application complies with the distance, design, and other applicable standards set forth in Chapter 9.36 and Bulletin No. 74, DER issues the permit. The Ordinance does not allow DER to regulate the use of a well or the use of water produced by the well.

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[2] Chapter 9.36 is attached as Attachment 2. Further statutory references are to the County Code unless otherwise specified.

The County has always considered approval of these well-construction permits to be a ministerial function of DER and thus exempt from CEQA. (AA 1:073-74 [Stipulated Facts 2, 3, 9(a)(3), 9(b)(2)].) In fact, since 1983, when the County Board of Supervisors first adopted implementing procedures for CEQA, the County has identified those permits on its list of County approvals determined to be ministerial. (AA 3:680, 689; see also Cal. Code Regs., tit. 14 ("CEQA Guidelines"), § 15268(c) [each agency should "provide an identification or itemization of its projects and actions which are deemed ministerial"].)

II. The State and County begin to regulate groundwater *extraction* in 2014.

Counties have thus regulated well construction for decades. In 2014, however, both the State and County passed legislation to regulate groundwater *extraction* for the first time. The Sustainable Groundwater Management Act ("SGMA") requires that public water agencies, counties, and other local agencies begin to adopt plans in 2020 that will regulate extraction within 50 years. (See Water Code §§ 10721(k), (r), (v), 10727, 10727.2(c).) And in November 2014, the County adopted its own ordinance to regulate some

wells to prevent the "unsustainable extraction of groundwater."[3] (§§ 9.37.040(A), 9.37.050(A); see also AA 1:073 [Stipulated Fact 4], 1:160-68.) Accordingly, although the well-construction-permitting program does not allow DER to regulate groundwater extraction, both the State and County have now developed new programs to provide that regulation.

III. The trial court holds that the County permits are ministerial, and the Court of Appeal reverses despite the decision in *California Water*.

In January 2014, Plaintiffs challenged the County's implementation of its well-construction permit program. They alleged that the County's longstanding "pattern and practice" of treating well-construction permits as ministerial, and thus exempt from CEQA, violated the statute. (AA 1:11.) After a trial based on stipulated facts, the superior court agreed with the County that DER's issuance of well-construction permits is ministerial and thus

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[3] The 2014 groundwater ordinance exempts small wells and wells subject to a water agency's approved groundwater management plan. (§§ 9.37.050(A), 9.37.030(10).) All permits subject to Chapter 9.37 are discretionary and subject to CEQA. (AA 1:074 [Stipulated Fact 9(a)(2)].)

exempt from CEQA.[4] (AA 1:68, 73-75 [Stipulated Facts], 3:740-53 [statement of decision].)

Plaintiffs appealed on April 11, 2016. After full briefing and argument, but before the court issued the Opinion, on June 28, 2018, the Second District Court of Appeal rejected a CEQA challenge to San Luis Obispo County's substantively identical well-permitting ordinance, which similarly adopts the Bulletin No. 74 standards. (*California Water, supra*, 25 Cal.App.5th 666.) The Second District held that "[n]o aspect of that ordinance, or the DWR standards it incorporates, supports an interpretation that well permits are discretionary." (*Id.* at 679.) The plaintiffs in *California Water* filed a petition for review in this Court on September 4,

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[4] In November 2015, after the trial in this case, a different group of plaintiffs challenged a single well-construction permit that DER had issued on November 18, 2014. (See *Coston v. Stanislaus County* (Aug. 24, 2018) No. F074209, [2018 Cal. App. Unpub. LEXIS 6474].) In that case, the trial court granted the County's motion for judgment on the pleadings on the same basis as its decision in this case. On appeal, the parties agreed that the two cases should be consolidated given the identity of issues. The Court of Appeal declined to consolidate them, but heard the cases together and issued virtually identical decisions on the CEQA issue in both cases. Along with this petition, the County is filing a petition for review of the *Coston* decision on the same issue.

2018. (*California Water Impact Network v. San Luis Obispo County*, Case No. S251056.)

The Court of Appeal issued the Opinion in this case on August 24, 2018, about two months after *California Water*. Based on a single standard in the DWR Bulletin, the court held that "the County retains discretion to determine whether a well will be placed an 'adequate' distance from a contamination source," and thus "the issuance of well construction permits is a 'discretionary' decision for CEQA purposes."[5] (Opinion at 2.) That standard lists default minimum distances between wells and common sources of contamination such as septic tanks. (AA 3:542-43.) It also allows the enforcing agency to adjust the default distances to address unusually "adverse" conditions or conditions that preclude compliance with the default minimum distances. (AA 3:543.)

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[5] The Opinion distinguished this language from other standards that it found ministerial, including those for locating wells upgradient from contamination sources and outside areas of flooding "where possible." (Opinion at 10, fn. 8.)

GROUNDS FOR REVIEW

I. The Court of Appeal's conclusion that well-construction permits are discretionary squarely conflicts with *California Water*. It thus leaves counties wondering how to proceed in issuing such permits.

The Fifth and Second Districts considered exactly the same DWR standards and reached opposite conclusions. Chapter 9.36 incorporates the same Bulletin No. 74 standards incorporated by the San Luis Obispo County well-permitting ordinance—and by many other county codes. (Compare § 9.36.150 ["Except as may be otherwise provided by this chapter, standards for the construction, repair, reconstruction or abandonment of wells shall be as set forth in Chapter II of . . . Bulletin No. 74 . . . ."] with *California Water*, *supra*, 25 Cal.App.5th 666, 677 ["'Standards for the construction, repair, modification or destruction of wells shall be as set forth' in DWR Bulletins"] (quoting San Luis Obispo County Code § 8.40.060(a)).)

Chapter II of the Bulletin sets forth a host of highly technical standards for well construction. The Court of Appeal in this case homed in on only one of those standards to hold that CEQA applies to all well permits: "because the County retains discretion to determine whether a well will be placed an 'adequate' distance from

a contamination source, the issuance of well construction permits is a 'discretionary' decision for CEQA purposes." (Opinion at 2; see also *id*. at 13, fn. 11 ["[W]hile the horizontal separation distances enumerated in the Bulletin provide some objective guideposts, the surrounding provisions confirm that the ultimate standard is that well/pollution separation[] distances must be 'adequate.'"].) According to the Fifth District, the County's ability to require *some* adjustment in the spacing between a well and a potential contaminant source triggers full review under CEQA. This stands in direct conflict with *California Water*.

The Second District also considered "whether state standards, set forth in DWR bulletins, require [San Luis Obispo] County to exercise discretion before issuing a well permit." (*California Water*, *supra*, 25 Cal.App.5th 666, 675.) But it held that "[n]o aspect of that ordinance, or the DWR standards it incorporates,"—the very same standards applied by Stanislaus County—"supports an interpretation that well permits are discretionary. Instead, the statutory scheme imposes fixed technical requirements." (*Id.* at 679; see also *id*. at 677 ["A well building permit is a type of building permit. So long as technical standards and objective measurements are met, County must issue a well permit to licensed

contractors," making those permits ministerial and exempt from CEQA.].) This analysis of the same state standards leaves no room to reconcile the Opinion with the decision in *California Water*.

Despite being unpublished,[6] the Opinion here and its departure from *California Water* will create significant confusion for counties across California about whether their well-construction permits are subject to CEQA. The dilemma about which case to rely on will be especially acute for counties in the Fifth District.

Because the Opinion is unpublished, superior courts throughout the state would be bound by the published decision in *California Water* for the moment. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, the existence of the Opinion means that plaintiffs will surely continue to challenge any county outside the Second District that attempts to rely on *California Water*, recognizing that they have a solid chance of prevailing on appeal. Indeed, given the Opinion, that outcome is

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[6] This Court has periodically granted review of decisions despite their being unpublished. (See, e.g., *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654, fn. 2; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 859; *In re Kieshia E.* (1993) 6 Cal.4th 68, 81.)

virtually certain in the Fifth District. Counties, which must try to anticipate how a court in practice will view their conduct, will thus be unable to safely rely on the *California Water* decision. (See O.W. Holmes, Jr., *The Path of the Law* (1897) 10 Harv.L.Rev. 457, 458 ["[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court . . . ."].)

In sum, the conflicting decisions create significant legal uncertainty across the state for county permitting programs that are based on a single *statewide* model. This is precisely the kind of problem that this Court's review is designed to solve. (See Cal. R. Ct. 8.500(b)(1); see also, e.g., *Beatrice Co. v. State Bd. of Equalization* (1993) 6 Cal.4th 767, 770-771 [review granted to resolve uncertainty created by split of authority].)

II. The Court of Appeal's opinion would require counties to perform fruitless environmental review.

The Opinion would require counties implementing the DWR standards to perform CEQA review for hundreds of permits each year. Yet county permitting agencies such as DER could do little or nothing to avoid the environmental impacts revealed by that

review because the standards do not allow them to deny permits or impose mitigating conditions on them.

This would be a clear waste of scarce public resources and inconsistent with this Court's holding that "[t]he purpose of CEQA is not to generate paper." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.) Courts have avoided that outcome by adopting a pragmatic, "functional" test for discretion under CEQA. The Court of Appeal failed to properly apply that test.

A. Courts apply a "functional test" to determine whether agency action on a project is discretionary for purposes of CEQA: the agency must have sufficient authority to reject or modify the project in response to information revealed by a CEQA analysis.

CEQA applies only to projects subject to *discretionary* governmental approval (Pub. Resources Code § 21080(a)), and thus not to *ministerial* projects (*id.* § 21080(b)(1)). But the distinction between the two is not black and white. Indeed, "[i]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." (*Johnson v. State* (1968) 69 Cal.2d 782, 788, *cited in* CEQA Guidelines §§ 15357 note, 15369 note.)

Accordingly, "CEQA does not apply to an agency decision simply because the agency may exercise *some* discretion in approving the project or undertaking." (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934 ("*San Diego Navy*").) Rather, "the discretion must be of a certain kind": the agency must have authority to deny or modify the proposed project to "meaningfully address any environmental concerns that might be identified in the EIR." (*Id.* at 933, 934 (citing *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266-67 ("*Westwood*")); *see also* *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 18-19, 23-24, 29-30 ("*County of Sonoma*") (citing *San Diego Navy*); *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394-95; *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 179 ("*Napa County Board*").) This test "implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR . . . environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117; see also *Westwood,* 191 Cal.App.3d at 272 [action is ministerial where "[n]o matter what the EIR might reveal about the terrible environmental

consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way"].)

This "functional" test, as the court in *Westwood* called it (191 Cal.App.3d 259, 272), is the "'touchstone' for determining whether an agency has undertaken a discretionary action." (*San Diego Navy, supra,* 185 Cal.App.4th 924, 928.)

In applying the functional test, courts focus on the scope of "the authority granted by the law providing the controls over the activity" to determine whether it affords the agency leeway to deny or meaningfully modify the project. (CEQA Guidelines § 15002(i)(2); accord, *People v. Dept. of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 192 ["The law administered by a public agency supplies the litmus for differentiating between its discretionary and ministerial functions."].) CEQA does not itself provide agencies authority to approve, deny, or mitigate the impacts of a project—any such authority must come from the other law that governs the agency's decision on the project. (See Pub. Resources Code § 21004 ["In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this

division."]; CEQA Guidelines § 15040(a), (b) ["CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws."].)

As explained below, the Opinion gave short shrift to the functional test. In doing so, it not only created a conflict with the Second District's decision in *California Water*, it erroneously imposed on the County—and other counties that wish to avoid a CEQA lawsuit—a burden to carry out futile environmental review. The Opinion therefore satisfies the criteria for this Court's review in Rule 8.500(b)(1) of the California Rules of Court.

B. The Court of Appeal's erroneous application of the functional test would require public agencies to perform futile CEQA analysis.

The functional test ensures that CEQA review occurs where it can do some good—where the lead agency has legal authority to alter or reject a project to address environmental impacts that might be revealed by CEQA review. Instead of applying the functional test, the Court of Appeal effectively applied a *formal* test. The CEQA review that would result would be similarly formalistic: counties attempting to comply with the Opinion would be required to do extensive environmental impact analysis, but could do virtually nothing with the information that analysis would generate.

The Opinion relies entirely on the word "adequate" in Section 8.A of the Bulletin to find that the entire well-construction permitting regime is discretionary. The court concluded that CEQA was triggered because, despite the quantitative default standards for well spacing, DER has the ability to require a permit applicant to move a well beyond that default spacing to ensure the spacing is "adequate" to avoid contamination from that source. (Opinion at 13, fn. 11 ["[W]hile the horizontal separation distances enumerated in the Bulletin provide some objective guideposts, the surrounding provisions confirm that the ultimate standard is that well/pollution separations distances must be "adequate."]; *id*. at 13 ["Determining whether a particular spacing is 'adequate' inherently involves subjective judgment."].) The court concluded that DER's discretion is "not [i]nsubstantial" (*id.* at 14) because even a small modification to well spacing is "not minor if it is the difference between safe versus contaminated groundwater" (*id.* at 15). The Opinion asserts that the "number of discretionary standards the local agency must consider is not the rubric for determining whether a permitting scheme is ministerial. . . . [I]f a *single standard* has the public official exercising subjective judgment as to how

the project will be carried out, the scheme is discretionary and subject to CEQA. (*Ibid*. (emphasis added).)

The Court of Appeal's "single standard" test converts the functional test into a formal test. Its approach clashes head on with that taken in the seminal *Westwood* case, *supra*. The *Westwood* court held that "[t]he fact public employees exercise their discretion to modify a single city council established standard or to impose a single condition or modification does not automatically mean the approval process is a 'discretionary project' within the meaning of Public Resources Code section 21080." (191 Cal.App.3d 259, 280.) Rather, "when that discretion is exercised as to several items and in the context of approval of a major project with substantial potential effects on the environment the process moves from a ministerial to a discretionary decision." (*Ibid*.) Ultimately, "the sheer quantity and consequences of discretionary decisions" made the approval in that case subject to CEQA. (*Ibid*.)

Similarly, in *Napa County Board*, *supra,* the court eschewed a single-standard test when it found the county's lot-line-adjustment decisions to be ministerial despite the ordinance's requirements that the agency determine that "no public utility easement shown on a final or parcel map will be *adversely affected*

by the adjustment" and that "the resulting parcel must be connected to a public sewer or be *suitable* for an on-site sewage disposal system." (205 Cal.App.4th 162, 177, fn. 11 (emphases added).)

Here, the Court of Appeal recognized that county permitting agencies have minimal room for maneuver under the DWR standards. It expressly acknowledged that counties applying the standards have no authority whatsoever to address the primary environmental impact of new groundwater wells: potential groundwater depletion. (Opinion at 16, fn. 14 [the ordinance "does not grant the DER the authority to do *anything* about groundwater depletion" because "groundwater consumption is not a permissible basis for denying a [well-construction] permit."].) The Bulletin's standards do not allow the permitting agency to limit a well's capacity or depth. Nor could the agency forbid a well owner from *operating* the well in any particular way. It thus could not, for example, impose a cap on the amount of water pumped from the well or limit the uses to which that water could be put. As a result, permitting agencies could not impose measures to mitigate the impacts of the use of the well.

Indeed, if an agency attempted to impose conditions requiring mitigation for such impacts, or denied a permit based on such impacts, the permit applicant would immediately—and successfully—sue the county alleging that such mitigation is outside the scope of the agency's authority under the ordinance and DWR standards. The functional test cases recognize that an approval is not discretionary if the applicant could obtain a writ compelling the agency to issue the approval without substantial modification.[7] (*Westwood*, *supra,* 191 Cal.App.3d 259, 269.)

Moreover, the agency's CEQA review of a well-permit application would need to encompass all of the reasonably foreseeable direct *and indirect* impacts of a new well, including cumulative impacts. (See CEQA Guidelines §§ 15064(d), (h), 15355.) The permitting agency thus could not limit review to the impacts of the construction and operation of the well itself, but would also need to address foreseeable impacts of the land uses that the well would

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[7] The Opinion thus forces counties to navigate between the Scylla of permit applicants who would challenge any mitigation measures imposed by the permitting agency and the Charybdis of plaintiffs like those here who would demand that the agency impose those measures.

serve. In this context, that means all of the environmental impacts of irrigated agriculture. Yet the permitting agency would have no authority to act on any of the information that CEQA review would reveal about these impacts. (See *California Water*, *supra*, 25 Cal.App.5th 666, 678 [county lacked authority to impose "additional conditions" beyond the scope of well ordinance and DWR standards]; CEQA Guidelines § 15002(i)(2).)

The Court of Appeal justified its conclusion on the grounds that CEQA review could shed light on the proper spacing between a well and a potential source of groundwater contamination and allow DER to alter that spacing.[8] (See *supra*.) But the process of issuing well-construction permits already serves that function, without CEQA's help. (See §§ 9.36.060-.080.)

In *County of Sonoma, supra,* the court rejected the same argument adopted by the Court of Appeal here. (11 Cal.App.5th 11,

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[8] To be clear, the agency's authority to modify the location of a well is limited to adjusting its spacing relative to a source of potential contamination. It could not require a well to be moved, for example, to avoid an impact on an adjacent landowner's well or to avoid construction impacts to habitat in the area where the well was proposed. Nor could the agency impose mitigation unrelated to well spacing to address other sources of potential groundwater contamination, such as the application of chemical fertilizers or pesticides.

30, fn. 18.) The county there required landowners wishing to develop a vineyard to obtain a permit to avoid potential erosion of slopes. (*Id.* at 16.) The court concluded that CEQA was not triggered by the minor discretion exercised by the county in carrying that erosion-control function. The court explained, "The purpose of the ordinance, in fact, is to control those impacts. The pertinent issue is whether the ordinance gave the [agency] discretion to *further mitigate* the impacts of the . . . project to any meaningful degree. . . ." (*Id.* at 30, fn. 18 (emphasis added); see also *id.* at 28, fn. 17.)

Because the well-construction-permitting process is already designed to address the risks posed by sources of potential groundwater contamination, CEQA review for that purpose would be wholly redundant. The functional test asks whether the agency's exercise of judgment would be *informed* by environmental review. (See, e.g., *Westwood, supra*, 191 Cal.App.3d 259, 272 [an approval is discretionary only if the agency can "deny or modify the proposed project on the basis of environment[al] consequences *the EIR might conceivably uncover*" (emphasis added)].) Here, it would not.

In sum, the County, like the other counties issuing permits for well construction, has no authority to require mitigation of any

environmental impact, other than to adjust the spacing between a well and a source of potential contamination. Yet the County's permitting process already serves to avoid the potential impact of groundwater contamination from nearby sources. Accordingly, to require environmental review under these circumstances "would constitute a useless—and indeed wasteful—gesture." (*Westwood, supra,* 191 Cal.App.3d 259, 272.)

The Court of Appeal in fact conceded that its decision could produce counterproductive results. (Opinion at 2-3, 21-22.)

> [I]t is troublesome that, for most well construction permits, the costly, time-consuming environmental review process may commonly prove unnecessary, or ultimately result in only minor alterations to the proposed well's location. Moreover, it is not difficult to imagine scenarios in which delays in addressing the problem of a residential or agricultural well going dry could cause harm, loss or hardship while ultimate approval of remedial action would be virtually certain.

(*Id.* at 2.) In responding to the County's concern "that CEQA review would require the County to analyze a host of environmental impacts it is powerless to address," the Court simply stated "that is not grounds for dispensing with CEQA." (*Id.* at 21; see also *id.* at 22 ["[T]he fact that some mitigation measures are outside the lead agency's authority to impose does not dispense with CEQA altogether."].) It thus suggested that the Legislature might

intervene to "to provide relief from the potentially high burdens imposed by CEQA in this context." (*Id.* at 3; see also *id.* at 22, fn. 21.)

In fact, the court understated the counterproductive results of its decision. It neglected to note that CEQA would require review of the full range of potential direct and indirect impacts flowing from issuance of a well permit, despite the County's near total inability to mitigate them. (See *supra*.) The County could not limit its review to potential sources of groundwater contamination and the proper separation from them.

It also appeared to believe, mistakenly, that the County had various ways to minimize the burden of performing review. (Opinion at 21-22.) For example, it contended that "[w]hen a lead agency identifies mitigation measures that it lacks legal authority to impose, it may simply make a finding . . . that the measures are legally infeasible." (*Id.* at 21.) But that cannot excuse the agency from going through the exercise of preparing an EIR to evaluate all of the impacts that it has no ability to mitigate. Here, that is *all* environmental impacts except the potential impact to groundwater quality from a nearby source. The court also suggested that the County could avoid preparing EIRs by instead preparing a

mitigated negative declaration. (*Id.* at 22.) But an agency cannot rely on a mitigated negative declaration where the proposed mitigation is infeasible, such as where the agency has no authority to impose that mitigation. (See Pub. Resources Code § 21080(c), (f), (g).)

Regardless, CEQA does not need amending to avoid these counterproductive results because it does not demand them as currently drafted. The functional test for discretion was designed to avoid just this kind of unnecessary review. The problem arises instead from the Court of Appeal's decision to apply a formal test rather than a functional one.

C. The Court of Appeal erred in failing to accord any deference to the County's longstanding conclusion that its well permits are ministerial.

The CEQA Guidelines—and the courts—have recognized that courts should defer to a public agency's determination that an approval is ministerial. The Court of Appeal mentioned this principle but thereafter ignored it. (Opinion at 9 ["[A]ppellate courts afford considerable weight to a local agency's classification of its own ordinance as ministerial."].)

Guidelines section 15268 emphasizes that "[t]he determination of what is 'ministerial' can most appropriately be made by the

particular public agency involved based upon its analysis of its own laws." (CEQA Guidelines § 15268(a).) The Guidelines also recommend that public agencies' local CEQA procedures "[i]dentify[] the activities that are exempt from CEQA" and include "[a] list of projects or permits over which the public agency has only ministerial authority." (*Id.* § 15022(a)(1); see also *id.* § 15268(c).)

Courts have consistently followed section 15268 and held that courts should defer to an agency's determination that its approval is ministerial. In *Napa County Board, supra,* the court rejected the plaintiffs' argument that the court "should not pay any deference to the County's classification" of the challenged decisions as ministerial and concluded that "surely that is not the law." (205 Cal.App.4th 162, 178.) "Otherwise," the court continued, "why would the governing regulations [i.e., the CEQA Guidelines] acknowledge that the local public agency is the most appropriate entity to determine what is ministerial, based on analysis of its own laws and regulations, and urge that the agency make that determination in *its* implementing regulations?" (*Ibid.*) Other courts—including the court in *California Water*—have similarly given deference to the agency's determination, recognizing that agency's view "is entitled to great weight unless that view is clearly

erroneous or unauthorized." (*California Water*, *supra*, 25 Cal.App.5th 666, 675 (citing *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015); see also *County of Sonoma*, *supra*, 11 Cal.App.5th 11, 19, 29; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144.)

As the Court of Appeal acknowledged (Opinion at 5), the County's legislatively adopted CEQA Procedures have recognized for over 30 years that approval of well construction permits is ministerial. (AA 3:676-84 [Resolution No. 83-1750 adopting CEQA Procedures].) The County's CEQA Procedures enumerate the County's ministerial approvals, including well-construction permits. (AA 3:680 [section 3(B)(5)], 689 ["sanitary well permits"].)

The County's determination is a straightforward application of the functional test for discretion based on the terms of the Ordinance and the Bulletin's standards. It is not "clearly erroneous" or "unauthorized." (*California Water, supra,* 25 Cal.App.5th 666, 675.) The Court of Appeal therefore should have upheld the County's longstanding interpretation.

III. The Court of Appeal's opinion threatens to undermine CEQA compliance and discourage environmental regulation.

The Court of Appeal's construction, or rather constriction, of the ministerial exemption threatens to encourage public agencies to either abandon permitting programs designed to protect the environment or to design those programs in suboptimal ways to avoid having to perform ineffectual environmental review. Proper application of the functional test would avoid these consequences.

First, in *County of Sonoma*, *supra*, in which the First District considered that county's erosion-control permit program, the court recognized the irony inherent in a narrow construction of the ministerial exemption in the context of a resource-protection permit:

> [A]dopting petitioners' argument would have the perverse effect of discouraging agencies from enacting ordinances, such as the ordinance here, specifically designed to mitigate environmental impacts through a permitting process. Under petitioners' view of the law, if an agency has any discretion under the language of such an ordinance it cannot determine that issuing a permit is ministerial, even if there is nothing to suggest that the discretion allows the agency to further mitigate potential environmental impacts to any meaningful degree. If this were the law, agencies would be motivated to avoid CEQA burdens by simply not enacting such ordinances in the first place.

(11 Cal.App.5th 11, 28, fn.17.) The well-construction permit program is the same kind of program, *viz.* one "designed to mitigate

environmental impacts[, i.e., potential groundwater contamination,] through a permitting process."[9] (*Ibid.*)

Second and related, the Opinion would encourage agencies to delegate their regulatory oversight to interested private parties to avoid the need to conduct CEQA analysis. That incentive arises from the Opinion's effort to distinguish *County of Sonoma, supra*. (Opinion at 14-15 (discussing 11 Cal.App.5th 11, 29-30.)) As the Opinion characterized one of the standards at issue in *County of Sonoma*, "the applicable ordinance required that a 50-foot setback from wetlands be established 'unless a wetlands biologist recommends a different setback.'" (*Id.* at 14 (quoting 11 Cal.App.5th at 29-30).) The permit applicant was then required to implement whatever the biologist—a consultant for the applicant—recommended. (*Id.* at 15 (citing 11 Cal.App.5th at 30).) The Court of Appeal here concluded that "the County (through its DER) is the arbiter of 'adequacy' [of well spacing]—not a third party whose

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[9] The point is not that counties would abandon their well-construction permitting programs, which are now mandated by the Water Code. Rather, the Opinion would discourage public agencies from implementing other, similar programs designed to prevent specific impacts.

recommendation the County is *essentially required to accept*." (*Ibid*. (emphasis added).) In other words, the court held that discretion will not trigger CEQA if that discretion has been delegated to a private party.

The obvious consequence would be to encourage public agencies to *outsource their discretion* to avoid triggering CEQA. The Opinion implies that, in the instant context, the County could require well-construction permit applicants to obtain an engineering report that proposes a distance between the proposed well and a source of contamination and require the applicant—without input from the County—to implement whatever distance is recommended. According to the Opinion, as long as the County has completely abdicated its ability to evaluate whether that distance is "adequate," CEQA would not be triggered. Proper application of the functional test avoids that outcome.

CONCLUSION

The County does not object to carrying out CEQA review for its actions. It is not filing this petition because it believes that review to be burdensome. Indeed, the County already performs environmental review for discretionary variance permits under Chapter 9.36 and all well permits subject to Chapter 9.37. Instead,

the County seeks the Court's review because the Opinion would require the County to perform *pointless* environmental review. The Court should grant the petition to avoid that outcome both for Stanislaus County and the other counties affected by the Court of Appeal's opinion.

October 3, 2018 SHUTE, MIHALY & WEINBERGER LLP
JOHN P. DOERING, COUNTY COUNSEL

By: /s/
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CERTIFICATE OF WORD COUNT

I certify that this petition contains 6,721 words, including footnotes but not including the caption, this certificate, the tables of contents and authorities, and the attachments, according to the word count function of the computer program used to produce the petition. The length of this petition therefore complies with the requirements of Rule 8.504(d)(1) of the California Rules of Court.

October 3, 2018

SHUTE, MIHALY & WEINBERGER LLP
JOHN P. DOERING, COUNTY COUNSEL

By: /s/
MATTHEW D. ZINN

Attorneys for Defendants and Respondents
STANISLAUS COUNTY ET AL.

ATTACHMENT 1

ORIGINAL

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al., Plaintiffs and Appellants, v. STANISLAUS COUNTY et al., Defendants and Respondents.	F073634 (Stanislaus Super. Ct. No. 2006153) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Offices of Thomas N. Lippe and Thomas N. Lippe for Plaintiffs and Appellants.

Law Office of Babak Naficy and Babak Naficy for California Water Impact Network and California Wildlife Foundation as Amici Curiae on behalf of Plaintiffs and Appellants.

Shute, Mihaly & Weinberger, Matthew D. Zinn, Sarah H. Sigman, and Peter J. Broderick; John P. Doering, County Counsel, and Thomas E. Boze, Assistant County Counsel, for Defendants and Respondents.

Dennis Bunting, County Counsel (Solano), Peter R. Miljanich, Deputy County Counsel, and Jennifer Henning for the California State Association of Counties as Amicus Curiae on behalf of Defendants and Respondents.

-ooOoo-

INTRODUCTION

This appeal relates to water well construction in Stanislaus County. The County issues hundreds of permits annually for residential and agricultural uses under an apparently routine permitting process.

The main purpose of environmental review under the California Environmental Quality Act (CEQA) is to "identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which significant effects can be mitigated or avoided." (Pub. Res. § 21002.1, subd.(a).) This environmental review is often costly, so statutory and categorical exemptions have been created to ease the burdens of environmental review for certain classes of projects. There is also an exemption "called the "common sense" exemption, which applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment" (CEQA Guidelines, § 15061, subd.(b)(3)." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 380.)

A threshold question for evaluating whether a project requires environmental review under CEQA is whether the lead agency's approval of the project is "ministerial" or "discretionary" – with discretionary decisions requiring environmental review. As explained below, we conclude that because the County retains discretion to determine whether a well will be placed an "adequate" distance from a contamination source, the issuance of well construction permits is a "discretionary" decision for CEQA purposes.

However, it is troublesome that, for most well construction permits, the costly, time-consuming environmental review process may commonly prove unnecessary, or ultimately result in only minor alterations to the proposed well's location. Moreover, it is not difficult to imagine scenarios in which delays in addressing the problem of a residential or agricultural well going dry could cause harm, loss or hardship while ultimate approval of remedial action would be virtually certain. If we were legislators, we

might seek a way to provide relief from the potentially high burdens imposed by CEQA in this context. But, we are judges, not legislators. The choice is not ours to make.

We reverse the judgment.

FACTS

Chapter 9.36 of the Stanislaus County Code

In 1973, the Stanislaus County Board of Supervisors enacted Ordinance No. 443. The ordinance was eventually codified as Chapter 9.36 of the Stanislaus County Code.[1] The purpose of the ordinance was "to protect the ground waters of the State for the enjoyment, health, safety and welfare of the people of the county by regulating the location, construction, maintenance, abandonment and destruction of all wells with may affect the quality and potability of underground waters." (Stan. Co. Code, § 9.36.010.)

Under Chapter 9.36, landowners must obtain a permit from the county health officer to construct, repair or destroy any well. (Stan. Co. Code, § 9.36.030.) The permit application must "contain such information as the health officer may require." (*Ibid.*) Chapter 9.36 also sets forth various standards for well construction, including:

> "1.) All wells shall be so constructed as to prevent the entrance of surface water from any source into the well or into any aquifer." (Stan. Co. Code, § 9.36.060.)
>
> "2.) The construction of a well pit is prohibited; provided, however, a variance permit may be granted by the health officer." (Stan. Co. Code, § 9.36.060.)
>
> "3.) All pumping equipment shall be installed with protective devices to effectively prevent the entrance of foreign matter into the well casing." (Stan. Co. Code, § 9.36.060.)
>
> "4.) All wells shall have a sanitary seal. All wells shall also have an annular seal, except agricultural wells not used for domestic purposes and located more than three hundred feet from a domestic well." (Stan. Co. Code, § 9.36.070.)

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[1] Except for some very minor changes (capitalization, etc.), Chapter 9.36 reflects the text of the ordinance. This opinion quotes from the current Stanislaus County Code.

"5.) After the construction, installation, or repair of any well, or pumping equipment, and prior to its use, the well and all appurtenances thereto shall be disinfected." (Stan. Co. Code, § 9.36.080.)

The health officer must also inspect a well before it is used. (Stan. Co. Code, § 9.36.100.) Under section 9.36.110, the health officer may "authorize an exception to any provision of this Chapter, when, in his/her opinion, the application of such provision is unnecessary. Upon application therefore, the health officer may issue a variance permit and shall prescribe thereon such conditions as, in his judgment, are necessary to protect the waters of the state from pollution."

Applicants may appeal the denial or revocation of their permits, to be heard by the Board of Supervisors. (Stan. Co. Code, § 9.36.170.)

Bulletin No. 74

Section 9.36.150 of the County Code provides:

"Except as may be otherwise provided by this chapter, standards for the construction, repair, reconstruction, or abandonment of wells shall be as set forth in Chapter II of the Department of Water Resources Bulletin No. 74, "Water Well Standards" (February 1968), or as subsequently revised or supplemented, which are incorporated in this chapter and made a part of this chapter."[2] (Stan. Co. Code, § 9.36.150.)

Bulletin No. 74-81 is a document published by the Department of Water Resources containing various specifications for water wells. (See *California Groundwater Assn. v. Semitropic Water Storage Dist.* (2009) 178 Cal.App.4th 1460, 1469.) Five years after its publication, the Legislature enacted Water Code section 13801 which, among other things, requires local authorities "to adopt an ordinance that 'meets or exceeds' the Bulletin No. 74-81 standards." (*Ibid.*; see also Water Code, § 13801, subd. (c).) Additional provisions were added in Bulletin No. 74-90. (*California Groundwater Assn. v. Semitropic Water Storage Dist., supra*, at p. 1469.)

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[2] The original Ordinance worded the last phrase differently, but to the same effect of incorporating Bulletin No. 74 by reference.

Stanislaus County Practices in Issuing Well Construction Permits Under Chapter 9.36

Prior to November 25, 2014,[3] Stanislaus County did not engage in CEQA environmental review of well permits under Chapter 9.36, unless the permit was a "variance permit" under section 9.36.110.

Stanislaus County's Designation of Well Permit Approvals as "Ministerial"

CEQA provides that "[a]ll public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations pursuant to this division." (§ 21082.) The Guidelines for the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000, et. seq.) further directs that a public agency's implementing procedures should contain "[a] list of projects or permits over which the public agency has only ministerial authority." (Guidelines, § 15022, subd. (a)(1)(B).)

In 1983, Stanislaus County adopted CEQA Guidelines and Procedures. That enactment read, in pertinent part:

> "(B) In the absence of any discretionary provision contained in the relevant ordinance, it shall be presumed that the following actions are ministerial: [¶] ... [¶]
>
> "(5) Issuance of sanitary well permits and septic tank permits."[4]

Sustainable Groundwater Management Act

The California Legislature passed the Sustainable Groundwater Management Act ("SGMA"; Water Code, §§ 10720, et seq.), which became effective January 1, 2015. (*Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th

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[3] This is the date Ordinance No. C.S. 1155 (discussed below) was approved.

[4] Stanislaus County's CEQA Guidelines and Procedures were subsequently amended. The version of the Guidelines and Procedures dated May 13, 2008, contained the same language deeming the issuance of sanitary well permits to be presumptively ministerial.

326, 335, fn. 3.) Among other things, SGMA provides "that certain newly created 'groundwater sustainability agen[cies]' may impose groundwater pumping charges to fund the costs of groundwater management,..." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1209, fn. 6.)

Chapter 9.37 of the Stanislaus County Code

On November 25, 2014, the County approved Ordinance No. C.S. 1155 (i.e., "the groundwater ordinance"), which amended Chapter 9.37 (not Chapter 9.36) of the Stanislaus County Code.

Chapter 9.37 now prohibits (1) the unsustainable extraction of groundwater; and (2) the export of water from the county. (Stan. Co. Code, § 9.37.040.) Section 9.37.050 exempts certain "water management practices" from these requirements, including "de minimis" extractions of water (defined as two-acre feet or less per year). (Stan. Co. Code, §§ 9.37.030(10), 9.37.050(A)(2).)

Stanislaus County Practices in Issuing Well Construction Permits After the Groundwater Ordinance

All applications for well construction permits filed under Chapter 9.36, after November 25, 2014, must put forth substantial evidence "that either: (1) one or more of the exemptions set forth in Section 9.370.50 apply; or (2) that extraction of groundwater from the proposed well will not constitute unsustainable extraction of groundwater." (Stan. Co. Code, § 9.37.045(A).)

Section 9.37.060 provides that the Stanislaus County Department of Environmental Resources (DER) "shall establish a system of permits to authorize water management practices otherwise prohibited by this chapter." The same section also allows for appeal of DER decisions to an appeal review committee.

After the adoption of the groundwater ordinance, Stanislaus County's review of well permit applications involves two steps. First, the DER reviews the permit

application to determine whether Chapter 9.37 applies. Second, the DER reviews the permit application for compliance with Chapter 9.36.

If a permit application is exempt from Chapter 9.37 pursuant to section 9.37.050(A), then the county does not engage in CEQA review (unless the application is for a variance permit under section 9.36.110.) Stanislaus County acknowledges that if a permit application is *not* exempt from Chapter 9.37, then CEQA environmental review procedures apply.

After November 25, 2014, Stanislaus County issued over 400 well permits, all of which were exempt from Chapter 9.37 and not subjected to CEQA environmental review.[5] Stanislaus County identified six well permit applications that do require CEQA environmental review, but none of those applications had yet been approved.

Litigation

On January 27, 2014, appellants Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance (collectively, "appellants"), filed a complaint for declaratory relief against Stanislaus County, and the director and the manager of the DER,[6] in their official capacities (collectively, respondents or "the County"). The complaint alleged the County violated CEQA through its "pattern and practice of approving well construction permits pursuant to Title 9, Chapter 9.36 of the Stanislaus County Code without applying the environmental review procedures of CEQA to its approval decisions and without determining whether its approval of such well construction permits may have significant adverse environmental effects before making its permit approval decisions." The complaint sought a declaratory judgment, a permanent injunction against permit approvals until the County changes its policy to include CEQA review of permit applications, attorneys' fees and costs.

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[5] None of the permits sought a "variance."

[6] Jami Aggers and Janis Mein, respectively.

The case was submitted to a court trial on stipulated facts. After trial, the court issued a statement of decision. The court concluded that the County's approval of exempt, nonvariance well construction permits was "ministerial" and therefore not subject to CEQA. The court entered judgment in favor of the County, which appellants now challenge.

DISCUSSION

I. The Decision Stanislaus County's DER Makes in Approving Well Permit Applications Contains Discretionary and Ministerial Aspects

A. Law of Ministerial and Discretionary Decisions

CEQA applies to discretionary projects (§ 21080, subd. (a)), but not to "[m]inisterial projects." (§ 21080, subd. (b)(1).)

" 'Discretionary project' means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (Guidelines, § 15357.)

" 'Ministerial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength

requirements in the Uniform Building Code, and the applicant has paid his fee."[7] (Guidelines, § 15369; see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117–118.)

B. Standard of Review

"[T]he legal determination of whether an approval is "exempt from CEQA review as a ministerial action" is subject to … de novo review." (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 303 (*Friends of Juana Briones House*).) However, appellate courts afford considerable weight to a local agency's classification of its own ordinance as ministerial. (See *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23–24 (*Sierra Club*); *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015; see also Guidelines, § 15268.) When there are doubts as to whether a decision is ministerial or discretionary, the doubt should be resolved in favor of finding the decision to be discretionary. (*Friends of Juana Briones House*, *supra*, 190 Cal.App.4th at pp. 301–302.)

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[7] The County argues its well permits are closely similar to common building permits, "which CEQA recognizes as presumptive ministerial." But building permits are ministerial "*if* the ordinance requiring the permit *limits* the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee." (Guidelines, § 15369, italics added.) Thus, building permits are presumptively ministerial "*[i]n the absence of any discretionary provision* contained in the local ordinance or other law establishing the requirements for the permit…." (Guidelines, § 15268, subds. (b) & (b)(1), italics added.) As we explain below, through its incorporation of the well spacing standard in Bulletin No. 74, the Stanislaus County Code does contain a significant, discretionary provision.

C. *The Determination as to whether a Proposed Well is Adequately Separated from a Contamination Source Involves Subjective Judgment Concerning How the Project Should be Carried Out and is Therefore Not Ministerial Under CEQA Guidelines, Section 15369*

Appellants cite provisions from Bulletin No. 74-90 governing standards for keeping wells untainted by potential pollution or contamination sources.[8] Respondents concede that the contamination source spacing standard is indeed a "standard[] for well construction."[9] Because such standards are incorporated into the County Code by section 9.36.150, we will now determine whether the standard calls for a discretionary or ministerial decision by the DER.

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[8] Appellants also point to provisions in section 8(B), 8(C), and 9. Section 8(B) provides that, "*[w]here possible*, a well shall be located up the ground water gradient from potential sources of pollution or contamination." (Italics added.) Section 8(C) states that, "*[i]f possible*, a well should be located outside areas of flooding." (Italics added.)

"Possible" is a more objective standard than "adequate." While determining whether something is "possible" may require scientific expertise, the ultimate question being asked is objective (i.e., can this be done?) rather than subjective (i.e., should it be done this way?).

Next, in section 9, the Bulletin provides for the minimum depths to which a well's annular seal must extend below ground surface. An annular seal is "a watertight seal placed between the well casing and the side wall of a drilled hole." (Stan. Co. Code, § 9.36.020(G).) For example, the annular seals of individual domestic wells must extend at least 20 feet below ground surface. But the annular seal requirements do not have an overarching "adequacy" standard. Instead, the section lists actual "minimum" depths that apply for each type of well, without the qualifying "guidepost" language found in the contamination source spacing section. Limited exceptions to the annular seal depth minimums are allowed in cases of shallow water depth, freezing areas, etc. But even those exceptions have absolute minimum depths – e.g., 10-foot seal depth when water depth is less than 20 feet; 50-foot seal depth for wells near pollution source; 4-foot seal depth for freezing areas; 4-foot seal depth if subsurface vault or equivalent feature is used. These annular seal depth provisions are objective and simply do not involve the scope of discretion provided in the well/pollution source spacing standard.

[9] The parties disagree, however, as to whether other provisions in the Bulletin are incorporated by section 9.36.150. We need not resolve that issue because we conclude a provision the parties do agree was incorporated – i.e., the contamination source spacing standard – renders the issuance of well permits discretionary.

Potential Pollution or Contamination Sources

Under the heading "**Separation**", section 8(A) of the Bulletin provides the following standard: "All water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination."[10]

Later in section 8(A), the Bulletin displays a chart, listing horizontal separation distances between various contamination sources (e.g., 50 feet between a well and a sewer line, 100 feet between a well and an animal enclosure, etc.) Above the chart is the following text:

> "The following horizontal separation distances are generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water. These distances are based on present knowledge and past experience. Local conditions may require greater separation distances to ensure ground water quality protection."

After the chart, is the following text:

> "Many variables are involved in determining the "safe" separation distance between a well and a potential source of pollution or contamination. No set separation distance is adequate and reasonable for all conditions. Determination of the safe distance for individual wells requires detailed evaluation of existing and future site conditions.
>
> "Where, in the opinion of the enforcing agency adverse conditions exist, the above separation distances shall be increased, or special means of protection, particularly in the construction of the well, shall be provided, such as increasing the length of the annular seal.
>
> "Lesser distances than those listed above may be acceptable where physical conditions preclude compliance with the specified minimum separation distances and where special means of protection are provided. Lesser separation distances must be approved by the enforcing agency on a case-by-case basis."

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[10] It also provides that "[c]onsideration should also be given to adequate separation from sites or areas with known or suspected soil or water pollution contamination."

D. Analysis

We conclude the contamination source spacing standard calls for a discretionary decision by the DER.

"A ministerial decision involves *only* the use of *fixed* standards or *objective* measurements, and the public official *cannot* use personal, *subjective judgment* in deciding whether *or how* the project should be carried out." (Guidelines, § 15369, italics added.) This dividing line is illustrated well in the case of *People v. Department of Housing & Community Development* (1975) 45 Cal.App.3d 185 (*Department of Housing*). There, the question was whether issuing a mobilehome park construction permit was ministerial or discretionary. The court noted that the Mobilehome Parks Act contained several "fixed design and construction specifications covering such matters as space occupancy, road access, toilets, showers and laundry facilities. [Citations.]" (*Department of Housing*, *supra* 45 Cal.App.3d at p. 193.) Because these were "*fixed* design and construction specifications ... the official decision of conformity or nonconformity leaves scant room for the play of personal judgment." (*Ibid.*, italics added.) The court held these provisions were ministerial.

However, the Mobilehome Parks Act had other, broader standards as well. "The applicant for a mobilehome construction permit must submit a 'description of the water supply, ground drainage, and method of sewage disposal.' [Citation.] There must be a 'sufficient' supply of artificial lighting. [Citation.] The water supply must be 'adequate' and 'potable.' [Citations.] The site must be 'well-drained and graded.' [Citation.]" (*Department of Housing*, *supra*, 45 Cal.App.3d at p. 193.) These standards were "more generalized" and presented "relatively personal decisions addressed to the sound judgment and enlightened choice" of the agency. (*Ibid.*) As a result, the decisions were held to be discretionary.

The standard for spacing wells from contamination sources imported into the County Code from Bulletin No. 74 are akin to the discretionary standards in *Department*

of Housing. The ultimate standard for contamination source spacing is that "[a]ll water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination." (Italics added.)[11] Determining whether a particular spacing is "adequate" inherently involves subjective judgment. (See *Department of Housing*, *supra*, 45 Cal.App.3d at pp. 193–194.)

The County's Well Permitting Scheme Does Allow the DER to Address Impacts That Would be Considered in Environmental Analysis

The County argues the Bulletin's spacing standard does not allow the DER to address impacts revealed by environmental analysis. (See *Friends of Westwood, Inc. v. City of Los Angeles*, *supra*, 191 Cal.App.3d at p. 267 ["the touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report."].) We disagree.

Suppose an applicant seeks approval for construction of a well near a contamination source. The applicant says the proposed spacing between the well and the contamination source is "adequate," even though it is closer than the "generally accepted" distances enumerated in the chart in section 8(A). Environmental analysis of such an application could reveal relevant information, including whether the lesser distance proposed by the applicant was "adequate" under the spacing standard (or

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[11] As noted above, the Bulletin does contain a chart enumerating horizontal separation distances that are "generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water." However, the Bulletin's language makes clear those distances are essentially guidelines, not fixed standards. The Bulletin provides that "[l]ocal conditions may require greater separation distances to ensure ground water quality protection"; that "[n]o set separation distance is adequate and reasonable for all conditions; and that "[d]etermination of the safe separation distance for individual wells requires detailed evaluation of existing and future sight conditions." In sum, while the horizontal separation distances enumerated in the Bulletin provide some objective guideposts, the surrounding provisions confirm that the ultimate standard is that well/pollution separations distances must be "adequate."

whether it was "acceptable" with respect to risk of contamination under the "lesser distances" provision). Depending on what the environmental analysis revealed, the County could deny the permit as failing to satisfy the spacing standard.[12]

The County's Discretionary Role is not Insubstantial

The County argues that its ability to require, for example, that a well be located 120 feet from a pollution source rather than 100 feet[13] "hardly constitutes the kind of substantial control required to make well construction permits discretionary." The County cites *Sierra Club*, *supra*, 11 Cal.App.5th 11, a case which involved a permit allowing an applicant to establish a vineyard on his land. Among other things, the applicable ordinance required that a 50-foot setback from wetlands be established "unless a wetlands biologist recommends a different setback." The county accepted a wetlands biologist's conclusion that a 35-foot setback would be sufficient for the applicant's vineyard. (*Id.* at pp. 29–30.)

In arguing the County's control over well/pollution source spacing is insubstantial, respondents cite *Sierra Club* for the proposition that no discretion was involved in that case, even though the agency could make adjustments to setback distances based on the biologist's report. We conclude *Sierra Club* is distinguishable on this issue.

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[12] With respect to this issue, the parties engage in a tangential debate about the relevance of the County's police powers to regulate groundwater depletion. We need not determine what the County could do to address environmental concerns through its police powers – and whether that issue is even relevant (see Guidelines, § 15002, subd. (i)(2)) – because Chapter 9.36 itself empowers DER to deny a permit for failure to comply with the contamination spacing standard. (See Stan. County Code, §§ 9.36.030 & 9.36.150.) In other words, because the County has the ability to affect the project (e.g., by denying the well permit) in response to at least one environmental concern that would be analyzed during CEQA review, it is not material that the County may or may not have other police powers.

[13] We appreciate that many would consider a distance measured in feet to be "minor." But if, for example, 20 feet is the difference between a well being adequately spaced from a pollution source versus groundwater becoming contaminated, then such a modification would not be "minor" even though it involves a short distance.

> "As the trial court put it, '[a]lthough the details for the size of any setback for undesignated wetlands are left open, the qualification is itself ministerial because the Ordinance provides that the setback will be *whatever a wetlands biologist recommends*. The actual size of the setback is not set, *but the requirement to accept a biologist recommendation is set.*' " (*Sierra Club*, *supra*, 11 Cal.App.5th at p. 30, italics added.)

In this case, however, the County (through its DER) is the arbiter of "adequacy" – not a third party whose recommendation the County is essentially required to accept. In other words, Stanislaus County's determination of "adequacy" involves "subjective judgment in deciding ... how the project should be carried out." (Guidelines, § 15369.)

In a similar vein, the County argues that its authority to modify the spacing between a well and a contamination source is a "minor adjustment." But such a modification is not minor if it is the difference between safe versus contaminated groundwater.

Nor is it minor merely because it involves only one of several decision points in the permitting process. Depending on the project, exercising discretion as to even a single standard can have a profound effect on the project and its environmental impacts. The number of discretionary standards the local agency must consider is not the rubric for determining whether a permitting scheme is ministerial. Rather, the question is whether the public official is *only* applying fixed standards and objective measurements or, instead, is exercising subjective judgment in deciding whether or how the project should be carried out. (Guidelines, § 15369.) Consequently, if a single standard has the public official exercising subjective judgment as to how the project will be carried out, the scheme is discretionary and subject to CEQA.[14]

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[14] The reach of this rule is cabined by the functional test established by case law:

> "[T]he pertinent judicial decisions have developed a 'functional' test for distinguishing ministerial from discretionary decisions. [Citation.] That test examines whether the agency has the power to shape the project in ways that are responsive to environmental concerns. [Citations.] 'Conversely, where the agency possesses enough authority (that is, discretion) to deny or *modify* the proposed project on the basis of

The Fact that Chapter 9.36 and Incorporated Standards are Designed to Address Groundwater Contamination Does not Dispense with CEQA

The County also argues that its permitting standards are designed to address the issue of groundwater contamination. As a result, an environmental impact report "would not "uncover" or "reveal" groundwater contamination caused by a proposed well because discovery and avoidance of such contaminants is what the County's permitting program already does."[15] This argument essentially boils down to the County claiming it should be excused from CEQA review of potential groundwater contamination because it performs comparable environmental review of potential groundwater contamination under its own statutory permitting scheme. But CEQA does not provide for such an equivalency exception.

This Case is Distinguishable from the San Diego Navy *Case*

This case is also distinguishable from *San Diego Navy*, *supra*, 185 Cal.App.4th 924. That case involved a hotel/retail/office space development in downtown San Diego. The development agreement between the government and the developer created "a development plan and a series of urban design guidelines related to the aesthetic design

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> environment consequences the EIR might conceivably uncover, the permit process is "discretionary" within the meaning of CEQA.' [Citation.]" (*Friends of Juana Briones House*, *supra*, 190 Cal.App.4th at p. 302, italics in original.)

Under this test, one or more otherwise discretionary standards can be deemed ministerial if they do not bestow upon the agency "the power to shape the project in ways that are responsive to environmental concerns. [Citations.]" (*Friends of Juana Briones House*, *supra*, 190 Cal.App.4th at p. 302.)

For example, appellants note that pumping groundwater can cause environmental harm. However, Chapter 9.36 does not grant the DER the authority to do anything about groundwater depletion through standard well construction permits. That is, groundwater consumption is not a permissible basis for denying a Chapter 9.36 well permit.

[15] This argument essentially inverts the rationale of *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924 (*San Diego Navy*), which held CEQA review of an environmental issue was not required because the relevant discretion did *not* concern the relevant environmental issue.

of the Project." (*Id.* at p. 929.) The development agreement required the developer submit its construction documents to the Centre City Development Corporation (CCDC) so it could determine whether the documents were consistent with the aesthetic criteria established in the development plan and urban design guidelines.

One of the questions the Court of Appeal faced was whether the CCDC's determination regarding the aesthetic criteria was "discretionary" or "ministerial."[16] (*San Diego Navy, supra*, 185 Cal.App.4th at p. 937.) The design standards CCDC was applying included: " 'Towers shall be designed as slender structures to minimize view obstructions,' " and " '[a] palette of colors and building materials shall be developed for the Broadway complex to ensure harmonious treatment.' " (*Id.* at p. 938.) The CEQA petitioners argued the standards were " 'subjective' " and involved " 'the exercise of judgment and deliberation.' " (*Ibid.*) As a result, petitioners argued, the City of San Diego should have prepared an updated EIR addressing the Project's impact on climate change. The Court of Appeal rejected that contention, holding as follows:

> "Assuming for purposes of this opinion that in performing the consistency reviews, the CCDC was required to exercise discretionary authority (Guidelines, § 15163, subd. (c)) with respect to various *aesthetic* issues on the Project, the [CEQA petitioners have] made no showing the scope of the CCDC's discretion extended to the Project's potential impacts on *global climate change*. We conclude that the failure to make such a showing is fatal to the ... claim." (*Ibid.*)

Whatever the merits of that holding, it does not apply here because the discretion the County DER exercises *does* concern an environmental issue: groundwater

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[16] This issue arose in an unusual circumstance. The City of San Diego prepared an EIR for the project when it entered into the development agreement. The question was whether *additional* environmental review was required under section 21166 when the CDCC subsequently evaluated construction documents for compliance with aesthetic criteria. To resolve that issue, the Court of Appeal needed to determine whether the CDCC's approval was discretionary.

contamination.[17] Because the County's discretionary authority covers an issue that *would* be a subject of environmental review, the rationale of *San Diego Navy* does not apply.

That the County Regulates Groundwater Depletion in Chapter 9.37 Does not Preclude the Conclusion that Chapter 9.36 Regulates Groundwater Contamination in a Discretionary Fashion

The County also argues that it regulates groundwater depletion separately, in Chapter 9.37. As a result, the County argues well construction permits under Chapter 9.36 "are not the tools to address ... depletion." That may well be. (Cf. *California Water Impact Network v. County of San Luis Obispo* (June 28, 2018, B283846) ___ Cal.App.5th ___ [2018 Cal.App. Lexis 662].)[18] But the fact that the County makes a separate discretionary decision concerning groundwater *depletion* under Chapter 9.37, does not impact our conclusion that the County also makes a discretionary decision concerning groundwater *contamination* under Chapter 9.36.

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[17] As respondents acknowledge, DER can require greater distance between a well and a pollution source in order "to prevent the well from contaminating groundwater."

[18] The Second District recently published its decision in *California Water Impact Network v. County of San Luis Obispo*, *supra*, ___ Cal.App.5th ___ [2018 Cal.App. Lexis 662]. That case involved whether San Luis Obispo County's well permit approvals are ministerial or discretionary decisions. The Court of Appeal observed that Chapter 8.40 of the Bulletin is concerned with groundwater contamination, not subsidence or groundwater depletion. We agree. But we must next determine whether the ordinance – which admittedly is concerned with groundwater contamination – affords the County " ' "the ability and authority to 'mitigate [that] ... environmental damage' to some degree." ' [Citation.]" (*California Water Impact Network v. County of San Luis Obispo*, *supra*, ___ Cal.App.5th ___ [2018 Cal.App. Lexis 662, *13].) Here, it is clear the ordinance, through its incorporation of the Bulletin's "adequate" well-spacing standard, *does* afford Stanislaus County with "the ability and authority to mitigate ... environmental damage" (i.e., groundwater contamination) "to some degree." As a result, the well permit approvals are discretionary.

E. Other Provisions in Chapter 9.36 Identified by Appellants are not Discretionary

Appellants point to other provisions in Chapter 9.36 of the County Code and argues they are discretionary. We disagree.

Appellants first cite a portion of section 9.36.030 reading: "The application for a permit shall be in the form prescribed by the health officer and contain such information as the health officer may require." (Stan. Co. Code, § 9.36.030.) But appellants do not appear to argue that this provision independently renders the permitting scheme discretionary. Rather, they note it "support[s]" the County's authority to "carry out its discretionary functions under the state standards and to assess whether the permit may have significant environmental effects under CEQA." To the extent appellants intended to suggest this provision itself is discretionary, they failed to support that argument with reasoned legal analysis.

Appellants next cite to the following portion of section 9.36.060: "All pumping equipment shall be installed with protective devices to effectively prevent the entrance of foreign matter into the well casing." Appellants argue the inclusion of the word "effectively" requires the County to make a "judgment call." We disagree. The entire phrase "to effectively prevent the entrance of foreign matter into the well casing" is simply another way to say the protective devices used must actually function. That is an objective standard; the protective device either functions properly to prevent foreign matter from entering the well casing or it does not.

Appellants also point to the provision in Chapter 9.36, which empowers the health officer to grant variance permits. (Stan. Co. Code, § 9.36.110.)

> "The health officer may authorize an exception to any provision of this chapter when, in his/her opinion, the application of such provision is unnecessary. Upon application therefor, the health officer may issue a variance permit and shall prescribe thereon such conditions as, in his or her judgment, are necessary to protect the waters of the state from pollution." (*Ibid.*)

The County acknowledges that its consideration of applications for variance permits is subject to CEQA. But appellants contend that the County must exercise judgment and discretion even on nonvariance permits in order to determine whether the normal standards are adequate or must be altered via a variance permit. The County responds that whether it will consider altering a standard is not discretionary because it "may issue variance permits only '[u]pon application therefor,' and not on its own initiative." Thus, CEQA would apply once an application for a variance permit is submitted, but not before that point.

We agree with the County that the phrase "[u]pon application therefor" requires that an applicant request a variance permit before the health officer may alter an applicable standard.[19] The language clearly conveys an absolute condition on the health

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[19] For this reason, the ordinance could run afoul of Water Code section 13801's requirement that a county's well ordinance must "meet[] or exceed[] the standard contained in Bulletin 74-81." (Water Code, § 13801, subd. (c).) When an applicable standard is going to be modified to *accommodate the applicant*, it seems appropriate to condition the variance on the applicant's request. But, what about when the relevant standard needs to be modified to be *more stringent* due to site conditions? As Bulletin No. 74-81 acknowledges, "under certain circumstances, adequate protection of groundwater quality may require *more stringent* standards than those presented here." (Italics added.) Arguably, since the Bulletin has no analogous precondition, DER's authority to require *more stringent* standards should not be conditioned on a request from an applicant, who presumably would never make such a request. (See Water Code, § 13801, subd. (c).)

However, resolution of this question must await the proper case. Appellants' complaint for declaratory relief seeks only a judgment concerning the County's failure to perform CEQA review of well permit decisions. It does not seek invalidation of the well permit ordinance, or any other relief related to the possibility the ordinance violates Water Code section 13801.

One way this issue could be relevant to the present case is its potential impact on the interpretation of section 9.36.110. Because there is a presumption official duties have been regularly performed (Evid. Code, § 664), one could argue that the ordinance should be interpreted in a way that brings it into compliance with Water Code section 13801. Specifically, that section 9.36.110 should be interpreted to permit DER to issue variance permits even without an application. Here, however, the language "[u]pon application therefor" so clearly conditions the health officer's authority, that no presumption or

officer's ability to grant variance permits. As a result, the decision to even consider altering a construction standard is ministerial – it arises with an application for a variance permit and without the exercising of discretion by the County. However, once the application is made, the decision of whether to issue the variance permit and on what conditions is clearly discretionary.

F. Practical Considerations

CEQA litigation often involves substantial commercial, industrial and governmental projects for which environmental review can be a costly and time-consuming undertaking. Yet, CEQA is not limited to projects of a specific magnitude or purpose.[20]

Stanislaus County issues hundreds of well permits annually for residential and agricultural wells. In a long-standing ordinance, the County has considered the issuance of these permits to be "ministerial." We understand that requiring CEQA review for these relatively small, routine projects may seem unnecessarily burdensome and of little benefit. Yet, we are constrained by what the law says about ministerial versus discretionary government approvals. Given the discretion accorded to the County, that standard leads us to conclude that CEQA applies here.The County and Amicus Curiae argue that CEQA review would require the County to analyze a host of environmental impacts it is powerless to address. But that is not grounds for dispensing with CEQA review altogether. When a lead agency identifies mitigation measures that it lacks legal authority to impose, it may simply make a finding in the environmental document that the measures are legally infeasible. (See *Sequoyah Hills Homeowners Assn. v. City of*

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canon of construction can alter its meaning. (See *People v. Shiga* (2016) 6 Cal.App.5th 22, 40 [presumption that law has been followed in the course of performing an official duty can be overcome].)

[20] *Some* smaller projects are subject to categorical exemptions from CEQA, like building a single-family residence or creating bicycle lanes on an existing right-of-way. (Guidelines, §§ 15303–15304.)

Oakland (1993) 23 Cal.App.4th 704, 715–716; see also § 21081, subd. (a)(3) [referencing "legal ... considerations" which "make infeasible the mitigation measures or alternatives identified in the environmental impact report"]; Guidelines, § 15364 [referencing the role of "legal ... factors" in determining feasibility].) However, the fact that some mitigation measures are outside the lead agency's authority to impose does not dispense with CEQA altogether.

We are also sensitive to the concerns of Amicus Curiae that our conclusion will likely require the County to obtain and analyze substantial amounts of information, the costs of which will be borne by local agencies and/or applicants. Elsewhere, CEQA does address the reality that some projects are too small or inconsequential to justify the time and expense of an EIR.[21] But we may not shoehorn that concern into the ministerial exemption, which addresses a different issue.[22] Moreover, it may[23] be that many well permits in Stanislaus County will be appropriate candidates for negative declarations, mitigated negative declarations or perhaps even an exemption (other than the ministerial exemption).[24] We leave that determination to the County.

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[21] For example, CEQA and its implementing regulations provide for negative declarations and exemptions for small structures or minor alterations to land. (§§ 21064, 21064.5; Guidelines, §§ 15303–15304.) Perhaps there should also be a categorical exemption for residential wells. But that issue must be raised with the Legislature, which has the power to create exemptions. (See *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 966, fn. 8.)

[22] The ministerial exemption addresses the distinct concern that an EIR would be wasteful not because the project is environmentally inconsequential, but because the government would be unable to exercise discretion in furthering the environmental interests that would be described in an EIR.

[23] We are not precluding or endorsing the use of negative declarations or notices of exemption for well permits in Stanislaus County. That issue it outside the scope of the present case.

[24] During argument at trial, appellants' counsel made the following comments to the trial court:

> "CEQA has a range of ... responses to a permit application once it's triggered. So the first level is preliminary review, and the question there is:

CONCLUSION

For the reasons set forth above, we conclude the deference owed to Stanislaus County's classification of well permits as ministerial has been overcome. We hold that the issuance of well permits under Chapter 9.36 of the Stanislaus County Code is a discretionary decision and subject to CEQA. However, this opinion neither precludes nor endorses a specific manner by which respondents must comply with CEQA going forward, whether by notice of exemption, negative declaration, or EIR.[25] The determination of which environmental document, if any, is proper under CEQA shall be made by respondents in the first instance.

> Is there an exemption? So for lots of well permits there's going to be a categorical exemption because – or there could be a common sense exemption which is there's no reasonable possibility this could have a significant adverse impact on the environment. That's called the common sense exemption. So for lots of domestic wells, that's going to be the case. Replacement wells, there's a categorical exemption for that. For single-family dwellings there's a categorical exemption for that. So this first level of review is [g]oing to take out of the CEQA process a range of permits."
>
> Shortly thereafter, appellant's counsel said:
>
> > "And moving on from there, if there's no exemption for the project it would go to the initial study. And at that point, if the initial study determines that the project may have a significant impact on the environment, then there would be an environmental impact report.... [I]f it would not have a significant impact on the environment, then the negative declaration would be the result, and that would be the end of the process."

We agree that many well permit applications will not require the preparation of an EIR. We anticipate, without deciding, that the County will be able to satisfy CEQA through exemptions and/or negative declarations in many, if not most, instances.

[25] Excepting only that respondents may not determine that CEQA itself does not apply on the grounds the project is not discretionary (§ 21080, subd. (a)) or that the statutory exemption for ministerial projects applies (§ 21080, subd. (b)(1)) to the issuance of well permits under Chapter 9.36 Stanislaus County Code (and incorporated provisions of Bulletin No. 74) as currently drafted.

DISPOSITION

The judgment is reversed and the matter remanded. The trial court is directed to enter a declaratory judgment in favor of plaintiffs, consistent with the views expressed in this opinion. The trial court shall consider plaintiffs' prayer for a permanent injunction and for attorney fees in the first instance.

Appellants shall recover their costs on appeal.

POOCHIGIAN, Acting P.J.

WE CONCUR:

FRANSON, J.

PEÑA, J.

ATTACHMENT 2

Chapter 9.36 WATER WELLS

9.36.010 Purpose.

The board of supervisors declares that the purpose of this chapter is to protect the ground waters of the state for the enjoyment, health, safety and welfare of the people of the county by regulating the location, construction, maintenance, abandonment and destruction of all wells which may affect the quality and potability of underground waters. (Prior code §3-300).

9.36.020 Definitions.

For the purpose of this chapter, certain words and phrases shall be defined as follows:

A. "Cathodic protection well" means any artificial excavation in excess of fifty feet constructed by any method for the purpose of installing equipment or facilities for the protection electrically of metallic equipment in contact with the ground, commonly referred to as cathodic protection.

B. "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease.

Contamination includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

C. "Destruction of well" means the complete filling of a well in such a manner that it will not produce water or act as a conduit for the interchange of waters.

D. "Health officer" means the health officer of the county or his authorized representative.

E. "Person" means any natural person, individual, firm, partnership, company, corporation, association, joint venture, joint stock company, organization, club, company, business trust, lessee, agent, servant, officer, employee, unincorporated association or representative of same.

F. "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonable affects:

1. Such water for beneficial use; or

2. Facilities which service such beneficial uses.

Pollution may include contamination.

G. "Seal, annular" means a watertight seal placed between the well casing and the side wall of a drilled hole.

H. "Seal, sanitary" is a grout, mastic

or mechanical device to make a watertight joint between the pump and casing or the concrete base.

I. "Seal, surface" is a monolithically poured concrete platform constructed around the top of the well casing on thoroughly compacted earth.

J. "Waters of the state" means any water, surface or underground, including saline waters, within the boundaries of the state.

K. "Well pit" is an excavation in which the top of the well casing is below the ground surface.

L. "Well" or "water well," as used in this chapter, means any artificial excavation constructed by any method for the purpose of extracting water from, or injecting water into, the underground. This definition shall

not include:

1. Oil and gas wells, or geothermal wells constructed under the jurisdiction of the Department of Conservation, except those wells converted to use as water wells; or

2. Wells used for the purpose of:

a. Dewatering excavation during construction, or

b. Stabilizing hillsides or earth embankments, or

c. Dewatering agricultural areas when the discharge is to irrigation facilities only. (Prior code §3-301).

9.36.030 Permit—Required.

The owner of property upon which a well is located or proposed to be located, or his/her authorized representative, shall obtain a permit from the health officer to construct, repair or destroy any well or well seal. No person shall construct, install, repair or destroy any well or well seal without first having been furnished a copy of a valid permit for such work. A permit shall be required when any well seal is broken. The application for a permit shall be in the form prescribed by the health officer and contain such information as the health officer may require. It shall be a condition of every permit for the repair of a well or well seal that there shall be compliance with the provisions of this chapter. For the purpose of this section, the term "well" includes cathodic protection wells. (Prior code §3-302).

9.36.040 Permit—Emergency work.

In the event of an emergency, repair or replacement of a well or pumping equipment may be begun without obtaining a permit. All emergency work shall comply with the provisions of this chapter. (Prior code §3-303).

9.36.050 Permit—Application.

As soon as possible, the owner or his/her authorized representative shall apply to the health officer for a well construction permit and shall, in addition, submit a statement explaining in detail the nature of the emergency. If the health officer finds that the work done does not comply with the provisions of this chapter, he or she shall order that such additional work be performed as may be necessary to comply with this chapter, or shall order that the well will be destroyed as provided in this chapter. (Prior code §3-303).

9.36.060 Protection against surface water entrance.

All wells shall be so constructed as to prevent the entrance of surface water from any source into the well or into any aquifer. The construction of a well pit is prohibited; provided, however, a variance permit may be granted by the health officer. All pumping equipment shall be installed with protective devices to effectively prevent the entrance of foreign matter into the well casing. (Prior code §3-304).

9.36.070 Seals.

All wells shall have a sanitary seal. All wells shall also have an annular seal, except agricultural wells not used for domestic purposes and located more than three hundred feet from a domestic well. (Prior code §3-305).

9.36.080 Disinfection.

After the construction, installation, or repair of any well, or pumping equipment, and prior to its use, the well and all appurtenances thereto shall be disinfected. (Prior code §3-306).

9.36.090 Injection or recharge wells.

An injection or recharge well shall be subject to all the provisions of this chapter, except those contained in Sections 9.36.060, 9.36.070 and 9.36.080, unless compliance with these sections is required by the health officer. (Prior code §3-307).

9.36.100 Inspection.

A well site and surrounding property may be inspected by the health officer at any time prior to the destruction or construction of any well. Upon completion of the work authorized by a permit, and before the well is used, or upon the destruction of a well, the health officer shall make an inspection. (Prior code §3-308).

9.36.110 Variances.

The health officer may authorize an exception to any provision of this chapter when, in his/her opinion, the application of such provision is unnecessary. Upon application therefor, the health officer may issue a variance permit and shall prescribe thereon such conditions as, in his or her judgment, are necessary to protect the waters of the state from pollution. (Prior code §3-309).

9.36.120 Destruction authority.

Every abandoned well shall be destroyed in accordance with the methods prescribed in the standards. The health officer shall have the authority to order the destruction or repair of any well that is polluted or unsafe or is so located as likely to become polluted. (Prior code §3-310).

9.36.130 Maintenance of well out of service.

The owner shall continuously maintain, in accordance with the provisions of this chapter, any well which is out of service, so as to be safe and to prevent pollution of any aquifer. A properly maintained out-of-service well shall not be considered to be an abandoned well. (Prior code §3-311).

9.36.140 Well driller's report.

Upon completion of a well, the owner or his/her authorized representative shall file with the health officer a copy of the well driller's report, as required by the State Department of Water Resources. (Prior code §3-312).

9.36.150 Standards adopted.

Except as may be otherwise provided by this chapter, standards for the construction, repair, reconstruction or abandonment of wells shall be as set forth in Chapter II of the Department of Water Resources Bulletin No. 74, "Water Well Standards" (February 1968), or as subsequently revised or supplemented, which are incorporated in this chapter and made a part of this chapter. (Prior code §3-313).

9.36.160 Fees.

The board of supervisors may establish, by resolution, a schedule of fees for permits, applications and for other services and such schedule, when adopted, shall become a part hereof. A copy of any schedule of fees established by resolution of the board shall be kept on file in the office of the clerk of the board of supervisors. (Prior code §3-314).

9.36.170 Appeal—Authorized.

Any person whose application for a permit or for an approval has been revoked or denied, may, within thirty days after the date of such denial or revocation, appeal therefrom in writing, accompanied with the appropriate appeal fees, to the board of supervisors. Such appeal shall be heard by the board at its next regular meeting thereafter, unless the appeal was filed within five days of such meeting, in which event it shall be heard at the next regular meeting subsequent thereto, and the board shall affirm or overrule the denial or revocation of the application. This section does not authorize appeals to the board from any action of the health officer authorized or required by state law or regulation. (Prior code §3-315).

9.36.180 Appeal—Hearing and action.

At the hearing of an appeal to the board of supervisors, any interested party may present oral or written evidence. Following the hearing, the board shall render a decision upon the appeal and may sustain, modify, or reverse any action of the health officer. The decision of the board shall be final. (Prior code §3-316).

9.36.190 Enforcement.

The health officer shall enforce this chapter and may perform all acts necessary or proper to accomplish the purposes of this chapter. (Prior code §3-317).

9.36.200 Penalty for violation.

Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished as set forth in Section 1.36.010. Every violation of any provision of this chapter shall be construed as a separate offense for each day during which such violation continues and shall be punishable as provided in this section. (Ord. CS 705 §17, 1999; prior code §3-318).

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S251709

No. _____

IN THE SUPREME COURT OF CALIFORNIA

PROTECTING OUR WATER AND ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

vs.

STANISLAUS COUNTY et al.,

Defendants and Respondents

After a Decision by the Court Of Appeal Fifth Appellate District
Case No. F073634

Appeal from the Stanislaus County Superior Court
Case No. 2006153

The Honorable Roger M. Beauchesne, Judge, Presiding

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Service on the Attorney General required by Rule 8.29(c)(2)(C)

PROOF OF SERVICE

Protecting Our Water and Environmental Resources et al. v. Stanislaus County et al.
California Supreme Court Case No. _____

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 San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On October 3, 2018, I served true copies of the following document(s) described as:

DEFENDANTS AND RESPONDENTS' PETITION FOR REVIEW

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

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 Shute, Mihaly & Weinberger LLP'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.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on October 3, 2018, at San Francisco, California.

/s/ Sara L. Breckenridge

TRUEFILING SERVICE LIST

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Protecting Our Water and Environmental Resources et al. v. Stanislaus County et al.**
Case Number: **TEMP-DN69D70S**
Lower Court Case Number:

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/s/Matthew Zinn
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