No. S251709

10.644.02

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal, filed August 24, 2018
Fifth Appellate District, Case No. F073634

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

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF *AMICUS CURIAE* NORTH COAST RIVERS ALLIANCE IN SUPPORT OF PLAINTIFFS AND APPELLANTS PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

STATUTES

REGULATIONS

MISCELLANEOUS AUTHORITIES

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, North Coast Rivers Alliance ("NCRA") requests leave to file the attached *Amicus Curiae* Brief in support of plaintiffs and appellants Protecting Our Water & Environmental Resources ("plaintiffs"). The proposed brief addresses the distinction between discretionary decisions that are subject to review under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., ("CEQA") and ministerial actions that are not subject to this review.

Proposed *amicus* NCRA is an unincorporated association that provides local, state and federal agencies with comments and expert testimony on land, water and wildlife management issues, and seeks compliance by local, state and federal agencies and private industry with state and federal environmental laws. NCRA's members are vitally interested in assuring that public agencies fully disclose the potentially significant impacts of projects on habitats and watersheds, including impacts on their dependent fish and wildlife.

NCRA is not affiliated with any party to this action, and writes solely to offer an environmental perspective on the significant issues of public welfare at stake in this dispute. NCRA's proposed amicus curiae brief will assist this Court's review. Counsel for proposed *amicus* are familiar with

the questions involved in the case and the scope of their presentation.

NCRA and its undersigned counsel have extensive experience litigating cases under CEQA, including *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 664-673 (addressing CEQA's requirements for discussing alternatives and mitigation measures), *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1300-1305 (discussing CEQA's requirement for consideration of alternatives to reduce a project's water supply impacts), *Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1093 (analyzing CEQA's application to water development project), *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428-435, 438-447 (addressing CEQA's standard of review and the interface between CEQA and water supply planning), *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 869-875 (discussing CEQA's application to water supply development and local planning), and *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931 (addressing CEQA's application to water supply planning and development).

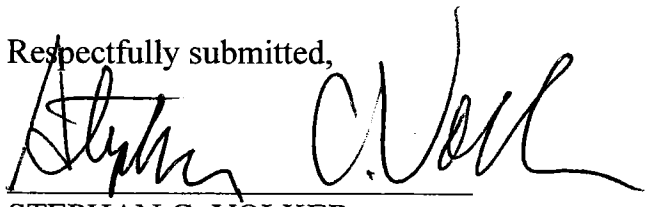
NCRA's undersigned counsel has also submitted numerous amicus curiae briefs addressing important issues of CEQA's application and

implementation, such as in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, and *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 229.

In view of the decades of experience of NCRA and its counsel addressing the interpretation and implementation CEQA, NCRA's views on these matters will assist this Court's review.

Dated: May 10, 2019

Respectfully submitted,



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INTRODUCTION AND SUMMARY OF ARGUMENT

When the County of Stanislaus (the "County") reviews and approves permits for wells, it must evaluate whether the proposed well is adequately separated from "known or potential sources of pollution and contamination," as required by the standards set forth in Bulletin No. 74 adopted by the California Department of Water Resources ("DWR") ("DWR Bulletin 74"). Appellants' Appendix ("AA") 542. As the Court of Appeal correctly determined, this exercise of discretion is sufficient to trigger the County's duties under CEQA. In its Opening Brief on the Merits ("OB") and Reply Brief ("RB"), however, the County contends that its approvals do not rise to the level of discretionary CEQA-triggering decisions. The County's argument misapprehends decades of controlling CEQA precedent and obscures a clear and compelling factual record.

Contrary to its argument, the County maintains ample authority "to alter a project to meaningfully avoid environmental impacts" (OB 33), as the County is empowered to address well pollution through alterations to each project. And while DWR Bulletin 74, section 8(A), provides some guidance about how to determine whether well separation is "adequate," this guidance is not a fixed standard that precludes the County from exercising the discretion it possesses, as the County erroneously implies.

OB 33; AA 542-543. Adequate well separation is no "minor standard" that may be cast aside as perfunctory; instead, it requires careful and independent judgment to protect water supplies from pollution and contamination. OB 33; AA 542-543.

Accordingly, this Court should affirm the Court of Appeal's holding that the County's approvals are discretionary.

STATEMENT OF FACTS

North Coast Rivers Alliance adopts and incorporates the Statement of Facts submitted by plaintiffs and appellants Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance (collectively "plaintiffs") in their Answering Brief ("AB").[1]

ARGUMENT

I. CEQA APPLIES TO ALL DISCRETIONARY APPROVALS

CEQA is California's primary statutory mandate for environmental protection. CEQA "shall apply to discretionary projects proposed to be carried out or approved by" state and local agencies. § 21080(a).[2] It "does not apply to . . . [m]inisterial projects." § 21080(b)(1).

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[1] NCRA notes that two citations on page 21 of the Answering Brief should be corrected. AA 150 should instead read AA 449, and AA 151 should instead read AA 450.

[2] All undesignated references are to the Public Resources Code.

Under the CEQA Guidelines, a "discretionary project" "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, regulations, or other fixed standards. The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project." 14 C.C.R. ("Guidelines") § 15357. By contrast, ministerial projects "involv[e] little or no 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." Guidelines § 15369.

In 2018, the California Resources Agency supplemented its definition of "discretionary project" to further distinguish discretionary projects from those in which the public agency "merely has to determine . . . conformity with . . . *fixed standards*" and exercises no "subjective judgment." Guidelines § 15357 (emphasis added). If a public agency exercises judgment in its approval or denial of a permit – rather than simply

determining whether the permit conforms to *fixed* standards – the approval is considered discretionary, and CEQA compliance is required.

"Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary, and will be subject to the requirements of CEQA." Guidelines § 15268(d). The CEQA Guidelines' imperative favoring environmental review of agency approvals that include both discretionary and ministerial components comports with "[t]he foremost principle under CEQA . . . that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

For over 30 years, the courts have consistently adhered to this "foremost principle" in applying CEQA to agency approvals involving both discretionary and ministerial features. *Friends of Westwood v. City of Los Angeles*, 191 Cal.App.3d at 267-273 ("the touchstone is whether the approval process . . . 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").

"So construed, section 21080 extends CEQA's scope to hybrid projects of a mixed ministerial-discretionary character; doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization." *People v. Department of Housing and Community Development* (1975) 45 Cal.App.3d 185, 194 (internal citation omitted, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83); *see also Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 301-302 ("where there are doubts whether a project is ministerial or discretionary, they should be resolved in favor of the latter characterization." (quoting *Citizens for Non–Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1583)). Thus, as decades of CEQA case authority make clear, approvals that have both ministerial and discretionary characteristics are subject to CEQA.

Compliance with CEQA is a multi-step process. First, for discretionary projects requiring CEQA compliance, the agency must determine whether the project is subject to a statutory exemption, a categorical exemption, or the "common-sense" exemption. Guidelines § 15062.

Second, if the project is not exempt from environmental review, then

the agency prepares an "initial study" to determine the level of environmental review that is required for CEQA compliance. Guidelines § 15063. In doing so, the lead agency must consult "informally" with responsible and trustee agencies, who may offer recommendations as to whether an EIR or negative declarations should be prepared. § 21080.3(a); Guidelines § 15063(g). If the agency concludes that a negative declaration or a mitigated negative declaration, rather than an EIR, is the appropriate environmental document, then the initial study must set forth the agency's reasoning in reaching that conclusion. Guidelines § 15063(c)(5).

The third and final step for the agency in applying CEQA depends on the conclusions of the initial study. If the initial study and public comment thereon show that there is no substantial evidence (or reasonable inferences therefrom) that the project may cause significant adverse environmental impacts, then the agency may adopt a "negative declaration." §§ 21080(c)(1), 21064; Guidelines § 15063(b)(2). If the initial study reveals substantial evidence that significant impacts might occur, but that the project applicant is able and willing to modify the project to eliminate all such potential or significant impacts, then the lead agency should adopt a "mitigated negative declaration" confirming that, as mitigated, the project clearly has no potential for causing a significant effect on the environment.

§§ 21064.5, 21080(c)(2); Guidelines §§ 15006(h), 15064(f)(2).

When the initial study – or public comment thereon – reveals that one or more significant environmental impacts may occur, the lead agency must prepare an EIR. § 21061; Guidelines §§ 15064(a)(1), 15080-15096, 15120-15132, 15160-15170. The EIR must analyze those effects and suggest feasible means, if any, of mitigating or avoiding them, including alternatives that would achieve most of the basic objectives of the project without causing significant environmental effects. §§ 21002, 21002.1, 21061; Guidelines §§ 15080-15096, 15120-15132, 15160-15170.

"[S]ection 21080 does not automatically impose an EIR on projects lacking environmental significance. It only confronts the agency with the next step in the process — to decide whether the physical proposal will have a significant environmental impact or, to the contrary, merits a negative declaration." *Department of Housing*, 45 Cal.App.3d at 194 (quoting *No Oil,* 13 Cal.3d at 79-80). A decision affirming the Court of Appeal would not alter this multi-step review, and would not mandate an overly burdensome process.

II. THE COUNTY'S APPROVALS OF WELL PERMITS ARE DISCRETIONARY

A. DWR Bulletin 74 Imbues the County with Discretion

Section 8(A) of DWR Bulletin 74 requires the County to determine

whether any proposed well is "located an *adequate* horizontal distance from known or potential sources of pollution and contamination." AA 542 (emphasis added). It provides a list of potential contamination sources but makes clear that the list is not exhaustive. *Id.* Instead, section 8(A) requires the County to determine whether other sources of pollution or contamination are adequately separated from any new well. *Id.* And, while it provides a list of "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 groundwater*," it requires the County to determine whether local conditions "require *greater* separation distances to ensure ground water quality protection." *Id.* (emphasis added).

Indeed, section 8(A) specifies that "no set separation distance is adequate and reasonable for all conditions. Determination of the safe separation distance for individual wells requires *detailed evaluation* of existing and future site conditions." AA 543 (emphasis added). Thus section 8(A) invests the County with broad discretion to determine whether "adverse conditions exist," and in those situations the County is empowered to increase the separation distances, or to require "special means of protection" related to the construction of a well. *Id.* The County is likewise

given authority to determine whether "lesser distances than those listed" are acceptable "where physical conditions preclude compliance with the specified minimum separation distances and where special means of protection are provided." *Id.* Section 8(A) thus provides a framework for evaluating whether appropriate well separation exists, but the standards it provides are inherently flexible and require agency discretion to implement them.

This process is similar to other discretionary approval processes that courts have found to trigger CEQA review. In *People v. Department of Housing and Community Development*, for example, an application for a permit to construct a mobile home park was deemed "not wholly ministerial" because it required the agency to exercise "sound judgment" in determining whether there was "adequate" water supply, and whether lighting would be "sufficient." 45 Cal.App.3d at 193. Despite these factors having "greater environmental significance" in some locations and "negligible significance" in others, their existence mandated CEQA review. *Id.*, at 194.

Similarly, in *Friends of Westwood v. City of Los Angeles*, 191 Cal.App.3d at 274, the city argued that its approval of a building permit was ministerial and not discretionary. But city staff exercised judgment when

considering the permit application, including evaluating whether ingress and egress would be "adequate." *Id.* The court found that the decisions inherent in the City's evaluation of the project were based on "subjective criteria" that rendered the approval discretionary, and reversed the trial court's denial of a preliminary injunction. *Id.* at 278.

Here, like in *Friends of Westwood*, and *People v. Department of Housing and Community Development*, DWR Bulletin 74, section 8(A)'s requirement that the County determine the "adequate" separation between a potential well and a potential source of pollution requires the County to exercise its judgment by implementing subjective criteria, imbuing the County's approval decision with sufficient discretion to trigger CEQA review.

B. Well Separation Must Be Evaluated for All Permits

The County argues that unless these flexible discretionary standards apply "to all or the vast majority of [the County's] well-construction permit approvals," CEQA compliance is not required. OB 59. But the County's legal conclusion is contrary to settled CEQA law. Whether CEQA applies to a particular approval is necessarily determined on a case-by-case basis. And, as shown, as to each permit approval, the relevant question is whether that approval involves the exercise of discretion. If it does, then CEQA

applies to that approval. As the record in this case demonstrates, CEQA applies because the County exercises its discretion in deciding whether wells are adequately separated from potential sources of pollution before deciding whether to approve or deny *any* well-building permit. AA 148-151.

Further, even if issuance of a specific well permit involves some element of ministerial review, CEQA still applies because, as discussed, CEQA compliance is required for project approvals that have both discretionary and ministerial characteristics. *People v. Department of Housing and Community Development*, 45 Cal.App.3d at 194. Because CEQA must "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language," "projects of a mixed ministerial-discretionary character . . . should be resolved in favor of the latter characterization." *Laurel Heights*, 47 Cal.3d at 390 (first quote); *People v. Department of Housing and Community Development* , 45 Cal.App.3d at 194 (second quote). Therefore, even if only one or some of the standards are discretionary, CEQA is applicable.

Furthermore, under the *Friends of Westwood* "functional distinction" test, "a project qualifies as ministerial 'when a private party can *legally*

compel approval without any changes in the design of its project which might alleviate adverse environmental consequences.'" *Friends of Juana Briones House*, 190 Cal.App.4th at 302 (*quoting Friends of Westwood*, 191 Cal.App.3d at 235) (emphasis in original). Here, permit applicants cannot compel the County to approve permits for wells that lack adequate protective measures. AA 148-149.

Conversely, an approval is discretionary under the functional distinction test if the agency "possesses enough authority (that is, discretion) to deny *or modify* the proposed project on the basis of environmental consequences the EIR might conceivably uncover." *Friends of Westwood*, 191 Cal.App.3d at 272 (emphasis and parenthetical in original). Such is the case here. The County enacted its well construction ordinance "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." AA 148 (County Code § 9.36.010). When the County considers whether adequate separation exists between a well location and potential sources of pollution – and what the adequate separation distance should be – it does so explicitly in order to protect these environmental resources from

contamination. AA 148-151, 542-543. Indeed, the discretion the County exercises here involves precisely the type of environmental consequence – groundwater contamination – that the CEQA process is designed to address.

Relying on *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, the County attempts to rehabilitate its fatally flawed claim that approval of well-building permits is ministerial. OB 59-63; RB 32-35. But *County of Sonoma* has no application here. First, *County of Sonoma* involved a particular project approval in which "the scope of any such discretion [was] drastically narrower than that which was conferred by the broad language of the regulations" at issue in the relevant precedent, *People v. Department of Housing and Community Development* and *Friends of Westwood.* 11 Cal.App.5th at 29. By contrast here, the degree of discretion afforded the County in issuing well-building permits is much greater than was the case in *County of Sonoma.*

Second, as the court acknowledged in *County of Sonoma*, the County Ordinances at issue there set forth fixed standards that the agency was required to apply. *Id.* at 30. The court pointed out that "'[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.'" *Id.* (quoting trial court). In *County of Sonoma* there was no evidence "demonstrating that the Commissioner had discretion under this provision or, even assuming there was some discretion, could mitigate potential environmental impacts to any meaningful degree." *Id.* Here, by contrast, the County has broad discretion both to determine what constitutes an adequate separation, and to mitigate the risk of contamination through separation and other measures. Thus, CEQA applies. *Id.*; *Friends of Westwood*, 191 Cal.App.3d at 272; *People v. Department of Housing and Community Development*, 45 Cal.App.3d at 193.

Even if the County were correct in asserting that the discretionary separation standard must be "relevant to all or some . . . of the well-construction permits" in order for its well-permitting scheme to be subject to CEQA, the separation standard clearly does apply to *all* well-construction permits. As DWR Bulletin 74, section 8(A), states, "*[a]ll water wells* shall be located an adequate horizontal distance from known or potential sources of pollution and contamination." AA 542 (emphasis added). Determining the appropriate separation distance between a well location and a contamination source is a two-part process. First, the County must evaluate known, potential, and suspected sources of contamination or pollution –

including "detailed evaluation of existing and future site conditions" – to determine whether any separation is necessary. AA 543. That decision is a subjective and meaningful determination that the County must make for *each* well-building permit application. Only after making that first discretionary determination can the County move on to its second discretionary decision of "determining the 'safe' separation distance between a well and a potential source of pollution or contamination." AA 543.

In making its second discretionary decision for each well permit, the County must determine whether there is a known or potential pollution source near *each* well prior to issuing that permit. Without an investigation of potential pollution sources for each well-construction permit application that is received, the County cannot know if any separation is required. This initial review of every well-building permit application is especially important given the fact that the list of potential pollution and contamination sources is not exhaustive. AA 542 ("Such sources include, but are not limited to . . ."). Furthermore, the County must consider not only known sources of pollution and contamination, but also potential and even suspected sources. And given that pollution sources can be introduced to areas through man-made activities, this determination must be made

anew for every permit application.

For each of these reasons, the County's twin theories for why this Court should treat DWR Bulletin 74, section 8(A)'s flexible and discretionary separation standard as merely ministerial both fail.

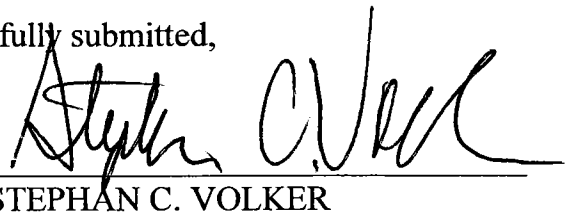
CONCLUSION

As shown above, the County's approval of well permits is sufficiently discretionary to require CEQA review.

Accordingly, this Court should uphold the Court of Appeal's decision on this point.

Dated: May 10, 2019

Respectfully submitted,



By: _____
STEPHAN C. VOLKER
Attorney for *Amicus Curiae*
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CERTIFICATE OF COMPLIANCE

In accordance with Rules 8.520 subdivision (b)(1) and 8.204 subdivisions (b)(4) and (c)(1), California Rules of Court, I certify that the *Amicus Curiae* Brief of North Coast Rivers Alliance, together with its application for leave to file this brief, is in at least 13-point proportional type and contains 3,639 words.

Dated: May 10, 2019

Respectfully submitted,

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PROOF OF SERVICE BY UNITED STATES POSTAL SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to within entitled action; my business address is 1633 University Ave, Berkeley, CA 94703.

On May 10, 2019, I served the below-named document:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF *AMICUS CURIAE* NORTH COAST RIVERS ALLIANCE IN SUPPORT OF PLAINTIFFS AND APPELLANTS PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES ET AL.

by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as set forth below (CCP §1012, 1013, and 1013(a)).

I am familiar with the practice of this firm for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on the same day on which it was placed at Law Offices of Stephan C. Volker for deposit, and addressed to:

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I declare under penalty of perjury that the foregoing is true and correct and that it was executed May 10, 2019, at Berkeley, California.

Teddy Ann Fuss