No. S251709

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

DEFENDANTS AND RESPONDENTS' CONSOLIDATED RESPONSE TO AMICI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

Like Plaintiffs, their amici California Water Impact Network et al. (collectively "California Water") and North Coast Rivers Alliance et al. (collectively "North Coast") argue for a bright-line test to determine which permits and other agency approvals are discretionary and therefore subject to the California Environmental Quality Act ("CEQA"). Although they contend this test is the law, even a cursory review of the cases shows it is not. Rather, recognizing that virtually any human decision requires the exercise of some degree of judgment, courts have applied a pragmatic, "functional" test on a case-by case basis.

Plaintiffs' amici would have this Court adopt a test that looks for magic words in the governing ordinance. If one can find a single adjective in a single standard that implies some open-ended evaluation—such as sufficient, feasible, possible, or as here, adequate—the inquiry is over and the approval is subject to CEQA. This was the Court of Appeal's approach below, but one looks in vain for another case in which a court found such a narrow basis for holding that an approval is discretionary.

Instead, as the County has argued previously, the cases on the discretion/ministerial distinction reveal an analysis in which the courts have considered two related factors: (1) the degree to which the applicable ordinance or statute cabins the agency's exercise of judgment and (2) the extent to which the agency might use that judgment to modify the project in ways that would affect its environmental impacts. (Defendants' Opening Brief on the Merits ("Open. Br.") at 42-44; Defendants' Reply Brief on the

Merits ("Reply") at 8-13.) Courts have applied these factors to conclude that an agency decision is discretionary only where the agency is given carte blanche to alter the project in a meaningful way. No case—until the Court of Appeal's Opinion here—has held that the ability to modify a single attribute of a project is enough to trigger CEQA. In fact, as amicus California Building Industry Association ("CBIA") points out, adopting a bright-line rule that finds discretion each time a regulation uses an open-ended adjective such as "adequate" threatens to bring a huge swath of permits traditionally considered ministerial—including ordinary building permits—within CEQA's purview.

Finally, amicus California Water devotes most of its brief to relitigating *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 (*County of Sonoma*). But *County of Sonoma* was correct in holding that an agency decision can be discretionary only if the provisions of the ordinance or statute that apply to that decision are discretionary. The mere existence of discretion somewhere in a regulatory program does not make all approvals issued under the program discretionary, unless the discretionary provision is relevant all such approvals. Here, even assuming the well-separation standard is sufficient to create discretion for CEQA purposes, it is only relevant to permits for wells in the vicinity of a source of potential contamination. Because the record provides no evidence about whether that is a few, many, or most permits, the record does not support Plaintiffs' only requested relief: complete invalidation of the County's well-permitting program.

ARGUMENT

I. Plaintiffs' amici propose a test for discretion that is unsupported and unworkable.

A. The absolutist view of discretion proposed by Plaintiffs' amici bears no resemblance to the functional test applied by the courts.

Contrary to Plaintiffs' arguments, now reiterated by their amici, the functional test does not establish a bright-line rule that would trigger CEQA if a lead agency has authority to exercise *any* judgment, no matter how circumscribed. (See Answer at 33, 35-37; California Water at 10-11; North Coast at 18.) Rather, as the County has shown, the functional test requires evaluation of (1) the *degree* to which the applicable ordinance or statute cabins the agency's exercise of judgment and (2) the *extent* to which the agency might use that judgment to modify the project in ways that would affect its environmental impacts. (Open. Br. at 42-44; Reply at 8-13.)

California Water and North Coast misconstrue the functional test. California Water frames the test as whether an ordinance or statute leaves "no room whatsoever for subjective judgment in any material sense." (California Water at 10-11.) North Coast quotes selectively from CEQA Guidelines section 15357 to argue that ministerial projects are "those in which the public agency 'merely has to determine . . . conformity with . . . *fixed standards*' and exercises *no* 'subjective judgment.'" (North Coast at 11-12 (second emphasis added); see also *id.* at 19 ["[E]ven if only one or some of the [Bulletin] standards are discretionary, CEQA is applicable."].)

This absolutist position reflects neither the case law on the discretionary/ministerial distinction—with the exception of the Court of Appeal's Opinion—nor the Guidelines. Rather, as the County has shown, the functional test applies two factors to determine whether the applicable standards in the relevant ordinance or statute confer meaningful discretion on an agency—discretion of that "certain kind" that triggers environmental review. (Open. Br. at 28 (quoting *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 933-34 (*San Diego Navy*)); Reply at 9-12.) The binary view of discretion is inconsistent with this approach.

The Opinion's conclusion that the County Department of Environmental Resources ("DER") exercises meaningful discretion based on one word—"adequate"—in one standard governing the minimum distance between a proposed well and sources of likely contamination is inconsistent with courts' application of both factors of the functional test. (Opinion at 13 [use of "adequate" in a standard "inherently involves subjective judgment" sufficient to trigger CEQA, citing *People v. Dept. of Housing & Community Dev.* (1975) 45 Cal.App.3d 185 (*HCD*)].) California Water and North Coast likewise latch onto the word "adequate" in Standard 8(A) and point to an ostensibly similar standard discussed in *HCD*, in which the court found the agency's decision to be discretionary. (California Water at 14-15; North Coast at 17-18.)

Applying the first factor, *HCD* is nothing like this case. There, the agency had to determine "[w]hether the water supply is adequate and potable; whether sewage disposal is satisfactory;

whether the site is well-drained and graded; whether lighting is sufficient; [and] whether sub-optimum features call for use and occupancy restrictions." (45 Cal.App.3d at 193.) The ordinance provided no constraints or guidance for the agency in applying these open-ended descriptors. By contrast, Standard 8(A) specifies quantitative default distances for DER to require between a proposed well and four common sources of contamination, and adds two pages of technical guidance to describe hydrologic and soil conditions in which those distances will be "adequate." (See Appellants' Appendix ("AA") 3:542-43; Open. Br. at 34-37; Reply at 13-14.) Thus, the Ordinance and Standard 8(A) do not delegate open-ended decision making authority to DER like that in *HCD*. (See also *County of Sonoma, supra*, 11 Cal.App.5th 11, 29 [distinguishing cases, including *HCD*, from Sonoma County's "series of finely detailed and very specific regulations" that governed the challenged permit].)

Moreover, if the Court were to accept the Court of Appeal's conclusion that the single adjective "adequate" "inherently involves subjective judgment" sufficient to trigger CEQA (Opinion at 13), a wide swath of other, traditionally ministerial permits, including common building permits, would be subject to it as well. As CBIA demonstrates, the state Building Code's standards, which most building permits implement throughout the state, use the

word "adequate" "hundreds of times."[1] (CBIA at 27-28 & fn. 9 [quoting nine representative Building Code standards that require "adequate" support, strength, stiffness, borings, reinforcement, or underpinnings].) Yet CEQA directs that building permits are presumptively ministerial. (CEQA Guidelines §§ 15369, 15268(b)(1).) And several cases have held permits to be ministerial despite the underlying ordinance's use of "adequate" or a similar adjective for one or more project parameters. (See Open. Br. at 10, 25; Reply at 10-13; see also *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 92-93 (*McCorkle*) [design review required consideration of "compatibility," "consistency," and "appropriate[ness]" of numerous project attributes], as modified (Jan. 25, 2019), review denied (Apr. 17, 2019).)[2]

This underscores the risk in focusing the analysis on a single word appearing in a single Bulletin standard to determine whether

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[1] Similarly, in the Court of Appeal, the County requested judicial notice of several provisions in the Building Code that authorize building officials to approve project-specific modifications to the standards if they are "satisfactory" and "compl[y] with the intent of" the Code. (See Respondents' Brief at 53-54 & fn.13; see also Respondents' Request for Judicial Notice, Ex. 1.) The Court of Appeal did not rule on the County's Request for Judicial Notice.

[2] After the County filed its Reply in this case but before Plaintiffs' amici filed their briefs, this Court denied the petition for review in *McCorkle*. North Coast nevertheless ignores it, and California Water relegates it to a dismissive footnote. (See California Water at 22-23, fn. 2.)

DER exercises meaningful discretion when it reviews applications to construct new groundwater wells: doing so could convert a raft of other traditionally ministerial agency approvals—and some already held to be ministerial—into discretionary ones.

Under the second factor of the functional test, Plaintiffs' amici fail to identify a single case holding CEQA applicable based on an agency's ability to affect only one minor attribute of several that make up a project. As noted above, in *HCD* the agency had unfettered discretion to control many aspects of the design and implementation of the project.[3] (See 45 Cal.App.3d at 193 [finding cumulatively meaningful discretion across five open-ended standards governing a proposed mobile home park].) Amici suggest that any one of those multiple standards would have been sufficient to trigger CEQA. (North Coast at 19; California Water at 15-16.) But the opinion provides no support for that theory. Indeed, on that view, the agency's ability to determine whether "artificial lighting" is "sufficient" for the proposed mobile home park would alone be enough to require CEQA review. (*HCD*, *supra*, 45 Cal.App.3d at 193.)

They also lean heavily on *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, but it too gives them no

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[3] The agency in *HCD* also had the choice to issue either "an unqualified construction permit" or "a conditional permit which prescribes on-going conditions on use or occupancy," which could certainly affect the project's impacts. (45 Cal.App.3d at 193.) There is nothing similar in Standard 8(A) here.

support. (North Coast at 19-21; California Water at 17-19.) As the County has pointed out, the *Friends of Westwood* court was explicit that it was not adopting the single-adjective test for which Plaintiffs' amici hope.[4] (See Open. Br. at 38-39; Reply at 11-12.) Rather, the court asked whether the city there could exercise a "*substantial* degree of discretion." (191 Cal.App.3d at 273, italics added.) City staff "had the opportunity to set[] standards and conditions as to many aspects of the proposed building" and "also had discretion to grant relief from city council established standards at many other junctures of the approval process." (*Id.* at 274.) The court rejected the notion that "discretion to modify a single city council established standard or to impose a single condition or modification . . . automatically mean[s] the approval process is a 'discretionary project.'" (*Id.* at 280.) Instead, it was the fact "that discretion is exercised as to several items" that made the agency's review discretionary. (*Ibid.*) Neither Plaintiffs nor their amici grapple with this repeated language in the seminal discretion case that directly contradicted their view that a single, open-ended adjective is sufficient to trigger CEQA.

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[4] Curiously, California Water provides a quote from *Friends of Westwood* that makes this point clear: "it is not the *number* of decision points on this flow chart which alone makes the 'plan check' a discretionary approval process. Rather it is the *amount* of discretion public employees exercise at many of these decision points." (California Water at 26, fn. 4 (quoting *Friends of Westwood*, *supra*, 191 Cal.App.3d at 274), italics added by California Water.)

By contrast, courts have found approvals to be ministerial where they require an agency to exercise judgment that affects a single, circumscribed aspect of a project. (See, e.g., *San Diego Navy, supra*, 185 Cal.App.4th 924, 929, 933-34 [city's ability to conduct design review did not trigger CEQA]; *McCorkle, supra*, 31 Cal.App.5th at 94-95 [same].) California Water struggles to distinguish these cases, claiming they are limited to projects subject to design review and are the product of unspecified "unique facts."[5] (California Water at 22, fn. 2.) In fact, *San Diego Navy* and *McCorkle* are analogous. Both focus on the limited scope of discretion left to an agency, finding it too limited to constitute the "meaningful discretion" required to trigger CEQA. (See Open. Br. at 44-46; Reply at 12-13.) California Water fails to explain why influence over the design of an entire project is narrower than influence over the distance between a well and a potential source of contamination.

The CEQA Guidelines also reject Plaintiffs' amici's absolutism. Amici ignore the Guidelines' recognition that ministerial approvals involve the exercise of "*little* or no personal judgment." (CEQA Guidelines § 15369, italics added.) And the full sentence in section 15357 which North Coast selectively emphasizes describes ministerial approvals as "situations where

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[5] California Water fails to recognize the extent to which *all* of the cases addressing the discretionary/ministerial distinction involve such "unique facts," as each agency approval is distinct. This explains the courts' refusal to adopt the kind of bright-line rule California Water advances.

the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, regulations, or other fixed standards." (CEQA Guidelines § 15357; North Coast at 11-12.) North Coast emphasizes the phrase "fixed standards" but fails to explain why the well-separation standard is not such a standard.[6]

Plaintiffs' amici claim that they are defending the functional test. In fact, they ignore key language in *Friends of Westwood* that created it and ask the Court for a rule that rejects the pragmatic inquiry that *Friends of Westwood* requires. By contrast, the County has identified the two factors that courts apply in implementing the functional test. These two factors focus review on the issue on which the CEQA Guidelines and the cases applying the functional test focus: when does an agency have autonomy and authority to shape an approval such that environmental review will meaningfully inform the agency's decision and thus serve CEQA's purpose of informed decision making. The Court should reject Plaintiffs' and their amici's absolutism in favor of the *functional* approach required by existing law.

B. There is no reason to overrule *County of Sonoma.*

Plaintiffs' amici also contend that the recent decision in *Sierra Club v. County of Sonoma, supra,* has no bearing here

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[6] Indeed, the implication of the phrase "applicable statutes, ordinances, regulations, or *other* fixed standards" (emphasis added) is that "statutes, ordinances, [and] regulations" are themselves "fixed standards."

(North Coast at 21-22) or was wrongly decided (California Water at 24-31). North Coast largely ducks the decision, addressing only one of the three ordinance provisions at issue in the case and asserting that the discretion in the Stanislaus Ordinance "is much greater." (North Coast at 21.)

California Water—represented here by the same attorney who represented the unsuccessful plaintiffs in *County of Sonoma*—attempts to relitigate the case.[7] It contends that neither the scope of the agency's review under a particular standard, nor the size or complexity of the project under review is relevant to determining whether the agency exercises meaningful discretion in reviewing the project. (California Water at 26-28.) Instead, California Water argues for a clearer "metric" or "benchmark" against which to measure discretion. (*Id.* at 26-27.) But it never attempts to reconcile its desire for a bright-line rule with the language of the CEQA Guidelines or the case law applying the functional test. Contrary to its characterization, the scope of the project and the cumulative amount of discretion allowed by the (potentially numerous) statutory provisions that govern the approval are relevant, especially to the second prong of the functional test—whether the agency can shape the outcome and impact of the approval. (*Id.* at 26-28.)

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[7] This Court denied the plaintiffs' petition for review in *County of Sonoma* on July 26, 2017.

California Water inaccurately paints the County as arguing that whether an approval is discretionary or ministerial in every case requires an ad hoc, fact-specific determination. (California Water at 11-12.) It appears to take the far opposite position that the determination is *never* ad hoc.[8] (*Id.* at 12-14, 28-31.) But the County has never argued that each individual permit and project must always be evaluated to determine whether the approval is discretionary or ministerial (and *County of Sonoma* does not hold as much). Some permitting programs may provide discretionary standards that apply to every permit under the program. But insofar as an agency's program involves standards that are relevant to some approvals but not others, as in *County of Sonoma* and the Ordinance, one can hardly call an approval discretionary based on those standards that are wholly irrelevant to the project. (See Section II, *post.*)

C. Plaintiffs' amici ignore the deference owed to the County's determination.

The County has argued that the Court should defer to the County's interpretation of its own Ordinance and longstanding designation of well-construction permits as ministerial. (See Open. Br. at 54-58; Reply at 26-29.) Similarly, amici League of California Cities ("LCC") and California State Association of Counties ("CSAC") identify a variety of policy and legal grounds that support

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[8] North Coast appears to disagree, contending that "[w]hether CEQA applies to a particular approval is necessarily determined on a case-by-case basis." (North Coast at 18.)

the Guidelines' instruction that courts should defer to an agency's interpretation of its Ordinance (CEQA Guidelines § 15268(a)), including the agency's role in drafting the Ordinance, its staff's technical expertise in the subject matter addressed by the Ordinance, and the regulatory stability provided by consistent implementation of a policy, as the County has done with the Ordinance. (LCC at 24-27; *see also* CSAC at 9-12.) Plaintiffs' amici fail to address the issue of deference entirely.

II. Plaintiffs' amici fail to show that Plaintiffs are entitled to the broad declaratory relief they seek.

As the County has explained, even if the well-separation standard were sufficient to confer meaningful discretion on DER, Plaintiffs still would not be entitled to a declaration that the County's pattern and practice of issuing well-construction permits violates CEQA because they cannot show that the standard applies to all or most permits. (Open. Br. at 59-63; Reply at 32-35.)

In response, California Water argues that the County here, and the court in *County of Sonoma*, seek to transform the functional test from a question of law to a question of fact. (California Water at 24, 30.) In contrast, North Coast agrees with the County that whether CEQA applies to a particular approval is determined on a case-by-case basis. (North Coast at 18.) However, North Coast contends incorrectly that the separation standard does apply to all well-construction permits. (*Id.* at 19.) Neither position is correct.

A. Courts consider only relevant provisions of law to determine whether a decision is ministerial or discretionary.

The County agrees with California Water that whether an agency decision is discretionary is a question of statutory interpretation. (See California Water at 30; Open. Br. at 29.) However, California Water seriously errs in contending that the facts of the particular permit are always irrelevant.

Statutory interpretation must be based on the law that is *relevant and applicable* to the agency's decision. "[A]ny regulation cited as granting discretion to the agency must actually have applied to the project under review. If it did not, the agency could not have exercised discretion under that regulation in approving the project." (*County of Sonoma*, *supra*, 11 Cal.App.5th at 26.) California Water would have this Court believe that the use of the word "adequate," for example, anywhere in an ordinance is sufficient to make all permits issued under that ordinance discretionary, whether or not the provision including the magic word applied to the particular permit under consideration.

That argument's absurdity is illustrated by the County's own well standards. There are different standards for different types of wells and for wells installed under different conditions; a standard for one well may be wholly irrelevant to another. For example, standards in the Bulletin governing permits for construction of cathodic protection wells are separate from and inapplicable to construction permits for domestic or agricultural water wells and are therefore irrelevant for determining whether the County's decision to issue a domestic well permit is

discretionary.[9] (AA 3:525-32.) Similarly, the Bulletin's well-construction provisions set out distinct sealing requirements depending on whether a well is drilled "in unconsolidated, caving material," "in unconsolidated material with significant clay layers," or "in soft consolidated formations," among other geologic formations. (AA 3:454-57; 3:545-47.) Accordingly, if the standards made issuance of permits for cathodic protection wells discretionary, that would not make issuance of permits for domestic or agricultural wells discretionary.[10] One cannot determine whether the applicable standards create discretion without knowing which standards are applicable, and one cannot know which standards are applicable without knowing anything about the proposed project.

Here, the County has shown that the well-separation standard is inapplicable to proposed wells not in proximity to any potential source of contamination, such as those proposed in the middle of an open field. (See Reply at 32; see also Open. Br. at 62.) Indeed, as amicus San Luis Obispo County ("SLO") explains, *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666 illustrates that very scenario. (SLO at

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[9] Cathodic protection wells are installed to "protect metallic objects in contact with the ground from electrolytic corrosion," which is the "deterioration of metallic objects by electrochemical reaction with the environment." (AA 3:584.)

[10] Plaintiffs concede this point by challenging the County's issuance of only well-construction permits, which are a subset of all permits governed by the Ordinance and the Bulletin.

15-16.) Plaintiffs there sought a writ of mandate to invalidate four permits, and the record revealed no evidence of any sources of pollution or contamination. (SLO at 7; *California Water*, 25 Cal.App.5th at 677.) Under California Water's theory and the Fifth District's Opinion, however, San Luis Obispo County would be obligated to conduct CEQA review for all well permit applications, including the four at issue in that case for which there was no source of contamination, merely due to the existence of the well-separation standard in the Bulletin.[11] (SLO at 15-16.) Similarly, amici Association of California Water Agencies et al. (collectively, "ACWA") point out that in a related case, *Coston v. County of Stanislaus* (No. S251721), the single well permit at issue did not implicate the well-separation standard "because there was no identified nearby contamination source." (ACWA at 17, 20.) As with the four permits in *California Water*, this permit would be subject to CEQA under California Water's theory, despite the well-separation standard's being wholly inapplicable to it.

Contrary to California Water's assertion, the County does not contend that, where a single standard is applicable to two permits, a permitting official may decide that the standard is discretionary for one but ministerial for the other. (California

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[11] California Water emphasizes that the inquiry is not whether "a particular set of facts actually triggered the use of subjective judgment." (California Water at 11, 19.) The County agrees. The County's point is merely that an agency has no opportunity to use subjective judgment if any provisions authorizing that use of judgment are irrelevant to its pending decision. (See Reply at 32-33.)

Water at 12.) Instead, the County's unremarkable point—and *County of Sonoma*'s—is that even if a permitting ordinance contains provisions that could make some permits discretionary, only those permits to which those provisions apply will be discretionary and thus subject to CEQA. (Open. Br. at 60-61; Reply at 33.) The nature of the project for which a permit is sought determines which provisions of the governing law are relevant. Thus, in challenging an agency's determination that a permit was ministerial, a plaintiff must show that any discretionary provisions in the governing ordinance were actually relevant to that permit. (See *County of Sonoma*, *supra*, 11 Cal.App.5th at 26.)

In contending that the "plain language" of the ordinance controls, and the facts of the project are entirely irrelevant, California Water oversimplifies the cases on which it purports to rely. (See California Water at 10, 23-24.) Most important, it makes no attempt to explain *which* plain language determines whether a permit is discretionary. For example, it cites *Friends of Westwood* as "look[ing] to the plain language of L.A.'s building permit ordinance to determine whether the cited provisions were discretionary" (*Id.* at 17-18), but fails to note that the provisions at issue were those that applied to the type of building for which a permit was sought. (See *Friends of Westwood*, *supra*, 191 Cal.App.3d at 273 [noting that "[t]he approval process for a 'major project' such as the instant 26-story office tower is far different than the process . . . for single-family residences"].) And California Water notably omits *Prentiss v. City of South Pasadena*, which held that "[t]he fact that discretion could conceivably be exercised

in projects arising under the State Historical Building Code does not mean that *respondents'* project was discretionary." ((1993) 15 Cal.App.4th 85, 97.) These cases reveal that there is no basis to apply CEQA to permits that implicate only ministerial standards, even if other permits might trigger discretionary standards.

As the Court of Appeal here largely recognized, the Bulletin comprises such ministerial standards. (See Opinion at 10, fn. 8.) For all permit applications for which the well-separation standard was irrelevant because no potential source of contamination exists in the project vicinity, the County's practice of treating these permit decisions as ministerial could not violate CEQA. Because the record in this case contains *no evidence* that the well-separation standard was relevant to many or all of the well permits the County considered such that the County should have—arguably—treated them as discretionary, Plaintiffs cannot show that the County's practice violates CEQA. (See Open. Br. at 59-63; Reply at 32-35; see also CBIA at 33.)

B. The County's approach does not place an undue burden on members of the public.

California Water contends that requiring plaintiffs to show that a discretionary provision was in fact relevant to a challenged agency decision unreasonably shifts the burden of "environmental fact-gathering away from the agency and onto the public." (California Water at 29.) This argument fails because CEQA imposes no "fact-gathering burden" on the agency when determining whether a decision is discretionary or ministerial. CEQA similarly imposes no burden on an agency to provide public

notice or an opportunity to be heard when the agency determines that a decision is ministerial. (See Reply at 35.) Indeed, California Water cites no case suggesting it does.

Additionally, a plaintiff's obligation to show that a discretionary provision was relevant to an agency's decision is not "unreasonable and unfair" or "near impossible." (California Water at 28-29.) In the County's case, any member of the public is entitled to request the County's records related to a permit application under the Public Records Act, Gov. Code § 6250 et seq. Indeed, the Plaintiffs here did precisely that. (See Reply at 35, fn. 17.) Each permit application contains a checklist in which an applicant indicates whether there is a nearby source of contamination and includes a diagram depicting the location of the proposed well. (AA 1:080-82.) If the Court of Appeal is correct that the well-separation standard confers meaningful discretion, then the information available on the application alone may be sufficient to challenge a determination that a permit is ministerial.

C. Contrary to North Coast's contention, there is no evidence that the well separation standard applies to all permits.

Unlike California Water, North Coast agrees with the County that whether CEQA applies is determined on a case-by-case basis. (North Coast at 18.) However, like Plaintiffs, North Coast contends that the well-separation standard *does* apply to all permits in the County. (*Id.* at 18-19; see also Answer at 43, 48.) According to North Coast, the County engages in discretionary review when it determines whether the well-separation standard is relevant to a permit. (North Coast at 23.)

Not so. It is no more discretionary than determining whether permit application involves a cathodic protection well or a domestic water well or determining whether the well is located in "unconsolidated, caving material" or "in soft consolidated formations," each of which trigger different standards. (See Section II.A, *ante*.) North Coast cites no case finding that an agency's determination of which of multiple standards apply to a project qualifies as discretionary.

North Coast contends that the Bulletin's "detailed evaluation of existing and future site conditions" occurs for every permit application, but the Bulletin makes clear that this evaluation occurs only when the County is engaging in a "[d]etermination of the safe separation distance for individual wells," i.e., only if there is a source of contamination or pollution in the first instance. (AA 3:542-43.) There is no discretion involved in the County's ascertaining whether a permit applicant has indicated that there is a source of potential contamination near a proposed well.

D. North Coast misconstrues the County's argument that Plaintiffs have not carried their burden to show that DER's permitting program is entirely invalid.

North Coast believes the County is arguing that the well-separation standard must apply to all or the vast majority of permit approvals "in order for its well-permitting scheme to be subject to CEQA." (North Coast at 22.) They fail to grasp the distinction between the County's remedial argument—that Plaintiffs are not entitled to a court order invalidating DER's

entire program on its face—with the County's merits argument—that the well-separation standard is not discretionary. The County has never argued that it could skip CEQA review for those permits to which the standard applies—assuming the standard is discretionary—merely because it does not apply to all permits. (See North Coast at 18.)

If Plaintiffs had challenged the County's issuance of permits for which the separation standard was relevant, they might have been entitled to a remedy invalidating those permits if this Court agrees with the Court of Appeal's conclusion about discretion. Indeed, Plaintiffs initially brought a case challenging particular permits, but they voluntarily dismissed it. (Open. Br. At 59-60, fn. 22.)

To obtain the remedy they seek in *this* case—declaring the entirety of the County's permitting process in violation of CEQA—Plaintiffs must show that the well separation standard is relevant to all or most permit applications. (See Open. Br. at 59-63; Reply at 32-35.) Because they cannot make such a showing on the record before the Court, Plaintiffs are not entitled to the only relief they have sought.

III. Amici present starkly different visions of CEQA and its burdens. Reality lies somewhere between.

Like Plaintiffs, California Water and North Coast attempt to downplay the burden imposed on counties by the Opinion's holding. (California Water at 36-37; North Coast at 13-15.) In contrast, CBIA and amici California Association of Realtors ("Realtors") and ACWA all contend that CEQA's procedural

burdens are responsible for California's housing crisis. (CBIA at 22-24, 39-41; Realtors at 7-8; ACWA at 24.) The County does not embrace either position.

A. California Water and North Coast are too quick to brush aside the challenges the Opinion would pose for counties and well-permit applicants.

Like Plaintiffs (and the Court of Appeal), California Water and North Coast attempt to downplay the burden imposed on counties by the Opinion's holding. (California Water at 36-37; North Coast at 15.) They contend that CEQA offers a variety of options short of an environmental impact report to consider a well's potential impacts. They are too sanguine.

Citing the Opinion, California Water suggests that most well-construction permits could be issued on an exemption or negative declaration.[12] (California Water at 36.) It points to the "common sense" exemption, which exempts projects if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect." (*Id.* at 37 (quoting CEQA Guidelines § 15061(b)(3)).) It contends that domestic and other "small-scale" wells would qualify for the exemption. (*Ibid.*) Yet it emphasizes elsewhere in the brief that "there is no 'de minimis' exemption from CEQA, because small impacts from small projects may nevertheless be cumulatively considerable." (*Id.* at 28.)

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[12] For its part, North Coast baldly asserts that finding the permits discretionary "would not mandate an overly burdensome process." (North Coast at 15.)

Moreover, one of the exceptions to CEQA's categorical exemptions, in Guidelines section 15300.2(b), prevents applying exemptions to projects "when the cumulative impact of successive projects of the same type in the same place, over time is significant." Because groundwater is a common pool resource, every well has a cumulative effect. It is thus by no means clear that counties will be able to conclude that individual wells—even minor domestic wells, as California Water contends—are exempt. Given that Stanislaus County alone can issue 100 or more well-construction permits each year (AA 3:715 [stipulated fact County issued over 300 permits from January 1, 2013 to November 25, 2014]), it is hard to see how requiring counties to comply with CEQA in issuing these permits would not be burdensome to counties and applicants. As the County and amicus CSAC have pointed out, because Stanislaus's ordinance is closely similar to the vast majority of county well-permitting ordinances, a holding that the County's permits are discretionary and subject to CEQA will have ripple effects throughout the state. (Open. Br. at 16; CSAC at 3-5.)

B. Arguments about the origin of California's housing crisis are not relevant to whether the Ordinance and Bulletin's standards confer meaningful discretion on DER, and the County does not join in them.

Several amici make sweeping claims about the purported contribution of CEQA to California's current housing crisis. (ACWA at 24; CBIA at 25, 38-39; Realtors at 7-8.) Whatever the merit of those arguments, they are irrelevant here. This case presents the limited question whether, under the well-established

functional test, the County's ordinance and the Bulletin's standards make well-construction permits ministerial or discretionary. The Court has no occasion to pass judgment on CEQA or the causes of the housing crisis. The County therefore does *not* join in these arguments.

CONCLUSION

The Court should reverse the decision of the Court of Appeal.

June 19, 2019

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 5,746 words, including footnotes but not including the caption, this certificate, the tables of contents and authorities, the quotation of the issues presented for review, and the attachment, according to the word count function of the computer program used to produce the brief.

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PROOF OF SERVICE

Protecting Our Water and Environmental Resources et al. v. Stanislaus County et al.
California Supreme Court No. 251709

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 June 19, 2019, I served true copies of the foregoing document on the parties in this action as follows:

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

Executed on June 19, 2019, at San Francisco, California.

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