Case No. S251709

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 Fifth Appellate District
Case No. F073634

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

APPELLANTS' COMBINED ANSWER BRIEF TO BRIEFS OF AMICUS CURIAE

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I. INTRODUCTION

Plaintiffs and Appellants, Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance (Appellants), submit this combined answer to the amicus curiae briefs filed in support of Defendant and Respondent Stanislaus County (County Amici).[1]

II. ARGUMENT

A. Standard of Review.

All parties and amici curiae agree that whether a project approval is ministerial or discretionary under CEQA is a question of law using the Court's independent judgement. (See *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 303 (*Friends of Juana Briones House*); *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1142 (*Health First*).) But the League of California Cities and California State Association of Counties argue that the Court should accord some weight to Stanislaus County's long-standing view that its well permits approvals are ministerial. (League of California Cities Brief 18-27; Association of Counties Brief 9-11.)

The League relies on *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162, 178 (*Napa County Board*) and *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004 (*Friends of Davis*) and other cases holding that where the court's determination rests on its interpretation of a local ordinance, the local government's interpretation

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[1]County Amici are: Association of California Water Agencies, California Special Districts Association; League of California Cities; California Association of Realtors; California Building Industry Association; California State Association of Counties; County of San Luis Obispo; JUSTIN Vineyards and Winery LLC; Lapis Land Company, LLC; Paso Robles Vineyard, Inc.; and Moondance Partners, LP.

of that ordinance is entitled to deference. In contrast, several decisions hold that the courts review local land use ordinances using their independent judgment. (See e.g., *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1049; *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928.)

The County's view that its well permit approvals are ministerial, while admittedly longstanding, is not entitled to any weight because the Court's determination of the question *in this case* does not rest on its interpretation of a local ordinance. Instead, it rests on an interpretation of the state law requiring that the County adopt an ordinance meeting the state bulletin standards for well construction. (See Water Code § 13801, subd (c).) The question presented is whether these standards confer discretion on the County. Neither the County's intent in adopting Chapter 9.36 nor its expertise are relevant to this determination.

Contrary to the League's suggestion, *Sierra Club v. Napa County Board of Supervisors, supra,* does not *require* deference to a lead agency's view that a permit approval is ministerial. Nor does CEQA Guideline section 15268, because such a reading would put the Guideline at odds with CEQA and the courts will not give weight to Guidelines that are "unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391.)[2]

This Court has held that courts determine the meaning of statutes using their independent judgment. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951; *Yamaha Corp. of America*

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[2]The CEQA Guidelines are codified at Title 14, California Code of Regulations, sections 15000 et seq. This brief cites the CEQA Guidelines as "CEQA Guideline #."

v. State Bd. of Equalization (1998) 19 Cal.4th 1, 7 (*Yamaha*).) Under *Yamaha* and its progeny, the County's interpretation of its own ordinances is only one of "several interpretive tools" that may help a court independently judge the meaning of an ordinance. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322 (quoting *Yamaha, supra*, 19 Cal.4th at pp. 7-8).) The Court has discretion to give weight to the County's interpretation of its laws if there are good reasons to do so, after considering "a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command," including whether the agency has "consistently maintained the interpretation in question, especially if the interpretation is long-standing." (*Yamaha, supra*, 19 Cal.4th at pp. 7-8, 12, 13.)

As noted above, most decisions hold that the question is one of law to be decided using the Court's independent judgment (e.g., *Friends of Juana Briones House, supra*; *Health First, supra*) while others hold, consistent with *Yamaha*, that some deference to the agency's views may be warranted where supported by specific facts (e.g., *Sierra Club v. Napa County* (2012) 205 Cal.App.4th 162, 178; *Friends of Westwood, supra,* 191 Cal. App.3d at p. 270; *Day v. City of Glendale* (1975) 51 Cal. App. 3d 817, 822.)

Here, there are no specific facts warranting deference to the County's view that the separation standard is ministerial. With respect to the County's argument that when it adopted section 9.36.150 it did not intend to adopt the general state bulletin standards that confer discretion to modify well permits to meet site-specific conditions, neither the League nor the County have presented facts that would warrant giving weight to this

position. There is no evidence that the County's position represents a long-standing interpretation on this topic or that it ever considered the topic before coming up with the litigation positions it advances here.

B. The Legislature Has Balanced the Administrative Burden of Applying CEQA Against its Benefits.

County Amici argue that a ruling affirming the Fifth District Court of Appeal opinion would, in the words of San Luis Obispo County, "negatively impact SLO County" and "negatively impact counties throughout the State and thousands upon thousands of well permit applicants." (San Luis Obispo County Brief 4.) The notion that the impact on counties and well applicants would be *negative* reflects SLO County's assertion that the Fifth District opinion would require "all well permit applicants, including applicants desiring to construct a well for private, domestic use, to engage in a significant, time-consuming and costly environmental review process." (San Luis Obispo County Application to File Amicus Brief, 4.)

These assertions falsely imply that applying CEQA to well permits would require in-depth environmental review for every application. But CEQA is not so wooden. CEQA gives lead agencies a plethora of tools to allocate resources to projects that require environmental review and to avoid or reduce the commitment of resources to projects that do not require or require less environmental review. Moreover, CEQA involves a series of graduated steps specifically designed to exclude projects that do not require in depth review from further processing.

CEQA establishes a three-tiered process. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 112-13 (*Davidon Homes*); Guidelines § 15002(k).) In the first step, an agency conducts a "preliminary review" to

determine whether CEQA applies to a proposed activity and, if so, whether the activity is exempt. (*Ibid* ["The first tier is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity"].) CEQA applies to "discretionary" projects approved or to be carried out by public agencies that cause physical changes to the environment. (Guidelines §§ 15002(i), 15357, 15378.) If CEQA applies, the agency must determine if the project is exempt from further environmental review because it falls within one of many statutory or categorical exemptions. (*Davidon Homes*, *supra*; Guidelines, § 15061.)

If the project is not exempt, the agency must proceed to the second tier and conduct an "initial study." (Guidelines, §§ 15002(k), 15063.) If the initial study reveals the project will not have a significant environmental effect, the agency must prepare a negative declaration, briefly describing the reasons supporting the determination. (Guidelines, §§ 15002(k), 15063(b)(2), 15070.)

If the initial study reveals the project may have a significant environmental effect, the agency must proceed to the third tier in the process, which is to prepare a full environmental impact report (EIR) to evaluate the significance of the projects impacts, identify mitigation measures to reduce its significant impacts, and discuss alternatives to the proposed project. (Guidelines, §§ 15002(k), 15063(b)(1), 15080; Pub. Resources Code, §§ 21100, 21151.) "An [EIR] is an informational document, the purpose of which is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; ... [Citation omitted.] The purpose of an [EIR] 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 those significant effects can be mitigated or avoided." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106; Guidelines, §§ 15126.2, 15126.6, 15130.)

At the project-by-project level, CEQA provides a number of mechanisms to screen out truly minor permits by using CEQA's many exemptions. For example, the common sense exemption 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))." There are also categorical exemptions for minor permits, including the Class 3 categorical exemption for "new construction of small structures" (CEQA Guideline § 15303) and the Class 4 categorical exemption for "minor alterations to land" (CEQA Guideline § 15304). (See Appellants' Answer Brief on Merits 56-57.)

These exemptions have the virtue of providing neighboring landowners or other stakeholders at least some opportunity to present evidence to the lead agency that a given well permit may have significant adverse effects. Thus, using—rather than avoiding—CEQA's procedures is consistent with the rule that "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.'" (*Friends of Westwood, supra,* 191 Cal. App.3d at 273.)

Moreover, all California counties issue their well construction permits as part of a regulatory "program" for which they have the option of preparing one Program EIR for the entire program, followed by individual CEQA determinations for each well construction permit that "tier" to the Program EIR. (See Pub. Resources Code, §§ 21093, 21094; CEQA Guidelines, §§ 15168, 15385.)

> A program EIR, as noted, is "an EIR which may be prepared on a series of actions that can be characterized as one large project" and are related in specified ways. (Cal.Code Regs., tit. 14, § 15168, subd. (a).) An advantage of using a program EIR is that it can "[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (Id., § 15168, subd. (b)(4).) Accordingly, a program EIR is distinct from a project EIR, which is prepared for a specific project and must examine in detail site-specific considerations. (id., § 15161.) Program EIR's are commonly used in conjunction with the process of tiering. [Citation omitted.] Tiering is "the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs...." (Cal.Code Regs., tit. 14, § 15385.) Tiering is proper "when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports." (Pub. Resources Code, § 21093, subd. (a); see also Cal.Code Regs., tit. 14, § 15385, subd. (b).)

(*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1169–1170; see also, *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 429-30, 440 [discussion of CEQA "tiering"]; *Friends of College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 945, 951-52 (*Friends of College I*) [discussing standards for determining if subsequent CEQA review is governed by CEQA section 21151 or 21166].)

In preparing a Program EIR, each county would enjoy broad discretion to determine the scope and depth of the environmental analysis:

> In addressing the appropriate amount of detail required at different stages in the tiering process, the CEQA Guidelines state that "[w]here a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof ..., the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand." (Cal.Code Regs., tit. 14, § 15152, subd. (c).) This court has explained that "[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases."

(*In re Bay-Delta etc., supra*, 43 Cal.4th at 1170, quoting *Vineyard Area Citizens, supra*, 40 Cal.4th at 431.)

Moreover, after certifying a Program EIR, counties would have a wide range of options for applying CEQA to individual well permits applications, including preparing "no new environmental document." (CEQA Guidelines, § 15168, subd. (c)(2).)

In short, defendant County and its allied amici defend the decision to not apply CEQA to well permits on the ground that applying CEQA is burdensome, while at the same time they refuse to employ, *or even discuss*, the vast array of tools that CEQA provides to reduce the burden of compliance.

This court rejected a similar argument in *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945. In that

case, California State University argued that CEQA did not compel it to explore alternative sources of funding for off-campus mitigation measures before finding such measures infeasible because "to reallocate funds for off-site mitigation could only result in the underfunding of CSU's core educational function." (*Id.* at 966.) In rejecting this argument, this Court held that "These arguments misconceive the Board's responsibilities under CEQA" because "while education may be CSU's core function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions. This is the plain import of CEQA, in which the Legislature has commanded that '[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.'" (*Id.*) Thus, the burden of applying CEQA is not relevant to whether it applies.

The amici's argument regarding the burden of applying CEQA ignores the *benefits* of applying CEQA. CEQA represents a fundamental policy of this state and establishes important public rights. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*); *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052; *Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 936, 939 (*Woodland Hills II*); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 893 (*CBD v. San Bernardino*); *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988; *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 435 ["environmental concerns in general and [CEQA's] statutory policy in favor of use of [EIRs] in particular involve preeminently important public rights"].)

This Court has observed that

> The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (§ 21001, subd. (a).) The EIR is therefore "the heart of CEQA." [Citations] An EIR is an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." [Citations] The EIR is also intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." [Citations] Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations] The EIR process protects not only the environment but also informed self-government.

(*Laurel Heights I, supra*, 47 Cal.3d at 392.) This is an impressive list of the benefits of preparing an EIR.

Amici's argument that applying CEQA is burdensome implies that this Court's determination as to whether CEQA applies to well permits requires this Court to balance the relative benefits and burdens of applying CEQA to well permits. This is incorrect because the Legislature has already balanced the benefits and burdens of applying CEQA.

In 1986, the Legislature amended Water Code section 13801 to require local governments to adopt well construction ordinances that "meet[] or exceed[] the standards contained in" the current version of the Bulletin. (Stats. 1986, ch. 1152, § 4; see also Water Code § 13801(c); AA

3:536.)[3] At that time, CEQA and its exemption of ministerial approvals had been on the books since 1973. In 1975, the Court of Appeal decided two cases: *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 192 (*HCD/Ramey*) and *Day v. City of Glendale* (1975) 51 Cal.App.3d 817 (*Day*), holding that CEQA applied to local ordinances because they included provisions "without fixed standards or objective measurements that require the exercise of judgment, deliberation, and decision" (*HCD/Ramey* at 193; *Day* at 823.) Both *HCD* and *Day* laid the foundation for the "functional test" because both cases affirmed that subjective standards in the language of local permitting schemes renders permits issued under those schemes discretionary for CEQA purposes, especially where the permitting authority may impose permit conditions of its own devising. Further, the 1986 amendment to Water Code § 13801(c) specifically refers to "Department of Water Resources Bulletin No. 74" as published in 1968; and Bulletin No. 74 contains both the discretionary language in the "separation standard" (AA 3:450-53; 3:542-43) and the general discretionary standards set forth in Chapter II. (AA 129.)

The Legislature is deemed to be aware of existing laws and judicial decisions. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.) Also, "it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*Big Creek Lumber Co. v. County of Santa Cruz*

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[3]The California State Association of Counties argues that "a county's exercise of its police power in regulating groundwater is entirely voluntary, as in the case of any exercise of the police power." (Association of Counties Brief 9.) As shown in the text above, this is not entirely accurate.

(2006) 38 Cal.4th 1139, 1149–1150.) Here, there is nothing in the 1986 amendment of Water Code section 13801 that supports a conclusion that the Legislature viewed county decisions on well permits as ministerial or otherwise exempt from CEQA.

The California Association of Realtors and the California Building Industry Association (CBIA) argue that affirming the Fifth District's opinion will exacerbate California's housing shortage. (Realtors Brief 8, CBIA Brief 12.) The Realtors' brief discusses the importance, in the private real estate market, of buyers and sellers having predictability as to whether home improvement construction projects will require CEQA review. While predictability is an important value, this Court's decision regarding the state's standards for water well construction in this case would have no effect on building permits for real property construction. Neither Realtors' nor CBIA provide a single example of a statute, ordinance, or regulation that governs housing that would be viewed as discretionary rather than ministerial if this Court affirms the Fifth District's opinion. Instead, Realtors ask the Court to "imagine" that affirming the Fifth District's opinion could lead to more CEQA review than would otherwise occur for housing projects. (Realtor's Brief 15.) "Imagining" adverse consequences is not a persuasive basis for a legal argument.[4]

CBIA provides the answer to its concerns that a ruling for Appellants in this case will adversely affect housing, observing that

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[4]The California Association of Water Agencies argues that affirming the Fifth District's opinion "converts many government actions presently understood to be ministerial into discretionary actions." (Water Agencies' Brief 5.) But the Water Agencies, like the Realtors, fail to provide a single example where this might happen.

> In recent years, the State Legislature has found and declared that excessive discretionary local review over housing approvals is a key cause of the state's housing crisis. To reverse this trend, the Legislature has begun requiring local governments to begin processing much more housing on a ministerial basis, regardless of whether the local governments might prefer to undertake discretionary review.

(CBIA Brief 13.) The CBIA brief details extensive recent legislation to address California's housing shortage, including SB 35, codified at Government Code section 65913.4. (CBIA Brief 22-24.) SB 35 provides that housing projects meeting specified criteria are entitled to ministerial approval, thereby precluding the application of CEQA.

Thus, the Legislature is fully capable of ensuring that the application of CEQA to housing projects does not prevent California from addressing its housing shortage, *regardless of how this Court rules in this case.* Further, the Legislature is fully capable of exempting well construction permits from CEQA, but has chosen not to do so.

C. The Sustainable Groundwater Management Act Does Not Impliedly Repeal CEQA.

Contrary to County Amici's suggestion, the Legislature's 2014 adoption of the Sustainable Groundwater Management Act (SGMA)[5] did not impliedly repeal the application of CEQA to well permits. "All presumptions are against a repeal by implication." (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573–574.) The courts will not find an implied repeal unless "there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the

[5]Stats. 2014, chs. 346-348; Water Code 10720 et seq.

two cannot have concurrent operation.'" (*Id.*) Courts "will infer the repeal of a statute only when ... a subsequent act of the legislature clearly is intended to occupy the entire field covered by a prior enactment." (*Id.*)

When these standards are applied, it is evident the SGMA did not impliedly repeal CEQA, either generally, or with respect to its specific application to well permits. There is nothing in the SGMA that would interfere with or conflict with a county's administration of its well permit approval program. Indeed, the SGMA specifically forbids groundwater sustainability agencies created pursuant to the SGMA from such interference, providing: "This section does not authorize a groundwater sustainability agency to issue permits for the construction, modification, or abandonment of groundwater wells, except as authorized by a county with authority to issue those permits." (Water Code § 10726.4, subd. (b).)

Indeed, in 2015, the Legislature specifically exempted from CEQA local well permit ordinances intended to *limit* the construction of new or deeper groundwater wells (Public Resources Code § 21080.46, subd. (a).)[6] This statute also specifically called out that *it did not exempt* from CEQA permits for new or deeper groundwater wells or the approval of land use changes that require the use of groundwater. (See *Vasquez v. State* (2008) 45 Cal.4th 243, 253 [courts "may not rewrite the statute to conform to an assumed intention that does not appear in its language"].)

D. Well Permit Approvals are Discretionary Regardless of Whether A Discretionary Standard Requires Modifying a Specific Permit to Protect the Environment.

Defendant County argues that CEQA cannot apply to a well permit approval unless and until a well permit application requires that the County

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[6]Stats. 2015, ch. 27.

invoke a discretionary standard, such as the separation standard, to modify a permit application. Amicus curiae San Luis Obispo County argues that its own recent history, in which it did not invoke the separation standard to modify any of the 232 well permits it issued in 2018, supports this argument. It does not.

The fact that San Luis Obispo county did not invoke the separation standard to modify any permits in 2018 may simply reflect the fact that it provided no notice of well permit applications to neighboring landowners or to the public, so the public had no opportunity to submit information during the permit process that could alert the County to the need to invoke the separation standard. If well permits are deemed discretionary, the County would at least be required, as a matter of due process, to notify landowners within 300 feet whose property interests may be substantially affected. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 614.)

If the County applied CEQA and then exempted a well permit from further review, members of the public would at least have either 35 or 180 days, depending on whether the County filed a notice of exemption pursuant to CEQA section 21167, subd. (d), to file a legal challenge in which they could present evidence that the use of an exemption was improper and that the County should invoke the separation standard to protect groundwater quality. Alternatively, if the County applied CEQA and then prepared an initial study, resulting in either a Negative Declaration or an EIR, the public would have ample opportunity to present evidence in the applicable comment period on these documents showing that the County should invoke the separation standard to protect groundwater quality. As it stands now, such evidence would be irrelevant.

Amicus San Luis Obispo County also presents evidence that "with

respect to the four well permits issued by EHS and challenged in *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666, none of the plot plans submitted as part of the well permit applications identify any sources of pollution or contamination." (SLO Brief 15.) San Luis Obispo County does not articulate why this evidence supports a conclusion that well permits approvals are ministerial. Nevertheless, this evidence illustrates a critical reason that applying CEQA review to well permits implements the Legislature's intent in adopting CEQA: i.e., CEQA lead agencies have an affirmative duty to evaluate the environmental impacts of permits applications, regardless of the quality and quantity of information that a permit applicant submits.

Thus, in the preliminary review stage of applying CEQA, lead agencies must affirmatively determine whether the facts support applying a categorical exemption or the common sense exemption. This review includes determining whether facts are present supporting any of the exceptions precluding the use of a categorical exemption listed in CEQA Guidelines 15300.2, such as whether unusual circumstances or cumulative impacts may lead to significant environmental effects. As this Court recently explained:

> even if a proposed project faces no opposition, an agency invoking a categorical exemption may not simply ignore the unusual circumstances exception; it must "consider the issue of significant effects ... in determining whether the project is exempt from CEQA where there is some information or evidence in the record that the project might have a significant environmental effect." [citation omitted] This follows from Guidelines section 15061, subdivisions (a) and (b)(2), which, respectively, (1) direct a lead agency to determine whether a proposed project is "exempt from CEQA," and (2) specify that a project is exempt if a categorical exemption applies

> "and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2." *Thus, an agency may not apply a categorical exemption without considering evidence in its files of potentially significant effects, regardless of whether that evidence comes from its own investigation, the proponent's submissions, a project opponent, or some other source.*

(*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1103 [italics added]; see also *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386-387 (*Muzzy Ranch*) [same conclusion regarding the common sense exemption].)

Thus, the fact that the four well permits applications involved in *California Water Impact Network v. County of San Luis Obispo, supra*, did not present evidence of nearby sources of contamination is not particularly relevant. The more important questions are (1) what the lead agencies's own investigation would have revealed had the County considered the permits discretionary; and (2) what information the public and other agencies would have submitted had the County engaged any of CEQA's notification processes. San Luis Obispo County's declaration does not answer these questions, precisely because the county considered these permit approvals to be ministerial. As a result, both San Luis Obispo County in *California Water Impact Network v. County of San Luis Obispo,* and Stanislaus County in the instant case squandered the opportunities that CEQA provides to develop the information necessary to judge whether they needed to invoke the separation standard to modify permit applications. (See Amicus Curiae Brief of California Water Impact Network, 17-19.)

San Luis Obispo County also states that in *California Water Impact Network v. County of San Luis Obispo,* the well dug by Real Party JUSTIN

Vineyards and Winery under its permit "yielded no water and was immediately abandoned." (SLO Brief 15.) San Luis Obispo County does not explain why this evidence is relevant to this case. To the extent San Luis Obispo County implies that CEQA should not apply to permits where post-approval events eliminate the possibility of environmental harm, it would represent an absurd version of "consequentialist" reasoning.[7] This reasoning would result in CEQA never applying to any permits because the permit applicant might decide, post-approval, to abandon the permit.

E. The Limited and Technical Purpose of DWR Bulletin No. 74 Supports a Ministerial Approval Process.

San Luis Obispo County, as does Defendant Stanislaus County, relies heavily on the decision in *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, to argue that the limited and technical purpose of the DWR Bulletins supports finding well permit approvals ministerial. (SLO Brief 9.) This issue is briefed in Appellants' Answer Brief on the Merits (at pages 25-43). The Amicus Curiae brief filed by the California Water Information Network provides additional rebuttal to this argument, at page 26-27.[8]

The opinion in *Sierra Club v. County of Sonoma* fails to reveal what

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[7]Consequentialism is defined as "the theory that the value and especially the moral value of an act should be judged by the value of its consequences." Merriam-Webster Online Dictionary. www.merriam-webster.com.

[8]The Water Agencies wrongly state that "The petition for writ of mandate in this action asks a straightforward question: is the Stanislaus well permit ordinance entirely discretionary or entirely ministerial?" (Water Agencies' Brief 6.) In fact, this is not a question presented by either the County's Petition for Review or Appellants Answer to Petition for Review. Indeed, it is well-settled that where a project involves both ministerial and discretionary action, it is subject to CEQA. (*Friends of Westwood, supra*, 191 Cal.App.3d at 271; CEQA Guidelines, § 15268, subd. (d).)

metrics determine when the scope of an agency's discretion is so much "narrower" or more "technical" than the scope of discretion conferred in *Ramey*, *Day*, and *Friends of Westwood* such that CEQA is inapplicable. This Court has previously rejected approaches to difficult CEQA issues that invite arbitrary results. For example, in *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, this court rejected the "new project" criterion for determining the standard of review for subsequent environmental review under CEQA, observing that:

> In the absence of any benchmark for measuring the newness of a given project, the new project test plaintiff urges would inevitably invite arbitrary results. As the Court of Appeal in Mani Brothers observed, to ask whether an agency proposal constitutes a "'new project'" in the abstract "'does not provide an objective or useful framework.'"

(*Id.* at 951.) This Court should reaffirm the time-tested functional test for discretion and reject the counties invitation to adopt a "you know it when you see it" approach to determining when discretion is sufficient to trigger CEQA.

San Luis Obispo County also suggest that the identity of the County official who issues well permits (i.e., health officer rather than planning director) should affect this Court's analysis of the legal issues presented here. (SLO Brief 10-12.) This is incorrect. There is no reason that the officials who issue well permits must be the same officials who conduct CEQA review of the permits. The County may choose which officials issue well permits and which officials conduct CEQA review of well permits based on the officials' respective areas of expertise.

San Luis Obispo County challenges the Fifth District's opinion's

basis for distinguishing the wetland setback standard in *Sierra Club v. County of Sonoma* from the separation standard in this case. The Fifth District cites the portion of the *Sierra Club v. County of Sonoma* opinion holding that the measures the County could impose were limited to measures recommended by a biologist, while in the instant case, the County is the "arbiter of 'adequacy.'" (Opinion 14-15.) San Luis Obispo County points out that, as a matter of fact, the local grading ordinance in *Sierra Club v. County of Sonoma* "required the Commissioner to allow the 35-foot setback in the absence of some reason to reject the biologist's report." (SLO Brief 14, citing *Sierra Club v. County of Sonoma, supra*, 11 Cal.App.5th at 29-30.) In San Luis Obispo County's view, this fact indicates that the First District Court of Appeal actually found this degree of discretion (i.e., rejecting the biologists report for "some reason") to be insufficiently discretionary to trigger CEQA.

San Luis Obispo County is wrong and its reliance on this aspect of the opinion in *Sierra Club v. County of Sonoma* is misplaced. First, the Court in *Sierra Club v. County of Sonoma* did not suggest or imply that the "some reason to reject the biologist's report" language provided Sonoma County with any discretion. Therefore, the premise of SLO County's argument fails and this aspect of the opinion in *Sierra Club v. County of Sonoma* remains fully distinguishable.

Second, to the extent SLO County is correct that the "some reason to reject the biologist's report" language provided Sonoma County with some degree of discretion, this aspect of the opinion illustrates its poor reasoning. As discussed above, if this language provides discretion, neither the opinion in *Sierra Club v. County of Sonoma* or the counties in this case explain how to determine when the scope of an agency's discretion is so "narrow" or

"technical" that CEQA is inapplicable.

Further, as discussed above, the absence of any reason in that case to reject the biologist's report is a self-fulfilling prophecy. By treating the application as ministerial, Sonoma County failed to invoke CEQA's substantive requirements and procedural opportunities for developing information necessary to judge whether it had "some reason to reject the biologist's report."

Defendant County, in its Reply Brief on the Merits (at 12-13), the Water Agencies (at 18-19), and amicus curiae California Building Industry Association, argue that the recent decision in *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80 (*McCorkle*) supports their argument that a minor degree of discretion can be insufficient to trigger CEQA review.[9] *McCorkle* is the most recent in a long line of cases holding that design review does not trigger the application of CEQA, including *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934 (*San Diego Navy*); *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144; *Madrigal v. City of Huntington Beach* (2007) 147 Cal.App.4th 1375; *and Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 724.) As Appellants explain in their Answer Brief, this line of decisions holds that "design review" for aesthetic compatibility with governing land use plans that occurs after CEQA review of the entire project has been completed is a ministerial approval that does not trigger a subsequent round of environmental review under CEQA section 21166. (Answer Brief 28-41.)

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[9] *McCorkle* is also cited by amicus curiae League of California Cities.

McCorkle is an outlier in this line of cases because it holds—in a factual context that did not specifically involve subsequent environmental review pursuant to CEQA section 21166—that "design review" for aesthetic compatibility with surrounding uses does not trigger CEQA review. However, the project in *McCorkle* was fully compliant with the City of St. Helena's governing general plan and zoning ordinances and did not require a discretionary use permit or variance. Therefore, the type and intensity of the project's proposed land use had, in fact, been subject to previous CEQA review in connection with the City's adoption of its general plan and zoning ordinance.

Consequently, *McCorkle* is distinguishable for the same basic reasons the other decisions in this line of cases are distinguishable: namely, the County's well permit approvals do not follow any previous environmental review under CEQA and the County well permit ordinance does not provide "design review" for aesthetic impacts.

CBIA points out that even apparently ministerial decisions may have some element of embedded discretion. (CBIA Brief 29, citing *Johnson v. State* (1968) 69 Cal.2d 782, 788 ["It 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"].) But as this court observed in *Johnson v. State*, the solution to this apparent difficulty is to avoid an overly semantic analysis of discretion, and look to the policy of the law that requires distinguishing discretionary from ministerial acts for guidance. (*Id.* at 789.) This is exactly what the Court of Appeal did in *Friends of Westwood* when articulating the functional test.

The California Supreme Court has held 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." [citation] Following this mandate, other courts have established the principle that CEQA applies even where the process is largely ministerial. As one court held: "Statutory policy, not semantics, forms the standard for segregating discretionary from ministerial functions .... CEQA is to be interpreted to " 'afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " [Citation.] ... 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." [Citation.]

(*Friends of Westwood, supra,* 191 Cal.App.3d at 271, citing HCD, *supra*, 45 Cal.App.3d at 194, citing *Johnson v. State, supra*, at 788.) CBIA offers no persuasive reason to second-guess this long-standing doctrine. Nor does CBIA offer a persuasive reason to conclude that the separation standard or the other general discretionary standards of the state water well bulletins are ministerial and not subject to CEQA.

CBIA's reliance on *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, is misplaced. In that case, a city argued that the State Historical Building Code provides it with discretion to prohibit the owner of a historic property listed on the state historic property register from making alterations that would harm its historic significance. While the State Historical Building Code provides some discretion to the city, it does so in only one direction, i.e., to grant the property owner relief from standard building codes where necessary to preserve the property's historic significance, but not to "compel an owner to preserve the historical

character of the property." (*Id.* at 96.) Based on this policy of the statute, the Court held this one-way type of discretion did not trigger CEQA.

In the instant case, however, the policy of Water Code section 13801, the state bulletins, and the local permitting ordinance are to protect water quality, i.e., the direction in which agency discretion triggers the application of CEQA.

F. The Fact that an Ordinance Does Not Grant an Agency the Power to Mitigate All Possible Significant Environmental Impacts of a Permitted Project Does Not Render the Approval Ministerial.

The Water Agencies defend Defendant County's argument that, in order to trigger the application of CEQA, the discretion conferred by an ordinance or statute must be "of a certain kind." (Water Agencies' Brief 5.) But the Water Agencies fare no better than Defendant County in explaining why the "functional test" for discretion is not up to the task of determining if well permits are discretionary or in articulating a workable, predictable test with which to replace the "functional test."

The Water Agencies describe a hypothetical where a local agency ordinance allows construction of a ten story office tower but gives the building department discretion regarding the design of landscaping around the building. The Water Agencies apparently argue that because the ordinance allows ten stories, the agencies' discretion to modify the landscaping should not trigger CEQA because CEQA review cannot change the building height. This argument is addressed by the Opinion below, which observes that "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." (Opinion 21.) This is because CEQA

requires the *disclosure* of significant environmental impacts even where impacts cannot be mitigated to less than significant. (CEQA, §§ 21002, 21081; Guidelines §§ 15091-15093.)

In a similar vein, the California State Association of Counties argues that if a local ordinance does not grant an agency the power to mitigate all possible significant environmental impacts of a permitted project, then the permit approval is not discretionary and CEQA does not apply. (Association of Counties Brief 5.) As discussed in Appellants Answer Brief on the Merits (at 54-55) , this argument conflates the County's legal authority under Chapter 9.36 with its separate legal obligations under CEQA.

Once CEQA applies, the County lacks authority to approve a project unless and until it complies with CEQA's requirements. (CEQA § 21002, 21002.1; 21081; Guidelines, §§ 15061, 15063, 15091-15093.) For example, if a lead agency is required to prepare an initial study, it cannot approve the project unless and until it adopts a negative declaration or prepares an Environmental Impact Report (EIR). (Guidelines, § 15063, subd. (b).) If the lead agency is required to prepare an EIR and the EIR discloses a significant adverse effect, the County cannot approve the project unless and until it can make the findings required by CEQA section 21081. These findings include a finding that all feasible mitigation measures or alternatives that substantially reduce the project's significant effects have been adopted, and that any remaining significant effects are "acceptable" due to the project's overriding social or economic benefits. (*City of San Diego v. Board of Trustees of California State University, supra,* 61 Cal.4th at 960-61; *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 350; *Mountain Lion Foundation, supra,*

16 Cal.4th at 127; CEQA, §§ 21002, 21081; Guidelines §§ 15091-15093.) Thus, if an EIR discloses that operation of a water well would cause significant adverse environmental effects, the County cannot approve the permit unless and until the County makes the findings required by CEQA section 21081, *which could include the adoption of feasible mitigation measures that are not otherwise specified in the ordinance that triggers CEQA review* (i.e., County Code, § 9.36.150.).

Moreover, contrary to the County's argument (DOB 29), CEQA section 21004 does not preclude the County from refusing to approve a well permit where the applicant refuses to accept a feasible mitigation measure not otherwise specified in County Code section 9.36.150. Consistent with section 21004, CEQA does not grant agencies new authority. *Instead, CEQA places new limits on agency authority to approve projects unless and until the agency complies with CEQA's procedures.*

III. CONCLUSION

The Court should affirm the Court of Appeal's disposition on the grounds discussed in this brief.

Dated: June 19, 2019 LAW OFFICES OF THOMAS N. LIPPE, APC

By: Tom Lippe

Thomas N. Lippe
Attorney for Plaintiffs and Appellants

WORD COUNT CERTIFICATION

I, Thomas N. Lippe, appellate counsel for Plaintiffs and Appellants, certify that the word count of this Answer Brief on the Merits is 7,316 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief.

Dated: June 19, 2019 LAW OFFICES OF THOMAS N. LIPPE, APC

Tom Lippe

Thomas N. Lippe

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PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of San Francisco, California. My business address is 201 Mission Street, 12th Floor, San Francisco, CA 94105. I am over the age of 18 years and not a party to the above entitled action. On June 19, 2019, I served the following documents:

- **Appellants' Combined Answer Brief to Briefs of Amicus Curiae**

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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, in the City and County of San Francisco, California.

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