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

PLAINTIFFS AND APPELLANTS ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

Stanislaus County has petitioned for review of the instant decision by the Fifth District Court of Appeal (*POWER*), as well as the decision by the Fifth District Court of Appeal in the companion case of *Jamie Coston, et al., v. Stanislaus County*, *et al.*, Supreme Court Case No. S251721 (*Coston*).

Plaintiffs request that the Court deny the petition for review and order the opinion in *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666, review filed Sept. 4, 2018; Supreme Court Case No. S251056 (*California Water*) depublished, for the reasons given in Section II, below.

If the Court grants review, Plaintiffs request that the Court also review the additional questions presented in section III, below.

In section IV below, Plaintiffs respond to the County's erroneous arguments that the Court of Appeal incorrectly decided this case.

II. THE COURT SHOULD DENY THE PETITION FOR REVIEW AND ORDER THE *CALIFORNIA WATER* OPINION DEPUBLISHED.

The Court should deny the petition for review and order the *California Water* opinion depublished. The County argues that the unpublished opinions in *Coston* and *POWER* conflict with the published

decision by the Second District Court of Appeal in *California Water*. Based on this asserted conflict, the County argues that counties around the state will be uncertain what their legal obligations are with respect to applying the California Environmental Quality Act (CEQA) to well construction permits. (*Coston* Petition 22-23, *POWER* Petition 21-22.) *Assuming arguendo* that this concern is valid, this Court can eliminate that concern by ordering the *California Water* opinion depublished. (CRC, Rule 8.1125(c)(2).) Plaintiffs' letter to the Second District Court of Appeal opposing publication of the *California Water* opinion is attached hereto.

III. ADDITIONAL QUESTIONS PRESENTED.

If the Court grants review, Plaintiffs request that the Court review the following additional issues.

1. Does Stanislaus County's local groundwater well permit ordinance incorporate the state Bulletins' general discretionary standards, and thereby confer discretionary authority triggering CEQA review?

2. Do the state Bulletins' specific discretionary standards referenced in footnote 8 of the Opinion confer discretionary authority triggering CEQA review?

3. Does the fact that the County's well permit ordinance authorizes a limited range of measures the County can impose on well permits to protect

the environment render additional mitigation measures that may be identified in an Environmental Impact Report legally infeasible?

4. Does "discretionary" mean the same thing for purposes of CEQA and constitutional due process requirements?

A. Does Stanislaus County's local groundwater well permit ordinance incorporate the state Bulletins' general discretionary standards, and thereby confer discretionary authority triggering CEQA review?

In both *Coston* and *POWER*, the Court of Appeal held that one state well construction permit standard incorporated by the local ordinance gives the county discretion to modify well construction projects "to address impacts revealed by environmental analysis," thereby triggering CEQA review. (*Coston* Slip Op. 14; *POWER* Slip Op. 13.) This "separation" standard provides minimum distances between potential sources of contamination and proposed wells and states: "All water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination." (*Coston* Slip Op. 12; *POWER* Slip Op. 11; citing Bulletin No. 74-90, section 8(A).) The Court of Appeal based this holding on the standard's requirement that, regardless of any generically specified distances, the actual distance must be "adequate," which requires the exercise of judgment and discretion (*Coston* Slip Op. 14; *POWER* Slip

Op. 13; citing *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 193-194 (*People v. Department of Housing*)) and gives Stanislaus County the power to "address impacts revealed by environmental analysis (*Coston* Slip Op. 14; *POWER* Slip Op. 13; citing *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267 (*Friends of Westwood*).)

The Opinion does not, however, rule on Plaintiffs' contention that Stanislaus County's local ordinance gives the County discretionary authority over well permit application by incorporating general discretionary standards from the state bulletins. Plaintiffs' contend these general standards provide the County with discretion to address and reduce site-specific environmental harm by changing the Bulletin's technical standards or creating new standards, as appropriate.

With respect to these general discretionary standards, the Opinion states: "The parties disagree, however, as to whether other provisions in the Bulletin are incorporated by section 9.36.150. We need not resolve that issue because we conclude a provision the parties do agree was incorporated – i.e., the contamination source spacing standard – renders the issuance of well permits discretionary." (*Coston* Slip Op. 11, n. 16; *POWER* Slip Op. 10, n. 9.)

County Code section 9.36.150 addresses "Standards adopted" and incorporates by reference the standards adopted by the state Department of Water Resources ("DWR"), stating:

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

(AA 120.) Bulletin No. 74 (at AA 123) was updated in 1981 in Bulletin No. 74-81 (at AA 139, 149), and supplemented again in 1990 in Bulletin No. 74-90 (AA 179 [or 498], 592, 181 [or 607]).[1]

Chapter II of Bulletin No. 74, entitled "Standards" provides:

> The standards presented in this chapter are intended to apply to construction (including reconstruction) or destruction of wells throughout the State of California. *Under certain circumstances, adequate protection of ground water quality may require more stringent standards than these presented*

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[1] Bulletin No. 74-81 explains DWR's authority and purpose in issuing well standards by reference to Water Code section 13800. (AA 141-42.) Water Code section 13801, subdivision (c), provides: "Notwithstanding any other law, each county, city, or water agency, where appropriate, shall, not later than January 15, 1990, adopt a water well, cathodic protection well, and monitoring well drilling and abandonment ordinance that meets or exceeds the standards contained in Bulletin 74-81."

> *here; under other circumstances, it may be necessary to deviate from the standards or substitute other measures which will provide protection equal to that provided by these standards. Since it is impractical to prepare standards for every conceivable situation, provision has been made in the succeeding material for deviation from the standards as well as for addition of appropriate supplementary standards.*

(AA 129 [Bulletin 74] (emphasis added).) This passage was updated in Bulletin No. 74-81 without substantial change. (AA 148 [Bulletin 74-81].) Thus, both originally and currently, the state standards contemplate the exercise of judgment and discretion by local authorities to determine how best to protect groundwater resources.

The need for local officials to exercise discretion is also expressed in Bulletin No. 74-81 at Chapter II, Part I, section 3, which provides:

> Exemption Due to Unusual Conditions. If the enforcing agency finds that compliance with any of the requirements prescribed herein is impractical for a particular location because of unusual conditions or if compliance would result in construction of an unsatisfactory well, *the enforcing agency may waive compliance and prescribe alternative requirements which are "equal to" these standards* in terms of protection obtained.

(AA 150 [Bulletin 74-81, Chapter II, § 3] (emphasis added).) Bulletin 74-81 provides additional discretionary authority for local agencies to prescribe "*special standards*" to account for "locations where existing geologic or

ground water conditions require standards more restrictive than those described herein." (AA 151 [DWR Bulletin 74-81, Chapter II, § 5] (emphasis added).)

Bulletin 74-90, issued in 1990, updates Bulletin 74-81. (AA 592, 181 [or 607].) This Bulletin also recognizes that local authorities must also exercise judgment in approving well construction permits:

> Well standards contained in Bulletin 74-81 together with well standards in this supplement (Bulletin 74-90) are recommended ***minimum*** statewide standards for the protection of ground water quality. ***The standards are not necessarily sufficient for local conditions.*** Local enforcing agencies may need to adopt more stringent standards for local conditions to ensure ground water quality protection. ¶ In some cases, it may be necessary for a local enforcing agency to substitute alternate measures or standards to provide protection equal to that otherwise afforded by DWR standards. Such cases arise from practicalities in applying standards, and from variations in geologic and hydrologic conditions. Because it is impractical to prepare "site-specific" standards covering every conceivable case, provision has been made for deviation from the standards. ¶ Standards in Bulletin 74-81 and this supplement (Bulletin 74-90) ***do not ensure*** proper construction or function of any type of well. Proper well design and construction practices require the use of these standards together with accepted industry practices, regulatory requirements, and consideration of site conditions.

(AA 181 [or 607] (emphasis in original).)

Bulletin 74-90 further provides that many normal standards are

subject to exceptions or alternative standards "at the approval of the enforcing agency on a case-by-case basis" or where "otherwise approved by the enforcing agency." (AA 186-87 [Bulletin 74-90, Part II, § 9.B].)

The County asserts that its ordinance incorporates only the specific, technical standards described in the state standards, and not the more general discretionary standards. This is incorrect for two reasons. First, there is nothing in the relevant County ordinance that supports the argument. (See AA 139 [County Code § 9.36.150].) Second, the County was required to adopt its ordinance by state law, which requires that the County adopt an ordinance that "meets or exceeds the standards" adopted by the state. (Water Code § 13801, subd. (c), AA 412-13[DWR Bulletin 74-81].) State law does not discriminate, for purposes of requiring that local ordinances "meet or exceed" its standards, between its quantitative and qualitative standards. The County's view would put the local ordinance at odds with the state law that requires it to "meet or exceed" the state standards and violate the rule of statutory construction against interpreting a statute in a way that defeats its purpose. (*International Federation of Professional & Technical Engineers, AFL-CIO v. City of San Francisco* (1999) 76 Cal.App.4th 213, 224.)

The Bulletins' general discretionary standards show the County can

"modify" all well construction permits to protect the environment. "[W]here the agency possesses enough authority (that is, discretion) to deny or modify the proposed project on the basis of environment consequences the EIR might conceivably uncover, the permit process is 'discretionary' within the meaning of CEQA." (*Friends of Westwood, supra,* 191 Cal.App.3d at 272 (emphasis in original).)

B. Do the state Bulletins' specific discretionary standards referenced in footnote 8 of the Opinion confer discretionary authority triggering CEQA review?

Bulletin No. 74-90 also provides for locating wells upstream of contamination sources, *if possible*:

> Gradients. *Where possible*, a well shall be located up the ground water gradient from potential sources of pollution or contamination. Locating wells up gradient from pollutant and contaminant sources can provide an extra measure of protection for a well. However, *consideration should be given* that the gradient near a well can be reversed by pumping, as shown in Figure 3 (page 28 of Bulletin 74-81), or by other influences.

(AA 184 [Bulletin 74-90, Part II, § 8.B (emphasis added)].)

In addition, Bulletin No. 74-90 provides for locating the wells outside areas of flooding, *if possible*:

> Flooding and Drainage. *If possible*, a well *should be located* outside of areas of flooding. The top of the well casing shall terminate above grade and above known levels of flooding caused by drainage or runoff from surrounding land. For community water supply wells, this level is defined as the: "...

> floodplain of a 100 year flood..." or above "... any recorded high tide...", (Section 64417, Siting Requirements, Title 22 of the California Code of Regulations.) If compliance with the casing height requirement for community water supply wells and other water wells is not practical, *the enforcing agency shall require alternate means of protection*. ¶ Surface drainage from areas near the well shall be directed away from the well. *If necessary*, the area around the well shall be built up so that drainage moves away from the well.

(AA 184 [Bulletin 74-90, Part II, § 8.C (emphasis added)].)

By incorporating these standards by reference, County Code section 9.36.150 requires that the County exercise discretion in deciding whether to issue well construction permits, because the County may deny the permit or require changes in the project as a condition of permit approval to address concerns relating to environmental impacts. The language used in the above standards demonstrate the need for County authorities to make individualized determinations on the facts and circumstances presented on a range of issues. Indeed, the County must judge whether the location of the well is appropriate in light of its "opinion" of the required distance from contamination sources and whether it is "possible" to locate the well up-gradient from contamination sources. (AA 183-84 [Bulletin 74-90].) The County must also "consider" "the possibility of reversal of flow near the well due to pumping." (AA 184 [Bulletin 74-90].)

The Court of Appeal held that standards conditioned on compliance

on being "possible" are not discretionary because—in the Court of Appeal's view—whether a directive is "possible" is an "objective" test. This is not an obvious conclusion.

The term "possible" includes "Capable of existing or happening; feasible." [2] CEQA case law has long held that determinations of feasibility are discretionary and trigger CEQA review. (See e.g., *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1583 ["Having made the final determinations as to whether or not it was feasible to eradicate the AMFF and what method would be most effective in doing so, CDFA cannot validly claim that it was performing purely ministerial functions. The 1985 project was discretionary within the meaning of section 21080, subdivision (a), and therefore subject to regulation under CEQA").]

C. Does the fact that the County's well permit ordinance authorizes a limited range of measures the County can impose on well permits to protect the environment render additional mitigation measures that may be identified in an Environmental Impact Report legally infeasible?

The Opinion suggests that because the County's well permit ordinance authorizes a limited range of measures the County can impose on well permits to protect the environment, additional mitigation measures that

[2]https://thelawdictionary.org/possible/

may be identified in an Environmental Impact Report may be found "legally infeasible," stating:

> The County and Amicus Curiae argue that CEQA review would require the County to analyze a host of environmental impacts it is powerless to address. But that is not grounds for dispensing with CEQA review altogether. When a lead agency identifies mitigation measures that it lacks legal authority to impose, it may simply make a finding in the environmental document that the measures are legally infeasible. (See Sequoyah Hills Homeowners Assn. v. City of Oakland (1993) 23 Cal.App.4th 704, 715–716; see also § 21081, subd.(a)(3) [referencing "legal … considerations" which "make infeasible the mitigation measures or alternatives identified in the environmental impact report"]; Guidelines, § 15364 [referencing the role of "legal … factors" in determining feasibility].)

(*Coston* Slip Op. 23; *POWER* Slip Op. 23-24.)

The County's Petition for Review echoes this view, arguing that "DER lacks any authority to require a permit applicant to avoid or minimize those [environmental] impacts. (*Coston* Petition for Review, p. 11; *POWER* Petition for Review, p. 10.) This view is incorrect, because once CEQA applies, the only authority that DER lacks is the authority to approve a well permit unless and until CEQA's requirements are satisfied.

The Opinion and the County's argument conflate the first and second stages of the two-stage analysis required where an ordinance arguably

grants an agency discretionary authority. If the ordinance grants an agency discretionary authority to protect any environmental resource, then CEQA applies; and once CEQA applies, the County must apply its environmental review procedures. (*Friends of Westwood, supra,* 191 Cal. App.3d at 269-70.)

In the second stage of the analysis, if applying CEQA's procedures discloses a significant adverse effect, the County cannot approve the project unless and until it can make the findings required by CEQA section 21081. CEQA section 21081 requires findings that all feasible mitigation measures or alternatives have been adopted that substantially reduce the project's significant effects, 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* (2015) 61 Cal.4th 945; *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 350 (*City of Marina*) ["The required [section 21081] findings constitute the principal means chosen by the Legislature to enforce the state's declared policy 'that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects

...'."]; *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 127, citing CEQA, § 21080.5, subd. (d)(3)(A); § 21002.)

Thus, if an EIR discloses that operation of the well would cause significant adverse environmental effects, the County cannot approve the construction permit unless and until the County makes the finding required by section 21081, which could include the adoption of a feasible mitigation measure that is not otherwise specified in the ordinance that triggers CEQA review.

Moreover, CEQA section 21004 is not in conflict with section 21081 because, consistent with section 21004, CEQA does not grant agencies any new authority. *Instead, section 21081 places new limits on agency authority.*

IV. THE COURT OF APPEAL'S DECISION IS CORRECT.

As discussed in section III.A, above, the Court of Appeal held that the local ordinance incorporates the state standard for "separating" wells from potential sources of contamination. As the Petition for Review notes, the Opinion focuses the word "adequate" in the portion of the standard that states: "All water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination." (*Coston* Petition 28; *POWER* Petition 27, citing *Coston* Slip Op. 12-14; *POWER*

Slip Op. 11-13; citing Bulletin No. 74-90, section 8(A).)

But Bulletin No. 74-90's recognition that local authorities must exercise judgment in approving well location is much more extensively expressed than merely using the term "adequate." The Bulletin provides:

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

(AA 183-84 [Bulletin 74-90, Part II, § 8.A (emphasis added)].) Thus, the Opinion's conclusion that the County has discretion to modify the location of wells to protect against contamination is fully supported by the text of the separation standard.

The County argues that CEQA does not apply because Chapter 9.36 of the County Code only grants discretion to protect groundwater quality, not groundwater depletion or other environmental harm. (Petition 27, AA 213.) This position is incorrect, as it conflates two distinct issues: whether the ordinance governing well construction provides authority for regulating impacts on groundwater other than water quality impacts with the County's obligation to disclose and mitigate significant environmental impacts under CEQA.

CEQA applies if the County has the power to address *any*, not necessarily *all*, environmental concerns. "The touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to *any* of the concerns which might be identified in an environmental impact report." (*Friends of Westwood, supra,* 191 Cal.App.3d at 267 (emphasis added).)

Many appellate decisions involve ordinances that confer discretion over limited subjects, but were held to trigger CEQA. (See e.g., *Day v. City of Glendale* (1975) 51 Cal. App. 3d 817, 822 [grading ordinance allowed city engineer to exercise discretion and impose conditions to reduce traffic, geological instability, and flooding impacts]; *People v. Department of Housing, supra,* 45 Cal.App.3d at 193[mobilehome park ordinance required

judgment regarding "sufficient" artificial lighting, and "adequate" water supply and drainage].) These ordinances did not address the many environmental resources that must be analyzed once CEQA is triggered (e.g., impacts on air quality, wildlife, recreation, etc), yet they triggered CEQA anyway. As *Friends of Westwood* holds, if there's discretion to impose conditions to address any environmental concern, then all of CEQA is triggered.

This Court's decision in *Communities for a Better Environment v. So. Coast Air Quality Management Dist.* at 48 Cal. 4th 310 (2010) is a good example of an agency with jurisdiction over one environmental impact—in that case the air district had jurisdiction over air quality only, but it had to prepare an EIR that studied all issues before it issued a permit to expand an oil refinery.

If the County's authority under Chapters 9.36 is "discretionary," CEQA applies, regardless of how many types of environmental harm Chapters 9.36 may regulate. And once CEQA applies, the County must apply its environmental review procedures. If these procedures disclose significant adverse effects, the County cannot approve the project unless it finds that all feasible mitigation measures or alternatives have been adopted that substantially reduce the project's significant effects, 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*; *City of Marina v. Board of Trustees of the California State University*, *supra*; *Mountain Lion Foundation v. Fish & Game Commission*, *supra*. Consequently, whether the County's ordinance provides it with authority to regulate groundwater quantity is not relevant to whether CEQA applies.

As discussed above in section III.C, above, the County's argument conflates the first and second stages of the two-stage analysis required where an ordinance arguably grants an agency discretionary authority. If the ordinance grants an agency discretionary authority to protect any environmental resource, then CEQA applies; and once CEQA applies, the County must apply its environmental review procedures. (*Friends of Westwood, supra,* 191 Cal. App.3d at 269-70.)

If the County's argument were correct, the Court of Appeal in *Friends of Westwood* would have held that CEQA did not apply because the building permit ordinance in question only gave the city authority to modify the building's design, not to modify the project to address a host of non-design related environmental impacts. For example, a building's air quality impacts depend in part on the number of people who drive to a building

rather than take mass transit. The omission of specific authority in the building design ordinance to require transit friendly employment policies (e.g., a ride share board) did not render the design ordinance in Westwood "ministerial."

The County relies on *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934 (*San Diego Navy*) to support its contention. This reliance is misplaced because in *San Diego Navy*, the factual and legal bases for applying CEQA were highly attenuated before even getting to the ministerial-discretionary distinction. In that case, in 1992 the City of San Diego entered into a development agreement with the United States to redevelop a retired Navy base and prepared a complete Environmental Impact Report under CEQA for the project. In 2006, a developer submitted construction plans. The development agreement required that the developer submit its construction documents to the Centre City Development Corporation (CCDC) (a public nonprofit corporation created to implement downtown San Diego redevelopment projects) so the CCDC could determine whether the plans were consistent with aesthetic criteria established in the development plan and the urban design guidelines. (*San Diego Navy*, 185 Cal.App.4th at p. 929.)

The plaintiff contended the CCDC and City were required to prepare a subsequent EIR under CEQA section 21166. Under section 21166, once "a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review .... While section 21151 is intended to create a 'low threshold requirement for preparation of an EIR' [citation], section [21166] indicates a quite different intent, namely, to restrict the powers of agencies 'by prohibiting [them] from requiring a subsequent or supplemental environmental impact report' unless the stated conditions are met." (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1050.) Thus, the initial decision to certify an EIR is "protected by concerns for finality and presumptive correctness." (*Snarled Traffic Obstructs Progress v. City & County of San Francisco* (1999) 74 Cal.App.4th 793, 797.)

The first prerequisite for an agency to require subsequent environmental review under CEQA section 21166 is the need for a new "discretionary approval." (CEQA Guidelines, § 15162(c).) When the *San Diego Navy* Court analyzed whether review of the construction plans for aesthetic consistency required a new discretionary approval, it considered the question in the context of the development agreement between the City and the developer. The purpose of a development agreement is to limit the

subsequent exercise of discretionary authority by the local agency. (*Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 649.) In *Davidson v. County of San Diego*, the Court held that a development agreement precluded an agency from later adopting more restrictive land use regulations that were not required to avoid a danger to the public health or safety, stating:

> "[N]otwithstanding the rights created by either a development agreement or a vesting tentative map, the local agency may apply subsequent regulations to the project if it determines failure to do so would create a condition dangerous to the public health or safety. (Gov. Code, §§ 65865.3, subd. (b) & 66498.1, subd. (c)(1).) *The usual exercises of police power in the land use context are not directly related to danger or potential danger to the health and safety of the public.* For instance, ordinances or regulations down-zoning from one use to another, limiting subdivision densities, or imposing height requirements would not ordinarily be so related. Davidson had the right to have his building permit application processed without consideration of any such later-enacted provisions."

(Id. at 649 [emphasis added].)

In *San Diego Navy*, the plaintiff presented a claim that the CCDC's authority to review the project plans' consistency with the development agreement's *aesthetic guidelines* also gave the CCDC the authority and duty under CEQA to assess the project's impact on *global climate change*. The Court rejected this claim specifically because, by entering the development

agreement in 1992, the City had contracted away its police power to impose new restrictions on the project beyond the aesthetic concerns allowed by the development agreement, stating:

> "CCDC only has limited discretion to review the Project as defined in the [Development] Agreement for consistency with the subjective criteria in the Design Guidelines." ... The fact that the CCDC made a "conservative" determination that its exercise of discretion as to *aesthetic issues* on the Project might be subject to CEQA, does not establish that the CCDC exercised any discretionary authority to mitigate the Project's impact on *global climate change.*

(*San Diego Navy, supra*, 185 Cal.App.4th at p. 940.) Thus, as noted, the factual and legal bases for applying CEQA in *San Diego Navy* were highly attenuated even before addressing the ministerial-discretionary distinction.

In the instant case, CEQA section 21166 is not involved and there is no presumption of finality for a previous CEQA review. Nor has the County partially contracted away its police powers to modify well permits to address environmental concerns. Therefore, the decision in *San Diego Navy* does not support the County's defense.

At a minimum, the ordinance in this case gives the County discretion to protect at least one environmental value, i.e., groundwater quality. Therefore, the facts of this case are similar to those in other decisions in which local ordinances provided discretion to protect a limited set of

environmental resources. (See e.g. *Day v. City of Glendale*, *supra*; *People v. Department of Housing, supra,* 45 Cal.App.3d at 193.)

V. CONCLUSION.

The Court should deny the petition for review and order the *California Water* opinion depublished. If the Court grants review, Plaintiffs request that the Court also review the additional questions presented in section III, above.

Dated: October 23, 2018 LAW OFFICES OF THOMAS N. LIPPE, APC

By:_____
Thomas N. Lippe
Attorney for Plaintiffs and Appellants

WORD COUNT CERTIFICATION

I, Thomas N. Lippe, appellate counsel for Plaintiffs, certify that the word count of this Answer to Petition for Review is 4,752 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief.

Dated: October 23, 2018 LAW OFFICES OF THOMAS N. LIPPE, APC

Thomas N. Lippe

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ATTACHMENT 1

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July 19, 2018

Submitted Electronically via TrueFiling

The Honorable Arthur Gilbert, Presiding Justice
The Honorable Steven Z. Perren, Associate Justice
The Honorable Martin J. Tangeman, Associate Justice
Second District Court of Appeal, Division Six
200 East Santa Clara Street
Ventura, CA 93001

Re: **Opposition to Request for Publication.** *California Water Impact Network v. County of San Luis Obispo* (Second District No. B283846)

Dear Honorable Justices:

This office represents the California Sportfishing Protection Alliance (CSPA), a California non-profit public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality, wildlife and fishery resources and their aquatic ecosystems and associated riparian habitats.

On behalf of CSPA, I write to oppose the July 10, 2018, request by respondent County of San Luis Obispo (County) and the July 17, 2018, request by the California State Association of

Counties (Association) to publish the Court's opinion filed June 28, 2018 (Opinion). As the Court has determined, the Opinion does not meet the standards for publication as set forth in California Rules of Court, rule 8.1105, subdivision (c).

The Opinion holds that the County's approval of groundwater well construction permits to licensed well drilling contractors pursuant to a local ordinance incorporating state construction standards were ministerial actions that did not trigger environmental review under the California Environmental Quality Act (CEQA). The County and Association contend the Opinion warrants publication pursuant to California Rules of Court, Rule 8.1105, subdivisions (c)(2), (c)(4) and (c)(6).

Subdivision (c)(2) does not apply because the Opinion does not apply "an existing rule of law to a set of facts significantly different from those stated in published opinions." At a minimum, the ordinance in this case gives the County discretion to protect at least one environmental value, i.e., groundwater quality because the state standards referenced in the Opinion are subject to a broad grant of discretionary authority to "require more stringent standards" or to "substitute other measures which will provide protection equal to that provided by these standards." (Bulletin 74-81, Ch. II, 3 JA 501.)

Therefore, the facts of this case are similar to those in other decisions in which local ordinances provided discretion to protect a limited set of environmental resources. (See e.g. *Day v. City of Glendale* (1975) 51 Cal. App. 3d 817, 822 [grading ordinance allowed city engineer to exercise discretion and impose conditions to reduce traffic, geological instability, and flooding impacts]; *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 193 *(Ramey*) [mobilehome park ordinance required judgment regarding "sufficient" artificial lighting, and "adequate" water supply and drainage].)

Subdivision (c)(4) does not apply because the Opinion does not "advance a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule." The opinion applies the 'functional test" for determining if a government decision is discretionary first articulated in *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App.3d 259, 273 (*Friends of Westwood*). But it does not "advance a new interpretation, clarification, criticism, or construction" of this test.

The Opinion's statement that "The effect of RPIs' wells on ground water quality is not at issue here" (Opinion, p. 9) appears to follow the reasoning of *Sierra Club v. County of Sonoma* (2017)

11 Cal.App.5th 11, 25-28 (*County of Sonoma*). But the Opinion does not cite or discuss that decision, and even if it had, the Opinion's use of a similar rationale is not "new."

Subdivision (c)(6) does not apply because the Opinion does not "involves a legal issue of continuing public interest." While the extent to which local approval of groundwater well permits may be an issue of continuing public interest, this case involved four specific well permits in one county, and the outcome rested heavily on the facts of these four permits. (See e.g. Opinion, p. 9 ["The effect of RPIs' wells on ground water quality is not at issue here"].) Therefore, the Opinion does not necessarily implicate issues of continuing public interest."

While the Association contends that 30 counties have adopted similar ordinances, there is no evidence that any other counties have adopted an ordinance that is identical to that of San Luis Obispo County. Therefore, it is not clear that the Opinion would provide useful guidance in other counties, or for other permits within San Luis Obispo County.

The Opinion also does not warrant publication because it does not discuss two crucial issues. First, the Opinion states that "DWR Bulletin No. 74-81 allows localities to deviate from state

standards and enact different standards for 'unusual conditions.' County did not deviate from DWR standards *in adopting section 8.40.060(a).*" (Opinion at p. 10 [italics added].) The Opinion does not, however, address the central contention that Appellant presented for decision, i.e., whether the local ordinance gave the County discretion to deviate from the state's technical standards, by requiring different or substitute technical standards *as a condition of approving the four permits at issue.*

> Second, the Opinion states:
>
> Only an impermissible rewriting of the ordinance would allow us to infer a legislative intent to condition well permits on pump limits or subsidence monitoring, which have nothing to do with groundwater pollution. The County has no discretion to impose water usage conditions on permits issued under Chapter 8.40.

(Opinion at pp. 10-11.) This passage does not discuss the two-stage analysis required where an ordinance arguably grants an agency discretionary authority. If the ordinance grants an agency discretionary authority to protect any environmental resource, then CEQA applies; and once CEQA applies, the County must apply its environmental review procedures. (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App.3d 259, 269-70.)

The County argued that CEQA does not provide agencies any authority to approve, deny, or mitigate the impacts of a project because any such authority must come from the ordinance that governs the agency's decision on the project, citing CEQA section 21004. This argument conflates the first and second stages of the analysis.

In the second stage of the analysis, if applying CEQA's procedures discloses a significant adverse effect, the County cannot approve the project unless and until it can make the findings required by CEQA section 21081. CEQA section 21081 requires findings that all feasible mitigation measures or alternatives have been adopted that substantially reduce the project's significant effects, 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* (2015) 61 Cal.4th 945; *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 350 (*City of Marina*) ["The required [section 21081] findings constitute the principal means chosen by the Legislature to enforce the state's declared policy 'that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such

projects ...'."]; *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 127, citing CEQA, § 21080.5, subd. (d)(3)(A); § 21002.)

Thus, if an EIR discloses that operation of the well would cause significant adverse environmental effects, the County cannot approve the construction permit unless and until the County makes the finding required by section 21081, which could include the adoption of a feasible mitigation measure that is not otherwise specified in the ordinance that triggers CEQA review.

Section 21004 is not in conflict with section 21081 because, consistent with section 21004, CEQA does not grant agencies any new authority. Instead, section 21081 places new limits on agency authority. As noted above, for discretionary projects that have significant impacts, agencies simply do not have the authority to approve the project unless and until the requirements of CEQA section 21081 are satisfied. Thus, if a feasible mitigation measure is available to substantially reduce a significant impact, the agency cannot approve it unless and until that mitigation measure is adopted.

For these reasons, CSPA encourages the Court to leave the Opinion unpublished.

Thank you attention to this matter.

Very Truly Yours,

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 July 19, 2018, I served the following documents:

- Letter dated July 19, 2018, to the Honorable Justices **Re: Opposition to Request for Publication.** *California Water Impact Network v. County of San Luis Obispo* (Second District No. B283846)

on the parties designated on the attached service list; and

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(check all that apply)

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[X] By Electronic Mail (e-mail)	I caused such document to be served via electronic mail (e-mail) via TrueFiling on the parties in this action by transmitting a true copy to TrueFiling for each addressee below.

[ ]	By Personal Delivery by Courier	I caused each such envelope to be delivered to an authorized courier or driver, in an envelope or package addressed to the addressee below.

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

Executed on July 19, 2018, in the City and County of San Francisco, California.

_____
Kelly Marie Perry

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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

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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 October 23, 2018, I served the following documents:

- **Plaintiffs and Appellants Answer to Petition for Review**

on the parties designated on the attached service list; and

MANNER OF SERVICE
(check all that apply)

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[ ] By Facsimile	I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
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[ ] By Personal Delivery by Courier — I caused each such envelope to be delivered to an authorized courier or driver, in an envelope or package addressed to the addressee below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 23, 2018, in the City and County of San Francisco, California.

Kelly Marie Perry

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Xavier Becerra, Attorney General State of California, Office of the Attorney General 1300 I Street; P.O. Box 944255 Sacramento, CA 94244-2550	A

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES v. STANISLAUS COUNTY**
Case Number: **S251709**
Lower Court Case Number: **F073634**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Lippelaw@sonic.net**

3. I served by email a copy of the following document(s) indicated below:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/23/2018

Date

/s/Thomas Lippe

Signature

Lippe, Thomas (104640)

Last Name, First Name (PNum)

Law Offices of Thomas N. Lippe, APC

Law Firm