No. S251709

IN THE SUPREME COURT OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

vs.

STANISLAUS COUNTY et al.,

Defendants and Respondents.

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

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

PRELIMINARY STATEMENT

This case satisfies both of this Court's criteria for review in Rule 8.500(b)(1). It involves a split of authority between two courts of appeal, and it presents an important legal question of statewide significance. Plaintiffs' Answer only underscores that the Court should grant review.

Plaintiffs do not dispute that the Court of Appeal's opinion ("Opinion") conflicts with the Second District's decision in *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666 ("*California Water*"), in which another petition for review is pending. Nor do they dispute that the conflict will create serious confusion for California counties that administer well-construction permit programs. They suggest that the Court depublish the *California Water* decision, but they neglect to explain how doing so could possibly solve the problem. In fact, it would only exacerbate the confusion. The only real solution is for this Court to grant review and resolve the conflict.

Plaintiffs have identified additional issues presented by the Opinion. The County agrees that the Court should grant review on those issues, and indeed, they are already within the scope of the issue set out in the County's Petition. These issues go to the

question whether the standards for well construction in the Department of Water Resources ("DWR") Bulletin and the County's well-construction permitting ordinance create sufficient discretion for the County Department of Environmental Resources ("DER") to trigger the California Environmental Quality Act ("CEQA").

As demonstrated in the Petition, the split between the Fifth and Second Districts has created confusion for counties, which must implement statewide standards for the construction of groundwater wells. Moreover, the Opinion here would require DER—and other county permitting agencies that hope to avoid litigation from Plaintiffs and similar groups—to perform pointless environmental analysis because they have no legal authority to avoid the potential environmental impacts resulting from new wells. Only this Court's review can resolve these problems.

ARGUMENT

I. The Answer fails to grapple with the problem created by the split of authority, and its proposal to depublish *California Water* would only exacerbate the problem.

As the County explained in the Petition, the split of authority between the Fifth and Second Districts creates an untenable situation for counties implementing well-construction permitting

programs. (Petition at 19-22.) Plaintiffs neither dispute the existence of that problem nor offer any solution to it.

Counties are stuck in the middle of two constituencies with competing demands: groups like Plaintiffs, which seek to maximize the use of CEQA review, and applicants for permits, which seek to minimize it because of its attendant cost and delay. Counties cannot resolve the uncertainty caused by the conflicting Court of Appeal decisions by either conducting CEQA review, as the Fifth District's decision would suggest, or declining to do so, as the Second District's decision would suggest. Those that adopt the former approach open themselves to lawsuits by permit applicants, who will point to the *California Water* decision as holding that CEQA is inapplicable because well-construction permits are ministerial. On the other hand, counties that decline to apply CEQA will find themselves sued by groups like Plaintiffs here and those in *California Water*, which will continue to argue that the Fifth District's decision was correct and the Second District's was wrong.

Plaintiffs do not dispute that counties face this "damned if you do, damned if you don't" situation. Instead, they suggest that

the Court should order the *California Water* case depublished.[1] (Answer at 8-9.) They assert, without explanation, that doing so would "eliminate [the County's] concern." (*Ibid.*) The suggestion is perplexing.

In fact, depublication would only create *more* uncertainty. Counties would still need to predict how a court would view the inevitable challenge—from one side or the other—to their decisions. At the moment, at least counties in the Second District can predict with some confidence the outcome of a future case challenging permits issued without CEQA review. If the decision were depublished, even that solid ground would be completely eroded. Depublication would only create more opportunities for relitigation of the issue presented here and in *California Water*.

The obvious inadequacy of Plaintiffs' proposed solution only emphasizes that this Court must grant review to resolve the problems caused by the split of authority. The Court should decline Plaintiffs' invitation to blithely sweep the issues presented under

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[1] Plaintiffs' answer is plainly defective if construed as a request for depublication of *California Water*. It is untimely and was not served on the court and parties in that action. (Cal. R. Ct. 8.1125(a)(4), (5).)

the rug. It should instead grant the petition and *resolve* those issues.

II. Plaintiffs' proposed additional issues bolster the arguments in favor of review.

Plaintiffs devote the majority of their Answer to arguing the merits of three additional questions that they ask the Court to consider if it grants review: (1) whether the County's ordinance incorporates "general discretionary standards" from the Bulletin, a question the Court of Appeal declined to answer; (2) whether specific standards in the Bulletin that the Court of Appeal found to be ministerial confer sufficient discretion to require CEQA review; and (3) whether DER has authority to impose measures on well-construction permits to mitigate significant environmental impacts beyond the scope of the authority provided in the well-permitting ordinance. (Answer at 9-10.)

The County disagrees with Plaintiffs' arguments on the merits of these issues, but it agrees that Plaintiffs' proposed issues for review are potentially important. Indeed, each of those issues is arguably encompassed by the County's issue presented for review. (Petition at 7-8.) All three of Plaintiffs' issues go to the important overarching question here: whether the statewide DWR Bulletin,

as incorporated by local ordinances, creates sufficient discretion to trigger CEQA. That is the issue that divided the Fifth and Second Districts, and it deserves this Court's review.

A. Plaintiffs' first additional issue is potentially important, but not essential.

In their first proposed additional issue for review, Plaintiffs ask, "Does Stanislaus County's local groundwater well permit ordinance incorporate the state Bulletins' general discretionary standards, and thereby confer discretionary authority triggering CEQA review?" (Answer at 9.) This issue presents the question of which portions of the DWR Bulletin are incorporated by reference by local ordinances. (Answer at 9, 15.) As noted in the Petition, both the Stanislaus ordinance and the San Luis Obispo ordinance at issue in *California Water* include substantially identical provisions that adopt and incorporate the "standards . . . as set forth" in the DWR Bulletin. (Petition at 19.) The Court of Appeal here expressly declined to answer the question whether the County's ordinance adopted the Bulletin lock, stock, and barrel, as Plaintiffs contend, or whether it adopted only the standards specifically set forth in the Bulletin, as the County contends. (Opinion at 10, fn.

9.) The Second District did not address this question at all. (*California Water, supra,* 25 Cal.App.5th 666, 675-76.)

This is a straightforward question of the meaning of the Stanislaus (and identical San Luis Obispo) ordinance, and thus standing alone, would not justify review. However, the answer to that question could affect the answer to the question whether the DWR Bulletin calls on permitting agencies to exercise sufficient discretion to trigger CEQA. Moreover, if the Court does not address this (purely legal) question, the Fifth and Second Districts might need to address it on remand, potentially undoing whatever result this Court reaches. Since the issue is common to this case and *California Water*, the County agrees it would be helpful for the Court to resolve it.

B. Plaintiffs' second issue is wholly within the scope of the County's issue.

As their second proposed issue, Plaintiffs ask, "Do the state Bulletins' specific discretionary standards referenced in footnote 8 of the Opinion confer discretionary authority triggering CEQA review?" (Answer at 9.) This issue asks the Court to determine whether several of the well-construction standards in the DWR Bulletin—standards that the parties agree were incorporated by

the County's ordinance—confer sufficient discretion to trigger CEQA review. The Opinion distinguished these standards, which address the location and sealing of wells, from the well-spacing standard that the court found to be discretionary. (Opinion at 10, fn. 8.) The court found those standards "more objective" and thus ministerial. (*Ibid*.)

There is no split of authority on this issue, as both the Fifth and Second Districts agreed (implicitly or explicitly) that these standards do not create sufficient discretion to trigger CEQA. However, given that these standards were incorporated by the county ordinances, the issue is within the scope of the County's proposed issue for review: whether the DWR Bulletin's standards incorporated by the County's ordinance create sufficient discretion to trigger CEQA. The County therefore agrees that the Court should resolve that issue if it grants review.

C. Plaintiffs' third proposed issue lies at the heart of the County's broader issue and presents an important question of law for this Court to resolve.

As their third proposed issue, Plaintiffs ask, "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?" (Answer at 9-10.) This issue is crucial for resolving the County's broader issue and is therefore within the scope of that issue.

Although Plaintiffs studiously avoid calling it by its name, the "functional test" for discretion triggers CEQA review only where the agency has sufficient authority to meaningfully affect the outcome of the project in ways that could avoid or moderate the environmental impacts revealed by CEQA review. (See Petition at 23-26.) Plaintiffs' third issue goes to the scope of DER's authority to impose conditions on well-construction permits to mitigate environmental impacts and thus is integral to applying the functional test. If, as Plaintiffs contend, DER has authority to require permit applicants to mitigate the full panoply of potential impacts—despite DER's sharply constrained regulatory authority under the ordinance and the DWR Bulletin—then the functional test would dictate that DER's permitting decisions are discretionary.

Plaintiffs appear to contend that DER's authority to mitigate the impacts of well permits is broader than that conferred by the well-permitting ordinance. (See Answer at 19 ["[T]he only

authority that DER lacks is the authority to approve a well permit unless and until CEQA's requirements are satisfied."]; see also *id*. at 18-21.) Yet they never explain *where* that authority would come from or offer case law or statutory citations to support their position.

In fact, the Legislature rejected Plaintiffs' argument when it adopted Public Resources Code section 21004, which clarifies that "'a public agency may exercise only those express or implied powers provided by law *other than*' CEQA." (*Sierra Club v. Cal. Coastal Com*. (2005) 35 Cal.4th 839, 864 (quoting Pub. Resources Code § 21004 and discussing its legislative history); see also *San Franciscans for Reasonable Growth v. City & County of S.F.* (1989) 209 Cal.App.3d 1502, 1525 ["[T]he Legislature enacted section 21004 to clarify that CEQA does *not* 'confer on public agencies independent authority to levy fees, impose exactions, and take other actions in order to comply with the general requirement . . . that significant effects on the environment be mitigated or avoided.'"]; CEQA Guidelines § 15040(b) ["CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws."].)

The same principle governs the determination of whether an agency has authority to act with meaningful discretion—the scope of the agency's authority is dictated by applicable law other than CEQA. (See CEQA Guidelines § 15002(i)(2) ["Whether an agency has discretionary or ministerial controls over a project depends on the authority granted by the law providing the controls over the activity."].) Indeed, this is a fundamental premise of the functional test for discretion. (See Petition at 25-26.)

Plaintiffs' third issue is thus central to resolving the problem created by the Fifth District's Opinion: DER would be obligated to perform extensive environmental review without authority to act on the information generated by that review. As explained in the Petition, the County's objection is not to performing CEQA review; it is to performing *futile* CEQA review. (Petition at 26-35.) The Opinion places DER in the position of having to perform that review and then doing either of the following:

(1) impose mitigation measures that it believes are outside the scope of its legal authority and thus invite near certain litigation from the permit applicant, or

(2) find that virtually all potential mitigation measures are legally infeasible because they are outside DER's authority and thus invite near certain litigation from Plaintiffs or similar groups.

(See Petition at 30.) Resolving Plaintiffs' third issue is essential to inform counties about which route they must take and to prevent further litigation when they take it.

CONCLUSION

In the Petition, the County explained the quandary for counties created by the Fifth District's Opinion and its split with the Second District. Plaintiffs have offered no rejoinder. Because this case involves both a split of authority and a significant legal question, and both create practical statewide problems, this Court should grant the Petition.

November 2, 2018 SHUTE, MIHALY & WEINBERGER LLP
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CERTIFICATE OF WORD COUNT

I certify that this petition contains 2,182 words, including footnotes but not including the caption, this certificate, the tables of contents and authorities, and the attachments, according to the word count function of the computer program used to produce the petition. The length of this petition therefore complies with the requirements of Rule 8.504(d)(1) of the California Rules of Court.

November 2, 2018 SHUTE, MIHALY & WEINBERGER LLP
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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