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

DEFENDANTS' OPENING BRIEF ON THE MERITS

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

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1. [As stated in the Petition for Review] The state Department of Water Resources publishes construction standards for wells to ensure they will not contaminate groundwater. Many counties, including Defendant Stanislaus County, implement those standards by requiring permits for well-construction. These permits cannot be denied or modified to address any environmental impact other than to adjust a well's distance from a potential source of contamination. The Court of Appeal concluded that this represents enough discretion to trigger application of the California Environmental Quality Act ("CEQA").

Was the Court of Appeal here correct, or was the Second District Court of Appeal in *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666 correct in holding that the same state standards are not discretionary because they provide insufficient authority to require mitigation for environmental impacts that might be revealed by CEQA review?

2. [As stated in the Answer to Petition for Review]

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?

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

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?[1]

PRELIMINARY STATEMENT

This Court granted Stanislaus County's petition for review to resolve a split between the Fifth and Second District Courts of Appeal over whether the California Environmental Quality Act ("CEQA") applies to local governments' issuance of permits for construction of groundwater wells. CEQA applies only to discretionary agency actions, and the two courts disagreed about whether the standards for well-construction permits make the approval of those permits discretionary or ministerial.

The state Department of Water Resources ("DWR") has adopted *Bulletin No. 74: Water Well Standards, State of California* ("Bulletin"), which provides model design and construction standards to prevent wells from inadvertently contaminating groundwater. Stanislaus and other counties throughout the state have adopted ordinances incorporating the Bulletin's standards with some local modifications. These ordinances require a permit for the construction of new wells. The County Department of En-

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[1] The Answer to the Petition for Review included a fourth question for review about due process that applies only to a related case, *Coston v. County of Stanislaus* (No. S251709). Unlike *Coston*, this case involves no due process claim, and thus inclusion of that issue in the Answer appears to be an error. The County accordingly does not address it here.

vironmental Resources ("DER") applies the Bulletin's standards, as modified by the County's ordinance, in issuing well-construction permits.

In *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666 (*"California Water"*), the Second District held that the Bulletin's standards do not call for San Luis Obispo County's permitting agency to exercise discretion in issuing well-construction permits and thus that those permits are not subject to CEQA. In this case, the Fifth District reached the opposite conclusion, based on one portion of one standard in the Bulletin, which requires that wells be separated from sources of potential groundwater contamination.

The court in *California Water* was correct. The Bulletin provides dozens of technical standards that govern the design and construction of wells statewide, across an array of physical conditions. County agencies apply relevant portions of the Bulletin's standards to the particular conditions on each property when issuing permits. The court below erred in holding that these permits are discretionary based solely on a single word—"adequate"—in one sentence of one of these standards.

Recognizing that the difference between ministerial and discretionary action is not binary, courts have developed a "functional test" for discretion under CEQA. Under that test, courts look to whether the applicable statute or ordinance gives the agency sufficient authority to alter the project to avoid or minimize the proposed project's environmental consequences. If so, the project is discretionary. As this Court has held, that test "rec-

ognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an [Environmental Impact Report] . . . environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 117.)

The County's concern in petitioning for review was precisely that: the decision below would force DER to conduct CEQA review for well-construction permits although it lacks the ability to require permittees to mitigate their environmental impacts. As the Court of Appeal acknowledged, DER can, at most, require a permit applicant to shift the location of a well away from a source of potential contamination or modify the depth or material of the well casing. It can do nothing to affect the amount of water pumped or the activities for which that water is used. Nor can it alter the location of the well for any other purpose, such as to avoid habitat or interference with a neighbor's well.

The Court of Appeal believed its conclusion was dictated by CEQA, and thus, while recognizing the potentially counterproductive consequences of its decision, it directed the County to the Legislature for relief. But that legislative referral was unnecessary. The established test for discretion is not so rigid that it requires futile environmental review, as the *California Water* decision shows. This Court should reverse the decision below and thereby create uniformity for the 47 counties that apply the Bulletin's standards in issuing well-construction permits.

STATUTORY BACKGROUND

I. Groundwater well permitting in California

The state Department of Water Resources first published *Bulletin No. 74: Water Well Standards, State of California* 50 years ago to advise local governments how to protect groundwater "against adverse effects caused by improper well construction or abandonment." (Appellants' Appendix ("AA") 2:196.) From the outset, Bulletin 74 focused narrowly on practices and materials that would prevent new wells from introducing contaminants to groundwater. (AA 2:194 [Bulletin 74: wells should be designed to protect "those subsurface conditions which existed prior to construction of the well and which prevented the entrance of waters of unsanitary and inferior mineral quality into usable ground water supplies"].) Accordingly, Bulletin 74 recommended technical standards for the design, construction, and destruction of wells that local agencies should implement to prevent wells from introducing contaminants to groundwater. (AA 2:199, 210-35.)

DWR later updated and expanded the Bulletin, publishing a revised version in 1981 and an update to some standards in 1991. Together, Bulletin 74-81 and 74-90 (collectively, "the Bulletin") provide the current standards. (AA 3:433, fn. 1; 3:521, 536.) Throughout the revisions, each iteration of Bulletin 74 has maintained its fundamental focus on ensuring that "wells [are] constructed . . . such that they do not contribute to the impairment of the quality of California's ground water supplies." (AA 3:431; see also AA 3:536.)

The original Bulletin 74 and Bulletin 74-81 provided recommendations, rather than mandatory standards for well construction. Then 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.[2] (Stats. 1986, ch. 1152, § 4; see also Water Code § 13801(c); AA 3:536.) In doing so, the Legislature reiterated the concern behind the Bulletin that "[i]mproperly constructed and abandoned water wells . . . can allow contaminated water on the surface to flow down the well casing, thereby contaminating the usable groundwater." (Water Code § 13701(b); see also Stats. 1986, ch. 1152, § 1.) As a result, counties and local water agencies throughout the state now regulate well construction and destruction by incorporating into their own ordinances, and in some cases modifying, the standards provided in the Bulletin.

In 1973, long before Water Code section 13801 required it to act, the County adopted its well-construction ordinance—codified as Chapter 9.36 of the County Code ("Ordinance" or "Chapter 9.36")—which incorporates portions of the Bulletin. (See Stanislaus County Code § 9.36.150 ["[S]tandards for the construction, repair, reconstruction or abandonment of wells shall be as

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[2] It also called on the State Water Resources Control Board to develop a model ordinance, which would apply in local jurisdictions that failed to adopt their own ordinances. (Water Code § 13801(d).)

set forth in Chapter II" of the Bulletin, except standards expressly modified or supplemented in Chapter 9.36.].)[3] Currently, 47 of the state's 58 counties, ranging from Del Norte to Imperial, incorporate the Bulletin's standards into their local ordinances, using substantially the same incorporation language as in Stanislaus County's Ordinance. (Defendants' Request for Judicial Notice ("DRJN"), Ex. 1; see also *California Water, supra,* 25 Cal.App.5th 666, 675-76 [discussing San Luis Obispo County's ordinance].) Each of these counties, like Stanislaus, relies principally on the Bulletin to provide the standards governing well-construction. Many counties add provisions tailored to address local needs. (E.g., § 9.36.070 [Stanislaus; excusing certain agricultural wells from annular seal requirement]; DRJN, Ex. 1 [Merced; requiring that groundwater wells penetrating Corcoran clay be constructed to prevent intermixing of water above and below the clay layer]; *ibid.* [Kern; prohibiting injection of chemicals into well discharge pipes].) But the Bulletin's default standards, including those governing well location and seal depth discussed below, govern most well-construction throughout the state.

II. The CEQA process

An agency begins the three-step CEQA process by determining whether a proposed action is a discretionary project. (Pub.

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[3] Further unspecified statutory references are to the County Code. Copies of Chapters 9.36 and 9.37 of the Code (AA 1:148-51, 153-58) are attached to this brief for ease of reference.

Resources Code § 21080(a); Cal. Code Regs. tit. 14 ("CEQA Guidelines") § 15002(i).) A *project* is an activity either undertaken or approved by a public agency which may cause a physical change in the environment. (Pub. Resources Code § 21065; CEQA Guidelines § 15378.) "A *discretionary* project is one subject to 'judgmental controls'" that require agency staff to make decisions based on its own independent reasoning rather than objective constraints. (*Mountain Lion Foundation, supra,* 16 Cal.4th 105, 112.) Only discretionary approvals are subject to CEQA.

Second, if the action is discretionary, the agency must determine whether it is nevertheless exempt under a statutory or categorical exemption. (Pub. Resources Code §§ 21080(b), 21080.01-.07; CEQA Guidelines §§ 15300-33.) If the action is exempt under either scenario, no CEQA compliance is required.

Third, for actions subject to CEQA, the agency conducts an initial study to determine if the project may have a significant effect on the environment. (CEQA Guidelines § 15063(a).) If there is no substantial evidence that the project may cause a significant effect on the environment, the agency prepares a negative declaration that briefly describes the reasons supporting its determination. (See *id.* §§ 15063(b)(2), 15070-75.) Otherwise, it must prepare a full environmental impact report ("EIR"). (*Id.* §§ 15063(b)(1), 15080-97; Pub. Resources Code §§ 21100, 21151.)

In the initial study and any eventual EIR, the agency must consider all reasonably foreseeable direct and indirect impacts on the environment, including cumulative impacts. (See CEQA Guidelines §§ 15064(d), (h), 15355 ["'Cumulative impacts' refer to

two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts."].) An EIR also must identify project alternatives and mitigation measures that would reduce the severity of significant impacts. (CEQA Guidelines § 15126.6.) If the agency approves the action, it must adopt mitigation measures, if feasible, as conditions of its approval. (Pub. Resources Code § 21002.) The CEQA Guidelines define "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (CEQA Guidelines § 15364.) If an agency lacks authority to require a mitigation measure as a condition of approval, then it may find the measure infeasible and need not adopt it. (*Id.* § 15126.4(a)(5); see also *id.* § 15091(a).)

STATEMENT OF THE CASE

I. The County adopts the Ordinance in 1973 to require permits for the construction of groundwater wells.

In 1973, shortly after DWR first issued the Bulletin, the County Board of Supervisors enacted the Ordinance "to protect the ground waters of the state . . . by regulating the location, construction, maintenance, abandonment and destruction of all wells which may affect the quality and potability of underground waters." (§ 9.36.010; see also AA 3:664-72 [Ordinance No. N.S.-443], 3:674 [Staff report for adoption of the Ordinance: "the intent of the Ordinance[] is[] protecting our underground water supply from degradation through improper construction of water wells in this county"].)

The Ordinance requires every person seeking to construct, repair, or destroy a well in the County to first obtain a permit from DER.[4] (See AA 3:664-72, 1:148-51; § 9.36.030.) DER applies the "standards for the construction, repair, reconstruction or abandonment of wells . . . as set forth in Chapter II" of the Bulletin to the permit application, except standards expressly modified or supplemented in Chapter 9.36.[5] (§ 9.36.150.)

The Bulletin's standards adopted by the Ordinance govern three types of wells: water (serving domestic, agricultural, and industrial uses), monitoring, and cathodic protection.[6] (AA 3:521, 536-37, 541-601; see also AA 3:447-81.) For each type of well, the Bulletin specifies standards for construction—including subsections governing location, sealing, surface construction, casing, and development, with additional standards applicable to monitoring and cathodic protection wells—and destruction. (E.g., AA

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[4] Plaintiffs in this case have challenged only the County's issuance of groundwater well *construction* permits. (AA 1:8-31 [Complaint].)

[5] Modified or supplemental construction standards include sections 9.36.060 (wells must prevent surface water and "foreign matter" from entering the well), 9.36.070 (requiring a sanitary seal and, on non-agricultural wells, an "annular seal"), and 9.36.080 (well equipment must be disinfected).

[6] Cathodic protection wells "house devices to minimize electrolytic corrosion of metallic pipelines, tanks, and other facilities in contact with the ground." (AA 3:584.)

3:525-532.) For example, standards for water well construction include the following:

- *Bulletin Section 8(A-D): Well Location with Respect to Pollutants, Contaminants, and Structures*—Establishes minimum safe distances between wells and, e.g., sewer lines, leach fields, cesspools, or animal enclosures, which shall be increased in the event of "adverse conditions"; wells should be located up gradient from contaminants and outside of areas that flood; the ground surface must slope away from the well (AA 3:450-53; 3:542-43).

- *Bulletin Section 9(A-F): Sealing the Upper Annular Space*[7]—Sets minimum depths of well seals below ground for six types of wells with additional conditions based on the surrounding soil type; specifies appropriate sealing materials, including types of cement and clay, ratios of cement to water, and minimum setting times; provides a mathematical formula for minimum seal thickness; specifies sealing methods (AA 3:453-460; 3:543-52).

- *Bulletin Section 10(A-F): Surface Construction Features*—Well openings must be above the surface of the ground and covered by a watertight cap; requires check valves and air vents in particular instances (AA 3:460-64; 3:552-54).

- *Bulletin Section 12(A-B): Casing*—Lists grades of steel, plastic, and concrete approved for use in well casings; designates appropriate methods for installing and joining casing segments (AA 3:465-470; 3:554-56).

If an application complies with the distance, design, and other applicable standards set forth in Chapter 9.36 and the Bul-

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[7] The "annular space" is the "space between two well casings or between the casing and the wall of the drilled hole." (AA 3:485.)

letin, DER issues the permit. DER issues hundreds of these permits each year. (AA 3:716 [Stipulated Fact 11].)

The County has always considered review of these well-construction permits to be a ministerial function of DER and thus exempt from CEQA. (AA 3:715-16 [Stipulated Facts 2, 3, 9(a)(3), 9(b)(2)].) In fact, when the Board of Supervisors first adopted implementing procedures for CEQA in 1983, it included well-construction permits on its list of ministerial approvals. (AA 3:680, 689; see also CEQA Guidelines § 15268(c) [each agency should "provide an identification or itemization of its projects and actions which are deemed ministerial"].)

The Ordinance also allows applicants for well-construction permits to request a variance from one or more requirements of the Ordinance. (§ 9.36.110.) The variance process is distinct from DER's consideration of standard, non-variance well-construction permits. (AA 3:715-16 [Stipulated Facts 2, 3, 9].) It confers discretion on the County health officer to "authorize an exception to any provision of this chapter [9.36] when, in his/her opinion, the application of such provision is unnecessary." (§ 9.36.110.) The health officer "shall prescribe thereon such conditions as, in his or her judgment, are necessary to protect the waters of the state from pollution." (*Ibid.*) The County acknowledges that variance permits are discretionary, and DER would perform environmental review under CEQA before issuing any variance permit. (AA 3:715-16 [Stipulated Fact 9(b)(1)].) Plaintiffs do not challenge the County's issuance of variance permits.

II. The State and County begin to regulate groundwater extraction in 2014.

Given its exclusive focus on preventing improper well design and construction from contaminating groundwater, the Ordinance—and the Bulletin's standards that it incorporated—did nothing to control the extraction or use of groundwater. (See *California Water, supra,* 25 Cal.App.5th 666, 677.) Indeed, few jurisdictions have regulated groundwater extraction until recently. In 2014, responding to a historic drought and largely unregulated overdraft of groundwater, both the State and County passed legislation to regulate groundwater extraction for the first time.

The Sustainable Groundwater Management Act ("SGMA") (Stats. 2014, chs. 346-348 (codified at Water Code §§ 10721 *et seq.*)) requires that public water agencies, counties, and other local agencies adopt groundwater sustainability plans by 2020 or 2022 and that those plans result in sustainable groundwater management within 50 years. (See Water Code §§ 10721(k), (r), (v), 10727, 10727.2(c).) SGMA defines sustainable groundwater management as practices that avoid the "undesirable results" of depleted groundwater levels, reduced aquifer storage capacity, degraded groundwater quality, land subsidence, and impacts on interconnected surface water. (*Id.* § 10721(x).)

In November 2014, after several years of policy development, the Board of Supervisors amended Chapter 9.37 of the County Code to regulate groundwater extraction in the County. (AA 3:715 [Stipulated Fact 4]; see also AA 1:160-68 [Ordinance No. C.S. 1155].) Chapter 9.37 now requires applicants for well-

construction permits to demonstrate that proposed wells will not cause or substantially contribute to the "unsustainable extraction of groundwater."[8] (§§ 9.37.040(A), 9.37.050(A).) It defines unsustainable extraction as use of groundwater in a manner that, over the long term, will substantially contribute to the same "undesirable results" identified in SGMA.[9] (§ 9.37.030(6), (8)-(9).)

For permits subject to Chapter 9.37, DER must determine if use of the proposed well will cause impacts such as "[s]ignificant and unreasonable" reductions in groundwater storage, degradation of water quality, and land subsidence. (§ 9.37.030.) Chapter 9.37 does not define or limit what makes an impact "significant" or "unreasonable." (*Ibid.*) These determinations fall within DER's delegated discretion and are subject to CEQA. (AA 3:715-16 [Stipulated Fact 9(a)(2)].)

Since the County's amendment of Chapter 9.37, DER regulates well construction in a two-step process. DER first determines whether the proposed permit is subject to regulation under Chapter 9.37. (AA 3:715-16 [Stipulated Fact 9(a)].) If the permit is exempt from the prohibition on "unsustainable extraction of groundwater" in Chapter 9.37, DER evaluates the application

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[8] Chapter 9.37 exempts small wells and wells subject to a water agency's approved groundwater management plan. (§§ 9.37.050(A), 9.37.030(10).)

[9] San Luis Obispo County also adopted a groundwater conservation ordinance in 2015. (See *California Water, supra*, 25 Cal.App.5th 666, 678-79.)

solely under Chapter 9.36. (AA 3:715-16 [Stipulated Fact 9(a)(1)].) This second group of well-construction permits governed only by Chapter 9.36 is at issue in this case.

III. Plaintiffs sue. The trial court holds that well-construction permits are ministerial, but the Court of Appeal reverses.

In January 2014, during a severe, multi-year drought, Plaintiffs challenged the County's implementation of its well-construction permit program. They alleged that the County's longstanding "pattern and practice" of treating well-construction permits as ministerial, and thus exempt from CEQA, violates the statute. (AA 1:11.) After a trial based on stipulated facts, the superior court agreed with the County that DER's issuance of well-construction permits is ministerial and thus exempt from CEQA. (AA 1:68, 73-75 [Stipulated Facts], 3:740-53 [Statement of Decision].) The trial court recognized the significance of the drought and Plaintiffs' attempt to address groundwater depletion through this litigation (AA 4:834), but it concluded that "[n]either the Well Permitting Ordinance nor Bulletin No. 74 was intended to address groundwater quantity or the consequences of the use of groundwater, and thus they do not authorize DER to do so" (AA 4:843).

Plaintiffs appealed. On June 28, 2018, after full briefing and argument but before the court issued its decision in this case, the Second District Court of Appeal rejected a CEQA challenge to San Luis Obispo County's substantively identical well-permitting ordinance, which also adopts the Bulletin's standards. (*California Water, supra*, 25 Cal.App.5th 666.) The Second District held that

"[n]o aspect of that ordinance, or the DWR standards it incorporates, supports an interpretation that well permits are discretionary." (*Id.* at 679.)

The Fifth District Court of Appeal then issued the opinion in this case on August 24, 2018 ("Opinion"). Based on one part of a single standard in the Bulletin, the court held that "the County retains discretion to determine whether a well will be placed an 'adequate' distance from a contamination source," and thus "the issuance of well construction permits is a 'discretionary' decision for CEQA purposes." (Opinion at 2.) That well-separation standard lists default minimum distances between wells and common sources of contamination such as septic tanks. (AA 3:542-43.) It also allows the enforcing agency to adjust the default distances to address unusually "adverse" conditions or conditions that preclude compliance with the default minimum distances. (AA 3:543.)

The Opinion distinguished this language from other standards that it found ministerial, including those for locating wells upgradient from contamination sources and outside areas of flooding "where possible." (Opinion at 10, fn. 8.) The Court of Appeal also declined to decide whether section 9.36.150 of the Ordinance incorporates general language in the Bulletin about the ability of local governments to adopt different standards to address local conditions, which Plaintiffs had claimed create discretion. (Opinion at 10, fn. 9.)

The court recognized that its decision could require the County to undertake futile environmental review in many cases.

(Opinion at 2-3, 21-22.) The court nevertheless concluded that such result was dictated by CEQA and that the County's remedy lay with the Legislature. (*Id.* at 2-3.)

The County filed its Petition for Review on October 3, 2018. This Court granted review on November 14, 2018.[10]

STANDARD OF REVIEW

Where the facts are undisputed, as here, conclusions of law are reviewed de novo on appeal. (*E.g., Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; see AA 3:715-17 [Stipulated Facts].) However, an agency's determination that its approval is ministerial is entitled to deference. (CEQA Guidelines § 15268(a); *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178 ("*Napa County Bd.*"); see also Section III, *post*.)

ARGUMENT

I. CEQA applies to a local agency action only where the legal standards applicable to that action give the agency authority to meaningfully alter its environmental consequences.

CEQA applies only to projects subject to *discretionary* approval (Pub. Resources Code § 21080(a)), and thus not to *ministerial* projects (*id.* § 21080(b)(1); CEQA Guidelines § 15268(a)). "'Discretionary project' means a project which requires the exercise of judgment or deliberation when the public agency or body

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[10] The Court also granted review in a companion case, *Coston v. County of Stanislaus* (No. S251721), and in *California Water* (No. S251056). It stayed briefing in those cases pending resolution of this one.

decides to approve or disapprove a particular activity . . . ." (CEQA Guidelines § 15357.) It does not include "situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (*Ibid.*)

The difference between discretionary and ministerial approvals is not binary. "CEQA does not apply to an agency decision simply because the agency may exercise *some* discretion in approving the project or undertaking." (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934 ("*San Diego Navy*") (quoting Remy et al., *Guide to the California Environmental Quality Act* (11th ed. 2007) p. 85).) The CEQA Guidelines recognize that "'[m]inisterial' describes a governmental decision involving *little or no* personal judgment by the public official as to the wisdom or manner of carrying out the project." (CEQA Guidelines § 15369, italics added.) Indeed, "[i]t 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."[11] (*Johnson v. State* (1968) 69 Cal.2d 782, 788 (quoting *Ham v. County of Los Angeles* (1920) 46 Cal.App. 148, 162).)

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[11] Although it predates CEQA, *Johnson* is cited repeatedly in the CEQA Guidelines' definitions of "discretionary" and "ministerial" and in the CEQA case law. (See CEQA Guidelines §§ 15357 note, 15369 note; see also, e.g., *People v. Dept. of Housing & Community Development* (1975) 45 Cal.App.3d 185, 192 ("*HCD*").)

Thus, "the discretion must be of a certain kind" to trigger CEQA: the agency must have authority to deny or modify the proposed project to "*meaningfully address* any environmental concerns that might be identified in the EIR." (*San Diego Navy, supra,* 185 Cal.App.4th at 933, 934, italics added (citing *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266-67); *accord Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 18-19, 23-24, 29-30 ("*County of Sonoma*") (following *San Diego Navy*); *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394-95 [city's decision to draft water from reservoir was ministerial where it "could do little or nothing to prevent or modify drafting of water between reservoirs to mitigate the environmental damage in any significant way"] (internal quotation marks omitted); *Napa County Bd., supra,* 205 Cal.App.4th 162, 179.) Courts have referred to this as the "functional" test for discretion. (*Friends of Westwood,* 191 Cal.App.3d at 272.)

"[I]t makes sense to exempt the ministerial [projects] from the EIR requirement" because "[n]o matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way." (*Friends of Westwood, supra,* 191 Cal.App.3d at 272.) "The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way." (*Ibid.*) This Court agreed in *Mountain Lion Foundation, supra*: "The statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a

public agency can shape the project in a way that would respond to concerns raised in an EIR . . . environmental review would be a meaningless exercise." (16 Cal.4th 105, 117 (citing *Friends of Westwood,* 191 Cal.App.3d at 267).) That pragmatism is dictated by the fact that "[t]he purpose of CEQA is not to generate paper" but rather to ensure that the project's environmental impacts are considered and, to the extent feasible, avoided. (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

In applying the functional test, a court must evaluate "the authority granted by the law providing the controls over the activity" to determine whether that law affords the agency leeway to deny or meaningfully modify the project based on the environmental impacts that CEQA review might uncover. (CEQA Guidelines § 15002(i)(2); *accord HCD, supra,* 45 Cal.App.3d 185, 192 ["The law administered by a public agency supplies the litmus for differentiating between its discretionary and ministerial functions."].) That is because CEQA does not provide agencies any authority to approve, deny, or modify a proposed project—any such authority must come from the other law that governs the agency's decision on the project. (*Sierra Club v. Cal. Coastal Com.* (2005) 35 Cal.4th 839, 859; Pub. Resources Code § 21004 ["In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division."]; Stats. 1982, ch. 1438, § 4, pp. 5484-85 [legislative finding that CEQA is "intended to be used in conjunction with discretionary powers granted to a public agency by other law"]; CEQA Guidelines §

15040(a), (b) ["CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws. [¶] CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws."].)

As explained in the sections that follow, the law that governs DER's issuance of well-construction permits—the Ordinance and those standards in the Bulletin that the Ordinance incorporates—does not give DER sufficient discretion to modify or reject proposed wells to avoid environmental impacts that might be revealed by CEQA review. The Court of Appeal accordingly erred in concluding that DER's approval of those permits is discretionary.

II. The standards in the Bulletin adopted by the County's Ordinance do not allow the County Department of Environmental Resources to exercise discretion in approving or denying well-construction permits.

As described above, the Bulletin establishes a panoply of standards that govern wells from design through destruction. It provides distinct sets of technical standards for the construction of water wells (with subsections governing location, sealing, surface construction, casing, and development) and their destruction, as well as for monitoring wells and cathodic protection wells. (See Statement of the Case Section I, *ante*; see also AA 3:525-532 [table of contents listing updated and new standards in Bulletin 74-90].) It also includes general language explaining the need for those standards and suggesting that local agencies may need to adopt different standards to suit local circumstances. Plaintiffs claim that four of the specific standards and the gen-

eral language confer discretion on DER. They are wrong on all counts.

The Court of Appeal addressed the four technical standards identified by Plaintiffs, which are found in the following portions of Chapter II of the Bulletin: Sections 8(A) ("Separation"), 8(B) ("Gradients"), 8(C) ("Flooding and Drainage"), and 9 ("Sealing the Upper Annular Space"). (Opinion at 10 & fn. 8.) The court found that only Section 8(A) confers discretion on DER, and that Sections 8(B), 8(C), and 9 require only ministerial determinations. (*Ibid.*) Nonetheless, the court held that the discretion it found in Section 8(A) was sufficient to trigger CEQA. (*Id.* at 13.) Having found a basis to reverse the trial court, the Court of Appeal then declined to resolve what had been Plaintiffs' primary claim, namely that the Ordinance also incorporates the general language from the Bulletin that Plaintiffs allege vests DER with broad, additional discretion to modify the standards in the Bulletin. (*Id.* at 10, fn. 9.)

In fact, none of the technical standards at issue satisfy CEQA's test for discretion: they provide DER with minimal leeway, far short of that necessary to meaningfully condition or deny well-construction permits to respond to information about environmental impacts generated by CEQA review. Further, the statements in the Bulletin that local governments may need to develop different standards for local conditions give DER no discretion. DER's authority is established by the Ordinance, not the Bulletin. The Ordinance does not adopt that language from the

Bulletin, but rather only the "standards" that are "set forth" in the Bulletin (§ 9.36.150).

In contrast with the court below, the Second District in *California Water, supra,* reached the right result in a CEQA challenge under San Luis Obispo County's similar well-permitting ordinance. The court there held that "[n]o aspect of that ordinance, or the DWR standards it incorporates, supports an interpretation that well permits are discretionary." (25 Cal.App.5th 666, 679.) Although the Fifth District here was aware of that decision (Opinion at 18, fn. 18), it mistakenly disregarded it. In resolving this split, the Court should go the way of *California Water*.

A. The technical standards adopted by the Ordinance do not give DER sufficient discretion to deny or modify well-construction permits to mitigate environmental impacts.

The standards in dispute here—four, out of the dozens of technical specifications for wells prescribed by the Bulletin—require applicants to separate groundwater wells from sources of potential contamination and establish the depths of annular seals. The Court of Appeal correctly held that the standard requiring that "[w]here possible, a well shall be located up the ground water gradient from potential sources of pollution or contamination" does not confer discretion on DER. (Opinion at 10, fn. 8 [Section 8(B)].) It reached the same conclusion for the standard

requiring that "[i]f possible, a well should be located outside areas of flooding" and the requirement for specific minimum seal depths.[12] (*Ibid.* [Sections 8(C) and 9].)

The Court of Appeal erred, however, in singling out only one portion of one standard as sufficiently discretionary to trigger CEQA: "[a]ll water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination" (the "well-separation standard"). (*Id.* at 11 [portion of Section 8(A)].) It held that this language confers significant discretion, reasoning that "[d]etermining whether a particular spacing is 'adequate' inherently involves subjective judgment" and thus triggers CEQA. (*Id.* at 12, 13.)

The Court of Appeal's reading of the Bulletin was mistaken in three respects. First, it read the word "adequate" in Section 8(A) in isolation, giving no weight to the remaining two pages of text in Section 8(A) (AA 3:542-43), which guide and limit DER's implementation of the well-separation standard. Second and related, the court's focus on one minor standard out of dozens was unprecedented. Finally, its decision largely ignores the functional test, under which CEQA review is triggered only if the lead agency has sufficient authority to alter a project to meaningfully avoid environmental impacts.

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[12] The Opinion discussed only the portion of Section 9 governing seal depths, but Section 9 also supplies standards governing sealing methods, materials, thickness, and placement. (Compare Opinion at 10, fn. 8 with AA 3:543-52.)

1. The Court of Appeal read the well-separation standard too narrowly, ignoring the Bulletin's guidance for well spacing.

Section 8(A) provides two pages of technical criteria that prescribe the distances between new well construction and specific facilities to prevent contaminants from those facilities from entering groundwater via the new well. (AA 3:542-43.) The court below disregarded the constraints that Section 8(A) places on DER's ability to adjust the location of a proposed well. It fixated instead on the word "adequate" in the phrase "[a]ll water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination" to find that the well-separation standard confers discretion on DER and thus requires CEQA review. (Opinion at 13 & fn. 11.)

But the Section 8(A) standard is far broader than the word "adequate" or even the phrase of which it is a part. This Court has repeatedly held that statutory or regulatory terms cannot be read in isolation, divested of their context. (E.g., *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-66; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-07; *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1391-92 & fn. 1 (Cuéllar J., concurring).) When read in its entirety, including the proper context, the well-separation standard involves "little or no personal judgment" by DER in approving permits. (CEQA Guidelines § 15369.)

Section 8(A) provides implementing agencies such as DER with criteria for what constitutes an "adequate horizontal dis-

tance" under particular physical conditions. First, it specifies default "minimum horizontal separation distance[s] between well[s] and known or potential source[s]" of contamination including sewer lines, septic facilities, cesspools, and animal enclosures. (AA 3:542.) These distances "are generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water." (*Ibid.*) The standard then directs that "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" where "adverse conditions exist." (AA 3:543.) "Lesser distances" than the listed defaults "may be acceptable where physical conditions preclude compliance with the specified minimum separation distances and where special means of protection are provided." (*Ibid.*)

The Court of Appeal acknowledged these criteria as "objective guideposts," yet wholly ignored them. (Opinion at 13, fn. 11.) It oversimplified the separation standard as giving DER autonomy to decide whether the distance between a groundwater well and a potential contamination source is "adequate." (*Ibid.* ["[T]he ultimate standard is that well/pollution separations distances must be 'adequate.'"].) The court did not explain why this portion, as opposed to the entirety of Section 8(A), is the "ultimate standard."

This Court's decision in *Tobe v. City of Santa Ana, supra,* demonstrates the error in a narrow focus on the word "adequate."

There the Court of Appeal had found a city ordinance that banned camping in public areas to be unconstitutionally vague because its definitions "were so unspecific . . . that they invited arbitrary enforcement of the ordinance in the *unfettered discretion* of the police." (9 Cal.4th 1069, 1106, italics added.) This Court reversed, concluding the Court of Appeal had erred by "isolat[ing] particular terms rather than considering them in context." (*Ibid.*) Instead, the Court held that "[t]he terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be." (*Id.* at 1107 (citing *Williams v. Garcetti* (1993) 5 Cal.4th 561, 569).) Like the Court of Appeal in *Tobe*, the court below here found the word "adequate" to be indefinite because it disregarded the term's context: the remainder of Section 8(A), which constrains DER's exercise of judgment about well separation.

In support of its selective reading of Section 8(A), the Court cited the decision in *HCD, supra*, for the proposition that the word "adequate" inherently implies discretion that triggers CEQA. (Opinion at 12-13 (citing 45 Cal.App.3d 185, 193-94).) But unlike Section 8(A), the standards in *HCD* gave no direction for the agency's exercise of judgment. Rather, the standards for mobile home parks in that case required that the agency determine "[w]hether the water supply is adequate and potable; whether sewage disposal is satisfactory; whether the site is well-drained and graded; whether lighting is sufficient; [and] whether suboptimum features call for use and occupancy restrictions." (45

Cal.App.3d at 193.) They provided no guidance for the agency's determination of what is "adequate" or "satisfactory" or "sufficient" or "sub-optimum."[13]

When read as a whole, Section 8(A) calls for DER to exercise "little or no judgment" in reviewing the separation of wells from sources of potential contamination. (See CEQA Guidelines § 15369.) The Court of Appeal erred in concentrating on a portion of that standard in isolation.

2. The Court of Appeal's "single standard" test for discretion is unsupported and unsupportable.

Even read in its entirety, Section 8(A)'s well-separation standard is only one part of the much larger regulatory scheme that applies to construction of new wells. Section 8(A) governs one parameter—which only a subset of well-construction permits implicates—out of the many that dictate DER's permitting decisions.[14]

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[13] Moreover, the agency there had unbridled authority to impose conditions on its approval of mobile home parks. (45 Cal.App.3d at 193 ["Instead of an unqualified construction permit, the enforcement agency may issue a conditional permit which prescribes ongoing conditions on use or occupancy."].)

[14] The portion of the Bulletin governing well construction also dictates the location of wells relative to groundwater flow toward or away from potential sources of contamination (Section 8(B)), areas prone to flooding (Section 8(C)), and buildings (Section 8(D)). (AA 3:543.) It also provides more than ten pages of direction about how to seal a new well (Section 9; AA 3:453-460, 3:543-

The Court of Appeal nevertheless concluded that

> the number of discretionary standards the local agency must consider is not the rubric for determining whether a permitting scheme is ministerial . . . . [I]f a *single standard* has the public official exercising subjective judgment as to how the project will be carried out, the scheme is discretionary and subject to CEQA.

(Opinion at 15, italics added.) This "single-standard" test—ignoring the role of that standard within the context of dozens of technical standards for well construction in the Bulletin—is unprecedented and creates a hair trigger for CEQA.

The "single-standard" test clashes with the approach taken in prior cases, most importantly the seminal *Friends of Westwood* case, *supra*. The court there found that a building permit for a 26-story building was discretionary because "the city retains discretion to require substantial changes in building design." (191 Cal.App.3d at 269.) The city staff "retained the power . . . to set standards for many important phases of the building project and

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552), along with further requirements for construction of well features at and above the ground surface (Section 10; AA 3:460-464; 3:552-554); disinfection (Section 11; AA 3:464); casing materials and installation (Section 12; AA 3:465-470; 3:554-56); sealing off strata of contaminated groundwater (Section 13; AA 3:470); well development (Section 14; AA 3:470-472, 3:556-557); water quality sampling (Section 15; AA 3:472); large diameter shallow wells and driven wells (Sections 16 and 17; AA 3:473-475); rehabilitation, repair, and deepening of wells (Section 18; AA 3:475); and temporary well covers (Section 19; AA 3:475-476).

to insist on modifications in the building plans to conform with those standards it created." (*Id.* at 277-78.)

The court was careful to note that CEQA is not triggered just because the agency exercises judgment on one parameter: "The fact public employees exercise their discretion to modify a single city council established standard or to impose a single condition or modification does not automatically mean the approval process is a 'discretionary project' within the meaning of Public Resources Code section 21080." (*Id.* at 280.) By contrast, "when that discretion is exercised as to several items and in the context of approval of a major project with substantial potential effects on the environment the process moves from a ministerial to a discretionary decision." (*Ibid.*) The court concluded that "the sheer quantity and consequences of discretionary decisions" made the approval subject to CEQA. (*Ibid.*)

Other courts have taken a similar approach. *HCD*, on which the Court of Appeal relied here (Opinion at 12-13), did not involve a lone standard that required some exercise of judgment, but rather a "relatively broad, relatively general" *set* of standards, each of which required the exercise of uncabined judgment. (45 Cal.App.3d 185, 193; see Section II.A.1, *ante*.) In *Napa County Board*, *supra,* the court held the county's lot-line-adjustment decisions to be ministerial despite the ordinance's requirements that the agency determine that "no public utility easement shown on a final or parcel map will be *adversely affected* by the adjustment" and that "the resulting parcel must be connected to a public sewer or be *suitable* for an on-site sewage disposal system."

(205 Cal.App.4th 162, 177, fn. 11, italics added.) Likewise, in *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, the court held that the city's grading permits were discretionary because the local ordinance "imposes *many requirements* that are discretionary." (*Id.* at 822-23, italics added.) Finally, in *California Water*, the Second District looked broadly at the Bulletin's well-construction standards, eschewing the Fifth District's approach of isolating a single standard. (25 Cal.App.5th 666, 677, 679.)

In *Mountain Lion Foundation*, *supra*, this Court found "no doubt" that the state Fish and Game Commission exercised discretion when state law directed it to "consider" delisting a species. (16 Cal.4th 105, 118.) There, the statute delegated broad discretion over the core policy decision at issue—whether to delist or continue protection of a species—to the Commission. Neither the statute nor its implementing regulations imposed limits on that determination analogous to those found in the Bulletin. (*Id.* at 118-19.) The Commission had effectively unfettered discretion over the delisting decision. The Court emphasized that the Commission decides whether delisting is "warranted" (16 Cal.4th at 118; *id.* at 115) and that a "species *may* be delisted if [the] Commission determines its existence [is] no longer threatened by enumerated factors" (*id.* at 118, italics in original; see also *id.* at 116). Nor was the challenged determination just one standard of many the agency was required to apply. Unlike the distance be-

tween a well and a source of contamination, the decision to list or delist a species was the entire "project" for CEQA purposes.[15]

Plaintiffs will argue that other standards incorporated from the Bulletin by the Ordinance and addressed in footnote 8 of the Opinion contribute to DER's alleged discretion. But they do no such thing. The Court of Appeal was correct that the standards in Sections 8(B) and 8(C) of the Bulletin merely ask DER to make the empirical determination whether an action is "possible." (Opinion at 10, fn. 8.) And Section 9 provides wholly objective requirements for the depth of well seals, including both default minimums and alternative minimum seal depths for wells drilled in locations with shallow groundwater, near potential sources of contamination, in areas subject to freezing, and within a subsurface vault. (*Ibid.*; see also AA 3:544-545.)

No court had previously held that the existence of one standard, out of many, calling for the exercise of minor judgment converts an agency's approval into a discretionary approval sufficient to trigger CEQA. DER's ability to require, for example, that a well be 120 feet from an "animal or fowl enclosure" instead of

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[15] In fact, in *Mountain Lion Foundation*, the Court was rejecting a far more sweeping contention than the County's position here: the real party in interest, Kern County, argued that there was an implied exemption for delisting decisions because of an "incompatibility" between CEQA and the California Endangered Species Act ("CESA"). (16 Cal.4th at 119; see *id.* at 116 [noting the "contention that a delisting decision is impliedly exempt from CEQA due to an irreconcilable conflict between CESA and CEQA"].)

100 feet in response to a particular soil type or degree of saturation (AA 3:542) is nothing like the far-reaching judgmental controls over projects that courts have identified as discretionary. By contrast, the Second District in *California Water* took the correct approach with the very same standards at issue here.

3. The Court of Appeal substituted a formal test of discretion for the functional test demanded by precedent.

Finally, the Court of Appeal's narrow focus described in the prior sections effectively substituted a *formal* test of discretion for the *functional* test uniformly applied by prior courts. It concluded that the Bulletin's "contamination source spacing standard" (Opinion at 12) was discretionary because "[d]etermining whether a particular [well] spacing is 'adequate' inherently involves subjective judgment." (*Id.* at 13.) But even if it was proper for the court to home in on the word "adequate" in one part of one standard, the Court erred because the existence of *some* discretion *simpliciter* is not sufficient to trigger CEQA.

Rather, as discussed in Section I, *ante,* the Guidelines and case law recognize that "CEQA does not apply to an agency decision simply because the agency may exercise *some* discretion in approving the project or undertaking." (*San Diego Navy, supra,* 185 Cal.App.4th 924, 934 (quoting Remy et al., *Guide to the California Environmental Quality Act,* p. 85); see also CEQA Guidelines § 15369 [defining "ministerial" action as involving "*little or no* personal judgment by the public official as to the wisdom or manner of carrying out the project" (italics added)].) "[T]he discretion must be of a certain kind": the agency must have authori-

ty to deny or modify the proposed project to "meaningfully address any environmental concerns that might be identified in the EIR." (*San Diego Navy,* 185 Cal.App.4th at 933, 934 (citing *Friends of Westwood, supra,* 191 Cal.App.3d 259, 266-67).) This functional test is the "touchstone" for the discretionary/ministerial distinction under CEQA. (*Id.* at 928.)

The Opinion acknowledged that DER's review of well-construction permits is narrowly constrained. The Ordinance and the incorporated Bulletin standards do "not grant the DER the authority to do anything about" concerns other than the risk that contaminants will enter a well: issues such as "groundwater consumption [are] not a permissible basis for denying a [well-construction] permit." (Opinion at 16, fn. 14; see also *id.* at 18, fn. 18 [agreeing with the court in *California Water* that "the Bulletin is concerned with groundwater contamination, not subsidence or groundwater depletion"].) DER's authority is limited to adjusting the separation of a well from sources of possible contamination (or modifying the well seal) to prevent migration of contaminants into or within groundwater, and only if it determines that the default limits are inadequate.

Yet the Court of Appeal concluded that DER's entire well-construction permitting program is discretionary solely because DER could, after full CEQA review, require greater separation of a well from a source of potential contamination. (Opinion at 13, fn. 11.) The court found that DER's discretion is "not [i]nsubstantial" (*id.* at 14) because even a small modification to

well spacing is "not minor if it is the difference between safe versus contaminated groundwater" (*id.* at 15).[16]

The ability to alter the separation between a well and an adjacent land use falls short of "meaningfully address[ing]" a project's environmental outcomes as required by the functional test. (*San Diego Navy, supra,* 185 Cal.App.4th 924, 933 (citing *Friends of Westwood, supra,* 191 Cal.App.3d 259, 266-67).) In fact, DER's authority under the Ordinance is similar to the "attenuated" authority present in *San Diego Navy, supra,* which Plaintiffs have strained to distinguish. (See Answer at 26; AOB 33-34; ARB 20-24.) There, a developer submitted plans for design review by a city-owned development corporation, which applied aesthetic guidelines established by a development agreement. (185 Cal.App.4th 924, 929 & fn. 3.) The plaintiffs claimed that the discretion afforded by the aesthetic guidelines triggered CEQA and thus required the developer to analyze other impacts such as wa-

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[16] In fact, as the Opinion implicitly recognizes, DER's authority under the Ordinance is far narrower than protecting groundwater quality generally. It is limited to preventing groundwater contamination from specific point sources near the well. For example, DER could not impose conditions to regulate the use of chemical pesticides or fertilizers on crops irrigated by the well to avoid leaching of those contaminants into the groundwater. Its control is limited to the location, sealing, surface construction, casing, development, and destruction of wells. Nor can DER control well spacing to address issues other than contamination. For example, it could not require a well to be moved to prevent the well from interfering with a neighbor's nearby well.

ter supply and greenhouse gas emissions. (*Id.* at 930.) Applying the functional test, the court rejected their claim: "there is no basis for requiring the agency to prepare the EIR" when the "limited scope of the [corporation's] discretionary authority in conducting consistency reviews" under the aesthetic guidelines left it with "no authority to modify [the] project based on the analysis contained in the EIR."[17] (*Id.* at 938, 939.)

DER's minimal leeway to adjust well spacing is dwarfed by the range of impacts that must be considered under CEQA but over which DER has no control. Those impacts would include the impacts of building the well, including disruption from construction activities and permanent changes to the existing landscape. They would also include impacts of pumping from the well, which may include drawdown of the groundwater table, effects on neighboring groundwater users, and impacts from generating energy used to operate the well. Further, they could include all foreseeable impacts of the land use that the well would serve. For agriculture irrigated with groundwater, such impacts could include air pollutant emissions, greenhouse gas emissions, impacts to species or their habitats, traffic impacts from transporting

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[17] Plaintiffs attach great weight to the fact that the authority for design review was limited by a development agreement. (Answer at 27-29.) But they fail to explain why a decision maker's authority created by the terms of a development agreement differs from that created by an ordinance or regulation.

crops or inputs, or land use conflicts.[18] If it applied, CEQA would require evaluation of all of these direct and indirect impacts, including the cumulative impacts of the approval of multiple well permits over time. (See CEQA Guidelines §§ 15064(d), (h), 15355; see also *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1591, 1599 [an ordinance restricting application of sewage sludge on land would likely indirectly cause substantial physical changes due to emission-intensive alternative methods of disposing of the sludge].)

Yet DER would have *no authority* to avoid or minimize these impacts in taking action on a well-construction permit. It could not deny the application based on those impacts. Nor could it require alternatives to the proposed well, such as water conservation or surface water supplies. Nor could it impose conditions of approval on a permit to mitigate these potential impacts. The authority to mitigate impacts, if any, must come from sources of law other than CEQA itself. (See Section I, *ante*.) Nothing in the Ordinance allows DER to take these actions. All it can do is modify well spacing, and even then, only to address the risk that the default spacing in the Bulletin is inadequate to prevent potential groundwater contamination from a specific source.

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[18] Wells proposed for domestic use may have less substantial impacts. However, because there is no de minimis exception to CEQA, as Plaintiffs have noted (Appellants' Opening Brief ("AOB") 16; Appellants' Reply Brief ("ARB") 46), those wells may nevertheless require review.

It follows that if DER attempted to deny a permit or impose conditions of approval on it to mitigate the range of potential impacts, the permit applicant could successfully sue DER for exceeding the scope of its authority under the Ordinance. Cases applying the functional test recognize that an approval is ministerial if the applicant could obtain a writ compelling the agency to issue the approval without substantial modification. (E.g., *Friends of Westwood, supra*, 191 Cal.App.3d 259, 269; *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 309.) Applicants for a well-construction permit have a right to that permit if their application complies with Chapter 9.36. (See *California Water*, *supra*, 25 Cal.App.5th 666, 672 ["If an applicant meets fixed standards" incorporated from the Bulletin by San Luis Obispo County's well ordinance, "County must issue a well permit."].)

The County does not object to performing environmental review. The County's concern is rather that the Opinion requires it to perform *futile* environmental review: review that the County will be legally unable to implement by denying or imposing mitigation measures on a proposed well. The Court of Appeal in fact conceded that its decision could produce such results. (Opinion at 2-3, 21-22.)

> [I]t is troublesome that, for most well construction permits, the costly, time-consuming environmental review process may commonly prove unnecessary, or ultimately result in only minor alterations to the proposed well's location. Moreover, it is not difficult to imagine scenarios in which delays in addressing the problem of a residential or agricultural well going dry could cause harm, loss or hardship while ultimate

> approval of remedial action would be virtually certain.

(*Id.* at 2.) In responding to the County's concern "that CEQA review would require the County to analyze a host of environmental impacts it is powerless to address," the Court simply stated "that is not grounds for dispensing with CEQA." (*Id.* at 21; see also *id.* at 22 ["[T]he fact that some mitigation measures are outside the lead agency's authority to impose does not dispense with CEQA altogether."].) It thus suggested that the Legislature might intervene to "to provide relief from the potentially high burdens imposed by CEQA in this context." (*Id.* at 2-3; see also *id.* at 22, fn. 21.)

In fact, the court understated the counterproductive results of its decision. It neglected to note that CEQA would require review of the full range of potential direct and indirect impacts flowing from issuance of a well permit, despite the County's near total inability to mitigate them. (See *supra*.) The County could not limit its review to potential sources of groundwater contamination and the proper separation from them.[19]

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[19] The Court of Appeal also appeared to believe, mistakenly, that the County has various ways to minimize the burden of performing futile CEQA analysis. (Opinion at 21-22.) For example, it noted that "[w]hen a lead agency identifies mitigation measures that it lacks legal authority to impose, it may simply make a finding . . . that the measures are legally infeasible." (*Id.* at 21 (citing, among other things, *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715-16).) But it failed to recognize that the infeasibility of mitigation does not excuse the

The court was too quick to refer the County to the Legislature. The existing functional test for discretion is designed to avoid the need for environmental review where the lead agency lacks authority to appreciably alter the project's environmental effects. This Court should reject the view of the word "adequate" as talismanic and instead apply the functional test with the pragmatism that prior courts have brought to it.

B. The Ordinance adopts and incorporates only the "standards" that are "set forth" in the Bulletin; it does not adopt the general, hortatory language Plaintiffs have emphasized.

Plaintiffs' primary argument for discretion below was unrelated to the well-spacing standard. Rather, they emphasized general statements in the Bulletin encouraging local governments to adopt their own well-construction standards if necessary to address peculiarly local conditions. (AOB 22-28, 35-36; ARB 19, 20, 42-43; AA 2:206, 3:449-50, 522.)

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agency from going through the exercise of preparing an EIR to evaluate all of the impacts that it has no ability to mitigate. Here, that is *all* environmental impacts except the potential of contamination from a nearby source to enter a well. The court also suggested that the County could avoid preparing EIRs by instead preparing a mitigated negative declaration. (*Id.* at 22.) But an agency cannot rely on a mitigated negative declaration where the proposed mitigation is infeasible, such as where the agency has no authority to impose that mitigation. (See Pub. Resources Code §§ 21080(c), (f), (g).)

Because the Bulletin is not self-executing, that language is relevant to DER's permitting only to the extent the Board adopted and incorporated it in the Ordinance. The Board did not do so.

The Court of Appeal declined to resolve this dispute because it found the well-spacing standard to create enough discretion to trigger CEQA. (Opinion at 10, fn. 9.) Plaintiffs asked this Court to address the issue in the Answer to the Petition for Review ("Answer"). (Answer 9-10.)

The Ordinance establishes DER's authority to issue permits. The Bulletin is relevant to that authority only insofar as the Board of Supervisors adopted it when it enacted the Ordinance. The Ordinance, in section 9.36.150, adopts and incorporates only portions of the Bulletin:[20]

> Except as may be otherwise provided by this chapter [9.36], 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.

This section makes clear that that the applicable "*standards* for the construction . . . of wells" in the County "shall be" the standards that are "set forth in Chapter II" of the Bulletin, not

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[20] As noted above, more than 80 percent (47 of 58) of the county well-permitting ordinances in the State use similar language to incorporate standards from the Bulletin. (See Statement of the Case Section I, *ante*.)

some other standards that DER might develop, as Plaintiffs contend.

Plaintiffs' theory is that the Bulletin's statements that local governments may need to adopt different standards is itself a "standard" that the Ordinance incorporated in section 9.36.150. This notion is unsupportable.

"Standard" is defined as "[s]omething that is established by authority, custom, or general consent, as a model or example to be followed; criterion; test." (*Webster's Third New International Dictionary* (2002) at 2223; *accord Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 252-53.) The Board clarified its intention to limit its incorporation of the Bulletin to the specific standards therein by emphasizing that the standards "shall be as set forth in Chapter II." The phrase "set forth" denotes specification. (See *The Compact Oxford English Dictionary* (2d ed. 1991), at 1722 ["set forth," as relevant here, means "[t]o express in words, give an account of, present a statement of, *esp. in order, distinctly, or in detail*"] (italics added); *Webster's Third*, at 2077 ["to give an account or statement of: present fully and clearly"].)

The language in the Bulletin that Plaintiffs emphasized below does not "set forth" "standards" at all and therefore was neither adopted nor incorporated by the Board in section 9.36.150. First, they quoted text from the introductions to Chapter II in the 1968 and 1981 versions of the Bulletin. (AOB 24 (quoting AA 2:206 [Bulletin No. 74] and AA 3:447 [Bulletin No. 74-81]).) But those introductions do not prescribe standards. Instead, they re-

fer to standards as something described *elsewhere* in Chapter II. (AOB 24; ARB 11, fn. 4.)

Second, Plaintiffs emphasized language in the introductions to Chapter II and elsewhere noting that local governments may need to modify or supplement the "standards" in Chapter II to address local circumstances. (AOB 24 (quoting AA 2:206 [Bulletin No. 74, at 13]); *id.* at 24 (quoting AA 3:447 [Bulletin No. 74-81]); *id.* at 25 (quoting AA 3:537 [Bulletin No. 74-90]); *id.* at 26 (quoting AA 3:542-43 [Bulletin No. 74-90]).) Similarly, Plaintiffs quoted language noting that local governments "may waive compliance and prescribe alternative requirements which are 'equal to' these standards." (AOB 24-25 (quoting AA 3:449 [Bulletin No. 74-81]); *id.* at 25 [noting the necessity for "special standards" to be prescribed by the local government] (quoting AA 3:450 [Bulletin No. 74-81]).) And finally, Plaintiffs explained that Bulletin No. 74-90 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.'" (AOB at 28 (citing AA 3:545-46 [Bulletin No. 74-90]).)

None of this language "set[s] forth" "standards," and therefore it was not adopted by reference as the standards that govern DER's approval of well-construction permits. None of it is a "model or example; criterion; test" that is "established by authority." (*Engine Manufacturers Assn., supra,* 541 U.S. 246, 252-53.) Quite the opposite: that language merely recognizes that local governments can develop their own standards *different* from

those that are "set forth" in the Bulletin. In requiring DER to apply the "standards . . . set forth" in Chapter II of the Bulletin, the Board did not authorize DER to ignore or alter those very standards or apply different standards of its own devising.

In fact, in the initial clause of section 9.36.150—"[e]xcept as may be otherwise provided *by this chapter* [9.36]"—the Board reserved to itself (not to DER) the power to modify or supplement the standards in Chapter II of the Bulletin. (Italics added.) And it exercised that power. For example, while the Bulletin requires that all wells include an "annular seal" (AA 3:453 [Bulletin No. 74-81]), the Ordinance modifies that requirement: "[a]ll wells shall also have an annular seal, except agricultural wells not used for domestic purposes and located more than 300 feet from a domestic well." (§ 9.36.070.)

Moreover, DWR appears to share the County's understanding of the "standards" set forth in the Bulletin. It states in the Bulletin that "for most conditions encountered in the State, the standards presented in this report are satisfactory for the protection of ground water quality." (AA 3:447; see also AA 3:436 [noting that 34 counties had adopted ordinances that "specify the standards presented in the 1968 edition [of the Bulletin], with modifications where appropriate"].) This statement would be nonsensical if, as Plaintiffs contend, the "standards presented" in the Bulletin include the language indicating that local conditions may require local governments to adopt different standards.

In sum, the Ordinance does not adopt portions of the Bulletin describing the potential for local governments to adopt differ-

ent standards. That language thus has no bearing on DER's issuance of well-construction permits and cannot be the basis for concluding that DER's permitting program is discretionary.

III. The County's longstanding interpretation of the Ordinance and incorporated technical standards warrants deference.

The CEQA Guidelines and the courts have recognized that the lead agency should determine whether an approval is ministerial because doing so involves the agency's interpretation of its governing rules—rules that in many cases the agency itself has promulgated. Here, the question whether the County's well-construction permits are ministerial involves interpretation of both the County's Ordinance and the Bulletin. The County's determination is entitled to deference on both fronts.

Guidelines section 15268 emphasizes that "[t]he determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws." (CEQA Guidelines § 15268(a).) The Guidelines also recommend that public agencies' local CEQA procedures "[i]dentify[] the activities that are exempt from CEQA," including "[a] list of projects or permits over which the public agency has only ministerial authority." (*Id.* § 15022(a)(1); see also *id.* § 15268(c) ["Each public agency should, in its implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances."].)

The courts of appeal have followed section 15268 and held that courts should defer to an agency's determination that its ap-

proval is ministerial. In *Napa County Board, supra,* the court rejected the plaintiffs' argument that the court "should not pay any deference to the County's classification" of the challenged decisions as ministerial because "surely that is not the law." (205 Cal.App.4th 162, 178.) "Otherwise," the court continued, "why would the governing regulations [i.e., the CEQA Guidelines] acknowledge that the local public agency is the most appropriate entity to determine what is ministerial, based on analysis of its own laws and regulations, and urge that the agency make that determination in *its* implementing regulations?" (*Ibid.*) The court accordingly concluded that the county's lot-line-adjustment decisions were ministerial. (*Id.* at 181.) Other courts—including the court in *California Water*—have similarly deferred to the agency's determination, recognizing that agencies' views are "entitled to great weight unless that view is clearly erroneous or unauthorized." (*California Water, supra*, 25 Cal.App.5th 666, 675 (citing *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015); see also *County of Sonoma, supra*, 11 Cal.App.5th 11, 19, 29; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144.)

The deference demanded by section 15268(a) is an application of the "fundamental rule that interpretation of the meaning and scope of a local ordinance is, in the first instance, committed to the local agency." (*Friends of Davis, supra,* 83 Cal.App.4th 1004, 1015.) "Under well-established law," the *Friends of Davis* court held, "an agency's view of the meaning and scope of its own ordinance is entitled to great weight unless it is clearly erroneous

or unauthorized." (*Ibid.* (citing cases).) That "well-established law" dictates that "[t]he construction placed on a piece of legislation by the enacting body is of very persuasive significance." (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021; see also *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1129-30 [holding that "deference should apply to the County's interpretation of its own local zoning ordinances"].)

The County adopted the Ordinance in 1979. In 1983, the Board adopted the County's CEQA Procedures. (AA 3:676-84; see also AA 3:688 [current CEQA Procedures § 1].) Following the state CEQA Guidelines' recommendation, the County's CEQA Procedures enumerate the County's ministerial approvals, including well-construction permits. (AA 3:680 [section 3(B)(5)], 689 ["sanitary well permits"].) The County's legislatively adopted CEQA Procedures thus have recognized for over 30 years that DER's approval of well-construction permits is ministerial.

The Board's interpretation of the Ordinance and Bulletin reflected in its CEQA Procedures, is "of very persuasive significance" and entitled to "great weight" and "considerable deference" from this Court.[21] (See *City of Walnut Creek, supra,* 101

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[21] The County does not take the extreme position advanced by the city in *Day v. City of Glendale, supra,* that "CEQA and its guidelines[] ha[ve] *delegated* to local agencies the prerogative to determine which projects are ministerial." (51 Cal.App.3d 817, 821, italics added).) The court there understandably rejected the con-

Cal.App.3d 1012, 1021; *Friends of Davis, supra,* 83 Cal.App.4th 1004, 1015; *Gray, supra*, 167 Cal.App.4th 1099, 1129.)

The Court of Appeal recited that the County's interpretation was entitled to deference (Opinion at 9), but it was mere lip service. The court's analysis made no mention of that required deference.

For their part, Plaintiffs in their opening brief below contended that whether a decision is ministerial or discretionary is a question of law subject to de novo review without deference. (See AOB at 18.) In reply, they shifted positions, arguing that deference is improper here because the meaning of the Bulletin, a state agency enactment, is at stake. (ARB at 12-18.) Neither position makes sense.

Plaintiffs' initial position flouts the Guidelines, the cases applying the Guidelines, and the general case law—including this Court's—recognizing that public agency interpretations of statutes and regulations are entitled to deference. (See *Western States Petroleum Assn. v. Bd. of Equalization* (2013) 57 Cal.4th 401, 415 ("*WSPA*"); *American Coatings Assn., Inc. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 461.) The independent judgment standard of review is hardly inconsistent with deference to an agency's interpretation of statutes. (See, e.g.,

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tention that agencies have "absolute power to determine which projects are ministerial." (*Id.* at 822.) The County contends only that its determination is entitled to deference.

Assn. of Cal. Insurance Cos. v. Jones (2017) 2 Cal.5th 376, 389-90 ["These contentions implicate interpretation of the relevant statutes, which is a question of law on which this court exercises independent judgment. [Citation.] In exercising our ultimate responsibility to construe the statutory scheme, however, we 'accord[] great weight and respect' to the administrative agency's construction."] (citing *WSPA* and *American Coatings*).) Indeed, Plaintiffs' position would completely dispose of the notion of deference to agency statutory interpretation, since the meaning of statutes is *always* a question subject to de novo judicial review.

Plaintiffs' revised theory fares little better. They claim that no deference is owed the County because it was required to adopt the Bulletin's standards by state law. (ARB at 14.) But the County adopted its Ordinance, and incorporated the standards, 17 years before it was required to do so. (AA 3:664-72 [Ordinance No. N.S.-443]; Water Code § 13801(c).) Moreover, they fail to explain why the County's interpretation of the standards incorporated by the Ordinance and implemented by DER is not worthy of deference. As the Court demonstrated in *American Coatings*, *supra,* local government agencies' interpretations of state statutes that they implement are as deserving of deference as state agencies'. (54 Cal.4th 446, 452-53, 461.)

The County's determination that its delegation of well-permitting authority to DER is ministerial is fully consistent with the language of both the Ordinance and the Bulletin. This Court should therefore give "great weight" to the County's longstanding interpretation.

IV. The Court should reject Plaintiffs' claim even if it concludes that the well-separation standard in the Bulletin is discretionary.

Even if the Court concludes that the Bulletin's well-separation standard confers discretion on DER, the existence of that single discretionary standard cannot render DER's entire permitting process discretionary. Because Plaintiffs have provided no evidence that the separation standard applies to all or the vast majority of DER's well-construction permit approvals, their challenge must fail.

Plaintiffs have brought a "pattern and practice" challenge to the County's well-permitting program. Such a claim challenges "an overarching, quasi-legislative policy set by an administrative agency" and "not a specific order or decision, or even a series thereof." (*Californians for Native Salmon and Steelhead Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1424, 1429 ("*Native Salmon*"); see also *East Bay Municipal Utility Dist. v. Cal. Dept. of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1113, 1119, 1123 ("*EBMUD*") [pattern and practice claim is a challenge "to an ongoing policy or manner of making decisions"].) Such challenges are distinct from mandamus actions challenging individual agency decisions.[22] (*EBMUD*, 43 Cal.App.4th at 1121-22; *Native Salmon*, 221 Cal.App.3d at 1428-29.)

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[22] Unlike this case, the related case against the County, *Coston*, and *California Water* both were mandamus actions challenging individual permits. Plaintiffs here also previously challenged a

A court may invalidate such a governmental policy only if the plaintiff shows that the policy is invalid in all or substantially all of its potential applications. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673 [holding that the "minimum showing . . . required for a facial challenge" to an ordinance is that a challenger demonstrate that the ordinance is invalid "in the *generality* or *great majority* of cases"].) It is not enough to anticipate or "hypothesize" unlawful applications of that policy in particular circumstances. (*EBMUD, supra*, 43 Cal.App.4th 1113, 1133; *Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1418.) Although the facial-challenge standard is typically applied in judicial review of statutes, the *Sturgeon* court rejected an argument that the standard "applies *only* to challenges to statutes and ordinances, not policies or practices." (174 Cal.App.4th at 1419, italics added.)

But an agency's approval of a permit is discretionary for CEQA purposes only if the standards that apply to that *particular* permit call for the exercise of discretion. (*County of Sonoma, supra*, 11 Cal.App.5th 11, 25.) "[A]ny regulation cited as granting discretion to the agency must actually have applied to the project under review." (*Id.* at 26; see also *Prentiss v. City of South Pasa-*

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variety of specific permits in a separate mandamus action against the County, which they settled and then dismissed. (See Respondents' Brief ("RB") 24, fn. 4 [discussing *Protecting Our Water & Environmental Resources v. County of Stanislaus,* Stanislaus Superior Court Case No. 2006276].)

dena (1993) 15 Cal.App.4th 85, 97 ["The fact that discretion could conceivably be exercised in projects arising under the State Historical Building Code does not mean that *respondents'* project was discretionary."].) As a result, the existence of a single discretionary standard in an agency's governing ordinance is not sufficient to show that all approvals under that ordinance are discretionary, unless that standard inevitably applies to all or the vast majority of approvals.

In *County of Sonoma, supra,* the plaintiffs argued that issuing an erosion-control permit was "always a discretionary act," because the governing ordinance contained allegedly discretionary provisions. (11 Cal.App.5th 11, 24.) However, the court found it unnecessary to determine whether some of the cited provisions conferred discretion because they were inapplicable to the property for which the challenged permit was issued. (*Id.* at 25-26.) Those provisions were "facially inapplicable" because the property lacked the land features they addressed. (*Id.* at 26.) For that reason, and because other provisions that were potentially applicable did not confer meaningful discretion, the court held that issuing the permit was a ministerial act.[23] (*Id.* at 30.)

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[23] Similarly, in *California Water, supra,* the court rejected the plaintiff's challenge in part because it concluded that "[t]he effect of [the permit applicants'] wells on groundwater quality is not at issue," and the Bulletin's standards address only well impacts to groundwater quality. (25 Cal.App.5th 666, 677.)

Consequently, to invalidate the County's policy of issuing permits without complying with CEQA based on the Court of Appeal's holding that only one of the numerous standards in the Bulletin is discretionary, Plaintiffs must show that the standard applies to all or the "great majority" of the County's well-construction permit approvals. (See *San Remo, supra*, 27 Cal.4th 643, 673.)

In fact, Plaintiffs cannot show that the separation standard applies to some, most, or all County well permits, and their claim fails. The separation standard is only relevant when there is a potential source of contamination in the vicinity of a proposed well. (See AA 3:542; see also *County of Sonoma, supra*, 11 Cal.App.5th 11, 25-26.) But the record contains no evidence of whether or how the County applies the separation standard in its permit approvals. The County issued more than 300 well permits between January 1, 2013 and November 25, 2014 (AA 3:715 [Stipulated Fact 5]), and more than 400 permits between that point and the trial in this case (AA 3:716 [Stipulated Fact 11]). Yet the record includes only one construction permit.[24] (AA 1:80-113 [Permit Application No. 2013-271].) One permit, out of hun-

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[24] A second permit in the record, Permit 15-20, applied to a well that was to be destroyed. (AA 1:140.) That permit is irrelevant because Plaintiffs challenged only the County's practice in issuing well-*construction* permits (AA 1:8-31 [Complaint]), and the well-separation standard is a well-construction standard (AA 3:542).

dreds, is plainly insufficient evidence to show that the well-separation standard applies to all or a great majority of permits.[25]

Because there is no evidence that the County applies the well-separation standard to all or even the great majority of its permits, Plaintiffs cannot prevail on their pattern and practice claim based on that single standard, even assuming it creates discretion.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeal.

January 14, 2019

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[25] In *EBMUD*, by contrast, the plaintiffs sought to demonstrate the challenged pattern and practice of issuing Timber Harvest Plans by introducing evidence of 39 Plans. (43 Cal.App.4th 1113, 1121.) And in *Native Salmon*, the plaintiffs stated a pattern and practice claim because they "alleged policies which impact on *each* THP approval." (221 Cal.App.3d 1419, 1430, italics added.)

CERTIFICATE OF WORD COUNT

I certify that this brief contains 12,693 words, including footnotes but not including the caption, this certificate, the tables of contents and authorities, the quotation of the issues presented for review, and the attachment, according to the word count function of the computer program used to produce the brief. The length of this brief therefore complies with the requirements of Rule 8.520(c) of the California Rules of Court.

January 14, 2019

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On January 14, 2019, I served true copies of the following document(s) described as:

DEFENDANTS' OPENING BRIEF ON THE MERITS

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC SERVICE: I electronically submitted the document(s) to the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on January 14, 2019, at San Francisco, California.

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ATTACHMENT 1

Chapter 9.36 WATER WELLS

9.36.010 Purpose.

The board of supervisors declares that the purpose of this chapter is to protect the ground waters of the state for the enjoyment, health, safety and welfare of the people of the county by regulating the location, construction, maintenance, abandonment and destruction of all wells which may affect the quality and potability of underground waters. (Prior code §3-300).

9.36.020 Definitions.

For the purpose of this chapter, certain words and phrases shall be defined as follows:

A. "Cathodic protection well" means any artificial excavation in excess of fifty feet constructed by any method for the purpose of installing equipment or facilities for the protection electrically of metallic equipment in contact with the ground, commonly referred to as cathodic protection.

B. "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease.

Contamination includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

C. "Destruction of well" means the complete filling of a well in such a manner that it will not produce water or act as a conduit for the interchange of waters.

D. "Health officer" means the health officer of the county or his authorized representative.

E. "Person" means any natural person, individual, firm, partnership, company, corporation, association, joint venture, joint stock company, organization, club, company, business trust, lessee, agent, servant, officer, employee, unincorporated association or representative of same.

F. "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonable affects:

1. Such water for beneficial use; or

2. Facilities which service such beneficial uses.

Pollution may include contamination.

G. "Seal, annular" means a watertight seal placed between the well casing and the side wall of a drilled hole.

H. "Seal, sanitary" is a grout, mastic

or mechanical device to make a watertight joint between the pump and casing or the concrete base.

I. "Seal, surface" is a monolithically poured concrete platform constructed around the top of the well casing on thoroughly compacted earth.

J. "Waters of the state" means any water, surface or underground, including saline waters, within the boundaries of the state.

K. "Well pit" is an excavation in which the top of the well casing is below the ground surface.

L. "Well" or "water well," as used in this chapter, means any artificial excavation constructed by any method for the purpose of extracting water from, or injecting water into, the underground. This definition shall

not include:

1. Oil and gas wells, or geothermal wells constructed under the jurisdiction of the Department of Conservation, except those wells converted to use as water wells; or

2. Wells used for the purpose of:

a. Dewatering excavation during construction, or

b. Stabilizing hillsides or earth embankments, or

c. Dewatering agricultural areas when the discharge is to irrigation facilities only. (Prior code §3-301).

9.36.030 Permit—Required.

The owner of property upon which a well is located or proposed to be located, or his/her authorized representative, shall obtain a permit from the health officer to construct, repair or destroy any well or well seal. No person shall construct, install, repair or destroy any well or well seal without first having been furnished a copy of a valid permit for such work. A permit shall be required when any well seal is broken. The application for a permit shall be in the form prescribed by the health officer and contain such information as the health officer may require. It shall be a condition of every permit for the repair of a well or well seal that there shall be compliance with the provisions of this chapter. For the purpose of this section, the term "well" includes cathodic protection wells. (Prior code §3-302).

9.36.040 Permit—Emergency work.

In the event of an emergency, repair or replacement of a well or pumping equipment may be begun without obtaining a permit. All emergency work shall comply with the provisions of this chapter. (Prior code §3-303).

9.36.050 Permit—Application.

As soon as possible, the owner or his/her authorized representative shall apply to the health officer for a well construction permit and shall, in addition, submit a statement explaining in detail the nature of the emergency. If the health officer finds that the work done does not comply with the provisions of this chapter, he or she shall order that such additional work be performed as may be necessary to comply with this chapter, or shall order that the well will be destroyed as provided in this chapter. (Prior code §3-303).

9.36.060 Protection against surface water entrance.

All wells shall be so constructed as to prevent the entrance of surface water from any source into the well or into any aquifer. The construction of a well pit is prohibited; provided, however, a variance permit may be granted by the health officer. All pumping equipment shall be installed with protective devices to effectively prevent the entrance of foreign matter into the well casing. (Prior code §3-304).

9.36.070 Seals.

All wells shall have a sanitary seal. All wells shall also have an annular seal, except agricultural wells not used for domestic purposes and located more than three hundred feet from a domestic well. (Prior code §3-305).

9.36.080 Disinfection.

After the construction, installation, or repair of any well, or pumping equipment, and prior to its use, the well and all appurtenances thereto shall be disinfected. (Prior code §3-306).

9.36.090 Injection or recharge wells.

An injection or recharge well shall be subject to all the provisions of this chapter, except those contained in Sections 9.36.060, 9.36.070 and 9.36.080, unless compliance with these sections is required by the health officer. (Prior code §3-307).

9.36.100 Inspection.

A well site and surrounding property may be inspected by the health officer at any time prior to the destruction or construction of any well. Upon completion of the work authorized by a permit, and before the well is used, or upon the destruction of a well, the health officer shall make an inspection. (Prior code §3-308).

9.36.110 Variances.

The health officer may authorize an exception to any provision of this chapter when, in his/her opinion, the application of such provision is unnecessary. Upon application therefor, the health officer may issue a variance permit and shall prescribe thereon such conditions as, in his or her judgment, are necessary to protect the waters of the state from pollution. (Prior code §3-309).

9.36.120 Destruction authority.

Every abandoned well shall be destroyed in accordance with the methods prescribed in the standards. The health officer shall have the authority to order the destruction or repair of any well that is polluted or unsafe or is so located as likely to become polluted. (Prior code §3-310).

9.36.130 Maintenance of well out of service.

The owner shall continuously maintain, in accordance with the provisions of this chapter, any well which is out of service, so as to be safe and to prevent pollution of any aquifer. A properly maintained out-of-service well shall not be considered to be an abandoned well. (Prior code §3-311).

9.36.140 Well driller's report.

Upon completion of a well, the owner or his/her authorized representative shall file with the health officer a copy of the well driller's report, as required by the State Department of Water Resources. (Prior code §3-312).

9.36.150 Standards adopted.

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. (Prior code §3-313).

9.36.160 Fees.

The board of supervisors may establish, by resolution, a schedule of fees for permits, applications and for other services and such schedule, when adopted, shall become a part hereof. A copy of any schedule of fees established by resolution of the board shall be kept on file in the office of the clerk of the board of supervisors. (Prior code §3-314).

9.36.170 Appeal—Authorized.

Any person whose application for a permit or for an approval has been revoked or denied, may, within thirty days after the date of such denial or revocation, appeal therefrom in writing, accompanied with the appropriate appeal fees, to the board of supervisors. Such appeal shall be heard by the board at its next regular meeting thereafter, unless the appeal was filed within five days of such meeting, in which event it shall be heard at the next regular meeting subsequent thereto, and the board shall affirm or overrule the denial or revocation of the application. This section does not authorize appeals to the board from any action of the health officer authorized or required by state law or regulation. (Prior code §3-315).

9.36.180 Appeal—Hearing and action.

At the hearing of an appeal to the board of supervisors, any interested party may present oral or written evidence. Following the hearing, the board shall render a decision upon the appeal and may sustain, modify, or reverse any action of the health officer. The decision of the board shall be final. (Prior code §3-316).

9.36.190 Enforcement.

The health officer shall enforce this chapter and may perform all acts necessary or proper to accomplish the purposes of this chapter. (Prior code §3-317).

9.36.200 Penalty for violation.

Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished as set forth in Section 1.36.010. Every violation of any provision of this chapter shall be construed as a separate offense for each day during which such violation continues and shall be punishable as provided in this section. (Ord. CS 705 §17, 1999; prior code §3-318).

View the mobile version.

Chapter 9.37 GROUNDWATER

9.37.010 Title.

The ordinance codified in this chapter may be cited as the Stanislaus County Groundwater Ordinance. (Ord. CS 1155 §2, 2014; Ord. CS 1138 §1, 2013).

9.37.020 Findings.

The Stanislaus County Board of Supervisors hereby finds:

1. The protection of the health, welfare, and safety of the residents of the county require that the groundwater resources of Stanislaus County be protected from adverse impacts resulting from the specific acts of unsustainable groundwater extraction within the county and the export of water outside of the county; and

2. Groundwater is an essential resource for continued agricultural production within the county which production includes, but is not limited to, field crops, nut and fruit crops, vegetable crops, seed crops, poultry and livestock and products which significantly contribute to the gross value of the total agricultural production of the county; and

3. Groundwater is an essential resource for municipal, industrial and domestic uses within the county; and

4. The unsustainable extraction of groundwater resources within the county and the export of water outside of the county each could have adverse environmental impacts on the county, including, but not limited to, increased groundwater overdraft, land subsidence, uncontrolled movement of inferior quality groundwater, the lowering of groundwater levels, and increased groundwater degradation; and

5. The unsustainable extraction of groundwater resources within the county and the export of water outside of the county each could have adverse economic impacts on the county, including, but not limited to, loss of arable land, a decline in property values, increased pumping costs due to the lowering of groundwater levels, increased groundwater quality treatment costs, and replacement of wells due to declining groundwater levels, replacement of damaged wells, conveyance infrastructure, roads, bridges and other appurtenances, structures, or facilities due to land subsidence; and

6. California Constitution, Article X, Section 2, as well as Water Code Section 100 prohibit the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. The county finds that the unsustainable extraction of groundwater and the export of water outside of the county are presumptively inconsistent with the California Constitution and the California Water Code; and

7. Nothing in this chapter determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights; and

8. There is a critical need for water well extraction data to analyze and understand the degree of groundwater depletion or recharge, to establish water budgets, and to balance conjunctive use of groundwater resources. The county finds and determines that

such data is critical to the implementation of groundwater regulation under this chapter. The county finds and determines that such data from persons is presumptively confidential and proprietary information, including geological and geophysical data, plant production data, or trade secrets. The county further finds and determines that the need to receive or obtain such data, and to maintain its confidentiality, outweighs the public need for site specific private information and that the public will have access to the aggregate of such information which is a

better measure of the cumulative status of groundwater resources. (Ord. CS 1155 §3, 2014; Ord. CS 1138 §1, 2013).

9.37.030 Definitions.

The following words and phrases shall have the following meanings when used in this chapter:

1. "County" means the county of Stanislaus.

2. "Board" means the board of supervisors of Stanislaus County.

3. "Person" means and includes natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons, and public entities.

4. "Groundwater" means water that occurs beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels.

5. "Public water agency" means any local public agency, mutual water company, or nonprofit tax-exempt unincorporated association within, or partially within, Stanislaus County that has authority to undertake water-related activities.

6. "Unsustainable extraction of groundwater" means the extraction of groundwater in a manner that is not sustainable groundwater management as defined in this chapter or state law.

7. "Export of water" means the act of conveying groundwater, or surface water for which groundwater has been substituted, out of the county.

8. "Sustainable groundwater management" means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon as defined in subdivision (q) of Water Code Section 10721 without causing or substantially contributing to undesirable results.

9. "Undesirable result" means one or more of the following:

a. Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods.

b. Significant and unreasonable reduction of groundwater storage.

c. Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies.

d. Significant and unreasonable land subsidence that substantially interferes with surface land uses.

e. Surface water depletions that have significant and unreasonable adverse impacts on beneficial uses of the surface water.

10. "De minimis extractor" means a person who extracts two acre-feet or less per year.

11. "Groundwater sustainability plan" means a plan adopted pursuant to Water Code Section 10727 et seq. (Ord. CS 1155 §4, 2014; Ord. CS 1138 §1, 2013).

9.37.040 Prohibition.

Except as otherwise provided in this chapter, the following actions are prohibited:

A. The unsustainable extraction of groundwater within the unincorporated areas of the county.

B. The export of water. (Ord. CS 1155 §5, 2014; Ord. CS 1138 §1, 2013).

9.37.045 Application.

A. The prohibition set forth in subsection A of Section 9.37.040 is applicable to the extraction from any groundwater well for which an application for a new well construction permit pursuant to Chapter 9.36 is filed after November 25, 2014. Applications for a well construction permit submitted after that date shall demonstrate, based on substantial evidence, that either: (1) one or more of the exemptions set forth in Section 9.37.050 apply; or (2) that extraction of groundwater from the proposed well will not constitute unsustainable extraction of groundwater. This subsection shall not apply to a well designed to replace an existing well that has been permitted under Chapter 9.36 prior to November 25, 2014 if the replacement well has no greater capacity than the well it is replacing.

B. Effective upon adoption of an applicable groundwater sustainability plan, the prohibition set forth in subsection A of Section 9.37.040 shall be applicable to the extraction from any groundwater well for which the county reasonably concludes that the extraction of groundwater constitutes unsustainable extraction of groundwater. In the event of such determination by the county, the affected holder or holders of a well construction permit issued pursuant to Chapter 9.36 for such well shall be notified and shall be required to demonstrate, based on substantial evidence, that continued extraction of groundwater will not result in an unsustainable extraction of groundwater as defined in subsection 6 of Section 9.37.030.

C. This section does not limit the application of subsection B of Section 9.37.040.

D. The regulations and prohibitions set forth in this chapter apply only to the unincorporated areas of Stanislaus County. (Ord. CS 1155 §6, 2014).

9.37.050 Exemptions.

A. The following water management practices are exempt from the prohibitions in Section 9.37.040:

1. Water resources management practices of public water agencies that have jurisdictional authority within the county, and their water rate payers, that are in compliance with and included in groundwater management plans and policies adopted by that agency in accordance with applicable state law and regulations, as may be amended, including, but not limited to, the California Groundwater Management Act (Water Code Sections 10750 et seq.), or that are in compliance with an approved groundwater sustainability plan.

2. De minimis extractions as set forth in Section 9.37.030(10) of this chapter.

3. Groundwater extraction or the export of water in compliance with a permit issued by the Stanislaus County department of environmental resources pursuant to this chapter.

B. The following water management practices are exempt from the prohibition against export of water in this chapter:

1. De-watering of shallow water tables where the net benefits of the removal of subsurface water substantially outweighs the loss of water because of damage the high water table reasonably may cause to agriculture, industry, commerce and other property uses. The groundwater in some areas of the county is very near the surface and if not removed by interceptor ditches or subsurface tile drains, the water can seriously impact crop root zones for agricultural production or destroy foundations, equipment, materials, buildings and infrastructure used for residences, industry, utilities or commerce. This groundwater may or may not be reused for other purposes and at times may leave the county and its groundwater system.

2. Reasonable use of groundwater resources to supplement or replace surface water released for other reasonable and beneficial purposes, including, but not limited to, fisheries, ecosystem habitat or downstream water quality or quantity needs, when required pursuant to federal and state law, regulations, licenses or permit conditions.

3. Conservation of water in compliance with applicable state law that authorizes public water agencies

to transfer water outside its usual place of use. Conservation investments may include, but are not limited to, irrigation practices in agricultural areas where the crops grown use less water, or communities that produce recycled water, fix leaks or promote other water saving devices and methods to conserve water on a temporary or permanent basis.

4. Recharge of groundwater in locations in the county that are capable of improving groundwater conditions in order to meet total water demands of beneficial uses in the hydrologic and groundwater basin area including, but not limited to, the following sources: surface water, treated municipal drinking water, recycled water and stormwater. The amount of recaptured groundwater transferred out of the area should not exceed the amount of water used to recharge the aquifer. The transfer can be accomplished by either direct or indirect transfer, that is, a public water agency can leave the water in the ground and transfer other supplies in lieu of pumping out the recharge water.

5. Remediation of contaminated groundwater that is pumped and treated to remove contaminants that are in violation of standards for beneficial uses. The extracted and treated water may be released out of the county, resulting in a net loss to the groundwater basin, if the release complies with discharge permits issued by the federal, state or state resource agencies.

6. Export of water that reasonably supports agricultural operations on property outside the county that is contiguous with property within the county and is under common ownership.

7. Export of water from a private water source that is bottled in compliance with a private water source operator license issued by the state pursuant to Health and Safety Code Section 111120.

C. The exemptions set forth in subsections A and B above do not exempt the activities described in those subsections from subsection B of Section 9.37.045. (Ord. CS 1155 §7, 2014; Ord. CS 1138 §1, 2013).

9.37.060 Implementation.

A. The Stanislaus County department of environmental resources shall have the primary responsibility for implementation of this chapter and regulations adopted by the board of supervisors. That responsibility shall include any preparation, approval, and/or certification of any environmental document pursuant to the California Environmental Quality Act (CEQA) for issuance of any permit for a groundwater well, to the extent required by CEQA, or a determination that such permit is not subject to, or is exempt from, CEQA.

B. The department of environmental resources shall establish a system of permits to authorize water management practices otherwise prohibited by this chapter. The department may issue a permit for a water management practice to the extent that such practice is consistent with the statements of county policy set forth in Section 9.37.020 of this chapter, and provided that such practice is for a reasonable and beneficial use of groundwater resources, supports sustainable groundwater management, and promotes the public interest. The term of a groundwater extraction permit issued by the department pursuant to this subsection shall not exceed the remaining term of any applicable groundwater sustainability plan.

C. The department of environmental resources shall have authority to investigate any activity subject to this chapter. Compliance with this chapter will be determined based on the submission of a technical report to the department of environmental resources on a form provided by the county. The department is authorized to enforce the prohibition of any activity that is determined to be in violation of this chapter or regulations adopted by the board of supervisors.

D. Any interested person or entity may appeal an administrative determination made by the department under this chapter which: (1) finds that an application is complete or incomplete; (2) establishes or modifies operating conditions; (3) grants or denies a permit; or (4) suspends or revokes a permit. Administrative appeals under this section must be made in writing, must clearly set forth the reasons why the appeal ought to be granted, and must be received by the chief executive officer within fifteen days of the postmark date on the envelope that transmits the administrative determination. Any appeal that is not timely filed, or that is not accompanied by the required fee, will be deemed ineffective and the administrative determination that is being appealed will become

final. The chief executive officer shall fix a reasonable time for the hearing of an appeal of an administrative determination, and shall provide written notice of the appeal hearing to the appellant and all interested parties, and to all landowners within one-quarter mile of the parcel where operations will occur. An appeal review committee comprised of the chief executive officer or designee, the chair and vice chair of the board of supervisors shall hear the appeal and issue a decision within thirty days after the hearing. The appeal review committee may take any appropriate action upon the original administrative action that was appealed, including granting or denying the appeal in whole or in part, or imposing, deleting or modifying operating conditions of the permit. The decision of the appeal review committee shall be final.

E. Any interested person or entity may appeal to the board of supervisors the following decisions and determinations of the department regarding a groundwater well permit: (1) a decision to approve or deny a negative declaration; (2) a decision to certify or refuse to certify an environmental impact report; or (3) a determination that a permit is not subject to, or is exempt from, CEQA. (Ord. CS 1155 §8, 2014; Ord. CS 1138 §1, 2013).

9.37.065 Groundwater monitoring.

A. All persons, including public water agencies that extract groundwater within the county shall cause to be prepared and submitted to the county department of environmental resources periodic reports of groundwater information that are reasonably necessary to monitor the existing condition of groundwater resources within the county, to determine trends, or to develop effective sustainable groundwater management plans and policies. A de minimis extractor shall not be required to submit such information.

B. The department shall develop and recommend regulations to be adopted by the board that establish the frequency and timing of required reports, and the required information to be monitored, including, without limitation, water level and pumping data, or other data necessary for any other method to determine groundwater production.

C. The county presumes that information submitted pursuant to this section will be exempt from disclosure under the California Public Records Act. The regulations developed under subsection B of this section shall include a process for submitters to confirm that their information is exempt from disclosure. Any document that aggregates information submitted under this section shall not be treated as exempt from disclosure if such document neither identifies the sources of that information nor permits the reader to otherwise determine the sources of that information. (Ord. CS 1155 §9, 2014).

9.37.070 Penalty for violation.

A. Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished as set forth in Stanislaus County Code Section 1.36.010. Each person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this chapter is committed, continued or allowed and shall be punishable accordingly.

B. In addition to or in lieu of the penalty provisions or remedies set forth in this chapter, any violation may be abated in any manner set forth in Chapter 2.92 of the Stanislaus County Code, including, but not limited to, abatement or issuance of administrative citations.

C. In addition to or in lieu of the penalty provisions or remedies set forth in this chapter, any violation of any of the provisions of this chapter, and any condition caused or allowed to exist in violation of any of the provisions of this chapter, shall be deemed a public nuisance and shall, at the discretion of county, create a cause of action for injunctive relief, including but not limited to any remedy under Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code. (Ord. CS 1138 §1, 2013).

9.37.080 Severability and effect.

A. The provisions of this chapter are hereby declared to be severable. If any provision, clause, word, sentence or paragraph of this chapter or the application thereof to any person, establishment or circumstances shall be held invalid, such invalidity shall not affect the other provisions or application of this chapter.

B. The prohibitions of this chapter shall not be applicable to the extent that their application would result in a violation of the Constitution or other laws of the United States or the state of California. The department of environmental resources shall issue a permit to authorize conduct otherwise prohibited under this chapter if the applicant demonstrates that such permit is necessary to avoid such a violation of state or federal law. (Ord. CS 1138 §1, 2013).

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