Case No. S251709

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,
Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.,
Defendants and Respondents.

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

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

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

Defendant Stanislaus County (County) approves water well construction permits without applying the California Environmental Quality Act (CEQA) based on its contention that these permit approvals are "ministerial" rather than "discretionary." Plaintiffs and Appellants, Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance (Appellants), contend these permit approvals are "discretionary" and thus trigger the application of CEQA.

The Court of Appeal Opinion holds that a state well construction permit standard incorporated by local County ordinance gives the County discretion to modify well construction projects "to address impacts revealed by environmental analysis," thereby triggering CEQA review. (Opinion 13.) This "separation" standard provides guidelines for setting minimum distances between sources of contamination and proposed wells. The standard also provides for the exercise of discretion beyond these guidelines, stating: "All water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination." (Opinion 11; citing State Bulletin No. 74-90, section 8.A.) The Opinion holds that this standard triggers the application of CEQA because judging the distance to be "adequate" for the purpose of protecting groundwater quality, regardless of any predetermined minimum distances, requires the exercise of discretion and gives the County the power to "address impacts revealed by environmental analysis." (Opinion 13, citing *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267 (*Friends of Westwood*).) In Section IV.A of this brief, Appellants demonstrate this holding is correct.

The County argues that CEQA does not apply to County issued well

permits because County Code section 9.36.150 grants the County discretion only to protect groundwater quality, not groundwater depletion or other types of environmental harm. The County asks this Court to announce a new rule that CEQA cannot apply where a regulatory statute only addresses one type of environmental impact. (Defendants' Opening Brief (DOB) 37-40.) The County's proposed rule is inconsistent with the "functional test" articulated over thirty years ago in *Friends of Westwood*, whereby a local land use ordinance triggers the application fo CEQA if it gives the agency the power to "address impacts revealed by environmental analysis." (*Friends of Westwood,* 191 Cal.App.3d at 267.)

The County's proposed rule is also unworkable. The separation standard gives the County the authority and obligation to protect groundwater quality from contamination, but in doing so it also protects against many types of environmental harm, including human health impacts from contaminated water, lost drinking water supplies, lost arable cropland if groundwater cannot be used for irrigation, harm to fisheries if contamination enters a fish bearing stream, etc. The County's contention that the separation standard is a "single standard" is overly simplistic.

The County has not shown why this Court should abandon the functional test. Nor has it shown how the separation standard does not meet this test.

The County also argues that "to invalidate the County's policy of issuing permits without complying with CEQA ... Plaintiffs must show that the [separation] standard applies to all or the 'great majority' of the County's well construction permit approvals." (DOB 59-62.) Appellants refute this argument in Section IV.B of this brief. In short, the discretion conferred by the separation standard "applies" to all well permits

applications because the County must decide whether the separation standard's "objective guideposts" are "adequate" to protect water quality or require modification for each permit. Administrative agencies "may not by the adoption of any rule of policy or procedure so circumscribe or curtail the exercise of [its] discretion under [a] statute as to prevent the free and untrammeled exercise thereof" and "may not refuse to exercise the discretion" conferred by statute. (*Bank of Italy v. Johnson* (1926) 200 Cal. 1, 15.) Moreover, the County failed to exercise the discretion conferred by the separation standard because it was "misinformed regarding its discretionary authority." (*Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1063 ["a prejudicial abuse of discretion occurs when a public agency is misinformed regarding its discretionary authority and, as a result, does not actually choose whether to exercise that discretionary authority"].)

Also, the County's obligation to exercise the discretion conferred by the separation standard is not dependent on Appellants or other members of the public proving, in the first instance, that one or more well permits present conditions requiring a departure from the standard's objective guideposts and the exercise the discretion. Any such rule would contravene well-settled CEQA case law governing "preliminary review" of projects. Lead agencies have an affirmative duty to evaluate the factual basis for whether CEQA applies to a project. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1103 (*Berkeley Hillside I*); *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386-387 (*Muzzy Ranch*); *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 112-13 (*Davidon Homes*); *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 192 (*HCD*); CEQA

§ 21080; Guidelines §§ 15002, subd. (k); 15061.) Here, the County concedes it has a policy of not applying CEQA to well permits based solely on its long-standing policy, which it applies without regard to the particular facts pertaining to a well application. The County's argument that it may follow this policy unless and until a member of the public presents evidence that a specific permit application requires the exercise of discretion is inconsistent with this Court's decisions in *Berkeley Hillside I* and *Muzzy Ranch*, which require lead agencies to conduct a factual "preliminary review" in the first instance.

The Opinion declined to rule on Appellants' contention that the County's local ordinance gives the County discretionary authority over well permit applications by incorporating general discretionary standards from the state bulletins. (Opinion 10, fn. 9.) Appellants' contend these general standards provide the County with discretion to address and reduce site-specific environmental harm by changing the Bulletin's technical standards or creating new standards, as appropriate; and that the County's discretion to revise or deviate from these standards triggers the application of CEQA.[1] In Section IV.C of this brief, Appellants demonstrate that these general discretionary standards are incorporated by the local ordinance.

The Opinion holds that a number of specific standards that Appellants argue are discretionary are actually ministerial and, therefore, do not trigger the application of CEQA. For example, the Opinion holds that standards predicated on compliance being "possible" are not discretionary because—in the Court of Appeal's view—whether a directive is "possible"

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[1]Appellants identified this issue for review in their Answer to Petition for Review (see page 9, Issue # 1).

is an "objective" test. (Opinion 10, fn 8.)[2] In Section IV.D of this brief, Appellants demonstrate this holding is incorrect because these standards confer discretion on the County to address environmental concerns, and thereby trigger the application of CEQA.

The Opinion also suggests that the discretion conferred by the County's well permit ordinance may limit the legal feasibility of mitigation measures considered for adoption under CEQA. (Opinion 23-24.) This portion of the Opinion conflates the County's authority under Chapter 9.36 with its obligations under CEQA. Where an ordinance grants an agency discretion to protect an environmental resource, CEQA applies and the agency must apply its environmental review procedures. (*Friends of Westwood, supra,* 191 Cal. App.3d at 269-70; *Day v. City of Glendale* (1975) 51 Cal. App. 3d 817, 822; *HCD, supra,* 45 Cal.App.3d at 192.) Once CEQA applies, the lead agency *lacks authority* to approve a project unless and until CEQA's requirements are satisfied. (CEQA § 21002, 21002.1; 21081; Guidelines, §§ 15061, 15063, 15091-15093.) For example, if an EIR is required and it discloses a significant adverse effect, the County cannot approve the project unless and until it can make the findings required by CEQA section 21081, including that all feasible mitigation measures or alternatives that substantially reduce the project's significant effects have been adopted, and that any remaining significant effects are "acceptable" due to the project's overriding social or economic benefits. (*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945 (*City of San Diego*); *City of Marina v.*

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[2]Appellants identified this issue for review in their Answer to Petition for Review (see page 9, Issue # 2).

Board of Trustees of the California State University (2006) 39 Cal.4th 341, 350 (*City of Marina*); *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 127; CEQA, §§ 21002, 21081; Guidelines §§ 15091-15093.) Thus, if CEQA applies and an EIR discloses that operation of a well would cause significant adverse environmental effects, the County cannot approve the permit unless and until the County makes the findings required by CEQA section 21081, *which could include the adoption of feasible mitigation measures that are not otherwise specified in the ordinance that triggers CEQA review.*[3]

Contrary to the County's argument, CEQA section 21004 does not preclude the County from refusing to approve a well permit where the applicant refuses to accept a feasible mitigation measure not otherwise specified in section 9.36.150. Consistent with section 21004, CEQA does not grant agencies new authority; it *limits* agency authority to approve a project unless and until the agency complies with CEQA's procedures.

This Court granted "review and hold" as to the Second District Court of Appeal decision in *California Water Impact Network v. County of San Luis Obispo*, Supreme Court Case No. S251056. Because the County's arguments here include all grounds cited by the Court of Appeal in that decision, Appellants do not separately discuss the opinion in *California Water Impact Network v. County of San Luis Obispo.*

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[3]Appellants do not argue that the County's legal obligation under CEQA to disapprove a project where it cannot make the findings required by CEQA section 21081 enlarges the discretion conferred by the County's well permit ordinance for purposes of determining whether the ordinance confers sufficient discretion to trigger the application of CEQA.

II. STATEMENT OF FACTS

A. Factual Background.

Appellants' claim for declaratory relief was tried in the Superior Court on a set of twenty-three "Stipulated Facts" (AA 67-75, 715-717; AA 884; RT 8.) These "Stipulated Facts" include authentication of relevant County ordinances and state standards governing the issuance of water well construction permits. (AA 75, 148-610.)

County Code section 9.36.030 provides: "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."[4] Appellants claim for declaratory relief is based on the fact that County Code section 9.36.150 establishes standards for the approval of well construction permits that are "discretionary," thereby triggering the application of CEQA. (AA 11, 148-51.) Section 9.36.150 establishes these standards by incorporating the standards set forth in a series of "bulletins" issued by the state Department of Water Resources (DWR) pursuant to Water Code section 13801. Section 9.36.150 provides that "standards for the construction, repair, reconstruction or abandonment of wells shall be as set forth in Chapter II of the Department of Water Resources Bulletin No. 74, "Water Well Standards" (February 1968), or as subsequently revised or supplemented, which are incorporated in this chapter and made a part of this chapter." (AA 120.) Bulletin No. 74 (at AA 123) was updated in 1981 in Bulletin No. 74-81 (at AA 139, 149), and supplemented again in 1990 in Bulletin No.

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[4]All further statutory references are to the Stanislaus County Code, unless otherwise indicated.

74-90 (AA 179 [or 498], 592, 181 [or 607]).

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

After Appellants filed this action, the County adopted a new groundwater ordinance (Ordinance 1155) which added Chapter 9.37 to the County Code. (AA 153-58; 160-168.) Chapter 9.37 identifies the types of significant environmental effects that groundwater pumping may cause, including depletion of groundwater supply, reduction of groundwater storage, degraded water quality, land subsidence, and surface water depletions that have adverse impacts on beneficial uses of the surface water. (AA 154.)

Chapter 9.37 does not affect Appellants' claim. The County now approves permits to construct water wells under Title 9, Chapters 9.36 and 9.37, of the Stanislaus County Code; and such permits lead to changes in the physical environment. (AA 73-75.) County policy is to apply CEQA's environmental review procedures to certain types of permit applications (hereinafter "CEQA applications") and not to apply CEQA's environmental review procedures to certain other types of permit applications (hereinafter "non-CEQA applications.") According to County policy, "CEQA applications" are permit applications that are not exempt from Chapter 9.37 and so-called "variance permit" applications under section 9.36.110 of the County Code; and "non-CEQA applications" are

permit applications that are exempt from Chapter 9.37 and not "variance permit" applications under section 9.36.110 of the County Code. (AA 73-75; 715-770.) These facts are summarized as follows:

	CEQA applications	**Non-CEQA applications**
Chapter 9.36	Variance permit	Non-Variance permit
Chapter 9.37	Not exempt	Exempt

With respect to "non-CEQA applications," the County admits it does not conduct any environmental review before approving because it considers these approvals "ministerial." (AA 74 [Fact 10].)

Chapter 9.37 requires that applicants for a limited category of well construction permits must provide the County with information the County does not otherwise require pursuant to Chapter 9.36. (AA 155 [§ 9.37.045.A].) Chapter 9.37 also expressly gives the County legal authority to regulate the use of groundwater wells after they are permitted under Chapter 9.36. (AA 155 [§ 9.37.045.B].) Chapter 9.37 does not change the standards the County must use to approve a well permit under Chapter 9.36, nor does it require the County to apply CEQA to well construction permits. Chapter 9.37 also does not require the County to disapprove a well construction permit if an applicant either refuses to provide the information required by section 9.37.045 or provides information that fails to meet the requirements of section 9.37.045. The key provisions of the new groundwater ordinance are sections 9.37.040 and 9.37.045. Section 9.37.040 provides that "except as otherwise provided," two practices are "prohibited:" "The unsustainable extraction of groundwater within the unincorporated areas of the County" and "The export of water." (AA 154.) Section 9.37.040 does not provide any mechanism for the County or the

public to enforce these prohibitions. (AA 154.)

Section 9.37.045, subdivision A, provides the only link between Chapter 9.36 and Chapter 9.37. This subdivision requires applicants for new well construction permits to "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." (AA 155.)

Chapter 9.37 and section 9.37.040 do not apply to several categories of new wells. (See AA 155 [§§ 9.37.045.A; 9.37.050.) As a result, they are not subject to the new ordinance's only arguable connection to Chapter 9.36 set forth in section 9.37.045.A. Therefore, for all of the permit applications that fall within these exemptions, the County's policy of not applying CEQA to non-variance well construction permits under Chapter 9.36 remains applicable.

One of the exemptions set forth in the new ordinance is for "De minimis extractions as set forth in Section 9.37.030 (10) of this Chapter." (AA 155 [§ 9.37.050.A.2].) "De minimis extractor" to mean "a Person who extracts two (2) acre-feet or less per year." (AA 155 [§ 9.37.030].) This is important because CEQA does not have a "de minimis" exception. (*Communities for a Better Environment v. California Resources Agency* ("*Communities*") (2002) 103 Cal. App. 4th 98, 117-118.) CEQA does not have a "de minimis" exception because significant "cumulative impacts can result from *individually minor but collectively significant projects* taking place over a period of time." (*Id.* at p. 120.)

Thus, Chapter 9.37 does not change County policy with respect to well permits that are exempt from Chapter 9.37. Well construction permit

applications in these exempt categories are still governed solely by Chapter 9.36.

Between January 1, 2013, and the County's adoption of Chapter 9.37 on November 25, 2014, the County issued over three hundred (300) permits to which it did not apply CEQA pursuant to its policy and it did not issue any Variance Permits. (AA 73 [Facts 5, 7].)

The County also concedes that the approval of well permits under Chapters 9.36 and 9.37 has the potential to result in changes in the physical environment. (AA 75 [Fact 16].)

B. Facts Relating to the "Separation Standard."

One of the standards in the state bulletins, section 8.A, relates to the minimum adequate distance for locating a well from possible sources of groundwater contamination. (AA 542-43.) The Court of Appeal based its holding that the County's well permit ordinance triggers the application of CEQA solely on this standard. (Opinion 13-15.)

C. Facts Relating to the State Bulletin's General Discretionary Standards.

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

> The standards presented in this chapter are intended to apply to construction (including reconstruction) or destruction of wells throughout the State of California. *Under certain circumstances, adequate protection of ground water quality may require more stringent standards than these presented here; under other circumstances, it may be necessary to deviate from the standards or substitute other measures which will provide protection equal to that provided by these standards. Since it is impractical to prepare standards for every conceivable situation, provision has been made in the succeeding material for deviation from the standards as well*

as for addition of appropriate supplementary standards.

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

The need for local officials to exercise discretion is also expressed in Bulletin No. 74-81 at Chapter II, Part I, section 3, which provides: "if compliance would result in construction of an unsatisfactory well, *the enforcing agency may waive compliance and prescribe alternative requirements which are "equal to" these standards* in terms of protection obtained." (AA 150 (emphasis added).) Bulletin 74-81 provides additional discretionary authority for local agencies to prescribe "*special standards*" to account for "locations where existing geologic or ground water conditions require standards more restrictive than those described herein." (AA 151 [DWR Bulletin 74-81, Chapter II, § 5] (emphasis added).)

Bulletin 74-90, issued in 1990, updates Bulletin 74-81. (AA 592, 181 [or 607].) This Bulletin also recognizes that local authorities must exercise judgment in approving well construction permits. (AA 181 [or AA 607].) Bulletin 74-90 further provides that many normal standards are subject to exceptions or alternative standards "at the approval of the enforcing agency on a case-by-case basis" or where "otherwise approved by the enforcing agency." (AA 186-87 [Bulletin 74-90, Part II, § 9.B].)

D. Facts Relating to the State Bulletins' Specific Discretionary Standards Referenced in Footnote 8 of the Opinion.

Bulletin No. 74-90 provides for locating wells upstream of contamination sources, *if possible*. (AA 184 [Part II, § 8.B (emphasis

added)].) Bulletin No. 74-90 also provides for locating the wells outside areas of flooding, *if possible*. (AA 184 [Bulletin 74-90, Part II, § 8.C (emphasis added)].) Appellants contend these standards are discretionary and trigger the application of CEQA. The Opinion holds these standards are ministerial and do not trigger CEQA. (Opinion 10, fn 8.)

III. STANDARD OF REVIEW

A. Standard of Review for Declaratory Relief.

A declaratory relief action under Code of Civil Procedure section 1060 is an appropriate method for challenging an agency policy of ignoring or violating applicable laws. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal. App. 4th 1547, 1565-1566; *Californians for Native Salmon and Steelhead Association v. Department of Forestry* (1991) 221 Cal. App.3d 1419, 1428-29 (*Californians for Native Salmon*).) Declaratory relief is particularly appropriate when a plaintiff challenges a policy that will likely be repeatedly applied in an unlawful manner. (*Californians for Native Salmon*, *supra*, 221 Cal. App. 3d at pp. 1430-1431 ("Piecemeal litigation of the issues in scores of individual proceedings would be an immense waste of time and resources.").

An actual and present controversy has arisen and now exists between Appellants and the County concerning the County's policy of not reviewing well construction permit applications pursuant to CEQA, a policy which Appellants challenge as unlawful. Thus, declaratory relief is an appropriate remedy.

B. Standard of Review for Approvals under CEQA.

"The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory

language.' " (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511.) Also, "CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment" subject to "narrow exceptions." (*Id.*)

Courts review agency actions for non-compliance with CEQA under the "prejudicial abuse of discretion" standard. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426 (*Vineyard*).) "Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Id.*) "Judicial review of these two types of error differs significantly: While [courts] determine *de novo* whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], [courts] accord greater deference to the agency's substantive factual conclusions." (*Vineyard, supra*, 40 Cal.4th at p. 435.) Courts independently review questions of law. (*City of Marina, supra,* 39 Cal.4th at 355.)

Whether a CEQA project approval is discretionary or ministerial is a question of law subject to de novo review. (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 303; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1142.) Several other decisions, while treating the question as one of law for the court to determine, suggest that some weight may be given to the lead agency's views if warranted. (*Sierra Club v. Napa County* (2012) 205 Cal.App.4th 162, 178; *Friends of Westwood, supra,* 191 Cal. App.3d at p. 270; *Day v. City of Glendale, supra,* 51 Cal. App. 3d at 822.)

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C. The Court Should Give No Weight to the County's View That Its Well Permit Approvals are Ministerial.

The County's interpretation of its own ordinances is one of "several interpretive tools" that may help a court independently judge the meaning of an ordinance. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322 (quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-7 (*Yamaha*). The Court has discretion to give weight to the County's interpretation of its laws if there are good reasons to do so, after considering "a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command," including whether the agency has "consistently maintained the interpretation in question, especially if the interpretation is long-standing." (*Yamaha, supra*, 19 Cal.4th at 7-8, 12, 13.) But "considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." (Id. at 8.)

Here, the County has offered no good reason why the Court should give weight to the County's interpretation. The mere fact that the County's view is long-standing is not persuasive when compared to the many legal reasons presented here that it is incorrect.

Also, while the well construction standards are "technical" and the County's permitting department possesses expertise and technical knowledge regarding these standards, this case does not require the Court to interpret or apply any of these technical standards to a permit application. Instead, this case requires the Court to determine the legal effect of the standards' many specific and general grants of discretionary authority. These determinations require legal, not technical, analysis. Accordingly,

the County's technical knowledge of the standards does not aid in deciding the legal question before the Court.

IV. ARGUMENT

A. The Court of Appeal's Holding That CEQA Applies to the County's Well Permits Based on the Separation Standard is Correct.

The Court of Appeal held that the County's local ordinance incorporates the state standard for separating wells from sources of contamination. The Opinion holds this standard triggers the application of CEQA because judging the distance to be "adequate" for the purpose of protecting groundwater quality requires the exercise of discretion, regardless of the predetermined minimum distances, and gives the County the power to "address impacts revealed by environmental analysis." (Opinion 13, citing *HCD, supra*, 45 Cal.App.3d at 193-194 and *Friends of Westwood, supra,* 191 Cal.App.3d at 267.)

The County suggests this holding is based on only one term in the separation standard (i.e., "adequate") where it states: "All water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination." (DOB 12; see also, Opinion 11-13; citing Bulletin No. 74-90, section 8.A.) This is overly simplistic. Bulletin No. 74-90, which is incorporated by the County's ordinance, expressly grants local authorities' discretion in approving well location much more extensively, going well beyond simply using the word "adequate." The Bulletin provides:

> These distances are based on *present* knowledge and *past* experience. Local conditions may require greater separation distances to ensure ground water quality protection.... ¶ Many *variables* are involved in determining the "safe" separation

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

(AA 183-84 [Bulletin 74-90, Part II, § 8.A (italics added)].) This language requires that local authorities weigh a number of factors, including *current* knowledge, *current* experience, and knowledge of local conditions to reach an *opinion* regarding a separation distance that is *adequate, reasonable* and *acceptable*, or if and an *adequate, reasonable, and acceptable* distance cannot be achieved, then to impose "*special means of protection*." Thus, the Opinion's conclusion that the County has discretion to modify the location of wells to protect against contamination is fully supported by the text of the separation standard.

All of the determinations referenced in the separation standard require the exercise of judgment and discretion by knowledgeable local officials. The County does not contend otherwise. Instead, the County contends the application of CEQA is only triggered by a "certain kind" of discretion. (DOB 27-28.) The County concedes that this "kind of discretion" is defined by whether the agency can "meaningfully address any

environmental concerns that might be identified in the EIR" which is the "functional" test for discretion articulated in *Friends of Westwood*, 191 Cal.App.3d at 272.) (DOB 28.)

However, the County has failed to articulate why the separation standard does not meet this functional test. As the Court of Appeal found, the separation standard authorizes and requires the County to modify the spacing between a well and a source of contamination where necessary to achieve adequate protection of groundwater quality. (Opinion 13-15.) In rejecting the County's argument "that its authority to modify the spacing between a well and a contamination source is a 'minor adjustment,' " the Court of Appeal noted that "such a modification is not minor if it is the difference between safe versus contaminated groundwater." (Opinion 15.)

Instead of explaining why the separation standard does not meet the functional test for discretion, the County takes an elliptical approach by criticizing the Opinion (DOB 34, 37, 42), as discussed in the following three subsections.

1. The Court of Appeal did not read the well-separation standard too narrowly and did not ignore the Bulletin's guidance for well spacing.

The County's first criticism of the decision below is that the Court of Appeal "read the well separation standard too narrowly, ignoring the Bulletin's guidance for well spacing." (DOB 34 [Argument § II.A.1].) For this argument, the County discusses several provisions of the separation standard that do not relate to the exercise of discretion. For example, the County discusses the "two pages of technical criteria" in section 8.A of the state Bulletin, including "minimum horizontal separation distance[s] between well[s] and known or potential source[s]" of contamination. (DOB 34, citing AA 3:542.) The County concedes, as it must, that the language of

section 8.A also authorizes the agency to increase or decrease these distances as appropriate depending on site-specific conditions. (DOB 34.) But the County never explains how or why the "technical" provisions of the separation standard vitiate the discretion conferred by the provisions of the separation standard that require the exercise of discretion and that allow the County to "meaningfully address any environmental concerns that might be identified in the EIR."

The County argues that the Court of Appeal "wholly ignored" these "objective guideposts" in the separation standard. (DOB 35, citing Opinion 13, fn. 11.) This is false. The Opinion explains why these "objective guideposts" do not preclude the County's exercise of discretion to determine adequate separation distances. (Opinion 13, fn. 11 ["In sum, while the horizontal separation distances enumerated in the Bulletin provide some objective guideposts, the surrounding provisions confirm that the ultimate standard is that well/pollution separations distances must be 'adequate' "].) In short, the County merely disagrees with the Court of Appeal's reading of the separation standard but fails to explain why that reading is incorrect.

The County's reliance on *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-07 (*Tobe*), is quite a stretch. That case involved a vagueness challenge to a penal statute; therefore, it is inapposite and the County does not explain why it is useful here.

To the extent the County cites *Tobe* for the proposition that all terms in a statute must be read "in context," Appellants agree. In *Tobe,* this Court held that the city of Santa Ana's bans on camping or storing personal possessions on public property did not give the agency "unfettered" discretion to decide when a crime had occurred because its key terms have a

definite meaning when read in context. No party has argued that County Code, Chapter 9.36, or the state standards that it incorporates, give the County "unfettered" discretion. And the functional test for discretion under CEQA does not require that the County have "unfettered" discretion. Here, as noted above, the Court of Appeal expressly construed the many discretionary terms in section 8.A of the state bulletin in context. (Opinion 13.)

The County argues that "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." (DOB 36.)[5] If the County suggests the Opinion found the term "adequate" to be "indefinite," the County is incorrect. The Opinion does not apply the standards governing whether a penal statute is void for vagueness and did not opine on whether the term "adequate" is "indefinite" or "definite." Nor does the County explain why the standards governing vagueness of a penal statute are relevant to the functional test for discretion under CEQA.

To the extent *Tobe* provides any guidance for the instant appeal, it supports the Court of Appeal's decision, because the Court in *Tobe* recognized that the City of Santa Ana has "prosecutorial"— though not "unfettered" discretion—to decide when to charge a homeless person with the crime of camping or storing personal possessions on public land. (*Tobe,* 9 Cal.4th at 1088, fn 8.) By the same token, the County has regulatory discretion to determine the safe separation distance between a well and a source of contamination.

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[5]To the extent the County suggests the decision in *Tobe* construed the word "adequate" in a statute, the County is incorrect; the statute in that case did not use this term.

The County distinguishes ordinances that combine a general grant of discretion with "objective guideposts" that apply to many typical situations from ordinances that grant discretion without such guideposts. Thus, the County criticizes the Court of Appeal's reliance on *HCD, supra*, because, the County asserts, "the standards in *HCD* gave no direction for the agency's exercise of judgment." (DOB 36.)[6] This distinction is not embraced by the courts and is not a meaningful addition to the functional test for discretion.

Also, the County's description of the mobilehome ordinance in *HCD* is inaccurate. That ordinance included both objective "fixed design and construction specifications covering ... space occupancy" and "relatively broad, relatively general" standards giving the agency discretionary authority "issue a conditional permit which prescribes ongoing conditions on ... occupancy." (*HCD*, 45 Cal.App.3d at 193.) Thus, the ordinance in *HCD*, like the ordinance here, involved a combination of ministerial and discretionary standards.

Also, the County's purported distinction between ordinances that combine a general grant of discretion with "objective guideposts" and ordinances that grant discretion without such guideposts is overly simplistic. The critical issue is not whether the agency's exercise of

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[6]In a footnote, the County asserts that "the agency [in *HCD*] had *unbridled* authority to impose conditions on its approval of mobile home parks." (DOB 37, fn 13.) This is hyperbole. The agency' discretion is limited by the requirements set forth in Code of Civil Procedure section 1094.5, subdivision (b) and (c), which requires that administrative determinations be supported by findings, and that the findings be supported by the weight of the evidence or substantial evidence, depending on the type of case. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516–17 (*Topanga*).)

discretion is guided by objective guideposts; it is whether the objective guideposts constrain the agency's discretion to such an extent that it does not meet the functional test. An example of the latter type is the grading ordinance construed in *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 15 (*County of Sonoma*), on which the County relies heavily. As discussed above, the Opinion's conclusion that the objective guideposts in the separation standard do not so constrain the County's discretion remains unrefuted.

The *County of Sonoma* decision has two major parts. First, the decision separates the provisions of the ordinance that confer some discretion into two categories: those that applied to the project at issue and those that did not. (*Id.* at 25.) Regarding the former, the Court analyzed three provisions of the ordinance that applied to the project and granted the county some discretion. These provisions (1) required a 50-foot setback from wetlands "unless a wildlife biologist recommends a different setback," (2) required stormwater to be diverted to "the nearest practicable disposal location," and (3) required the applicant to incorporate natural drainage features "whenever possible." (*Id.* at 27.) The Court viewed Sonoma County's erosion control ordinance as tightly limiting its grants of discretion to specific erosion control features of the project and as not providing discretionary authority to generally mitigate potential erosion impacts in a meaningful way, stating: "The purpose of the [erosion control] ordinance, in fact, is to control those impacts. The pertinent issue is whether the ordinance gave the [agency] discretion to further mitigate the impacts of the ... project to any meaningful degree... ." (*Id.* at 30, fn 19.)

Here, in contrast, the objective guideposts included in the separation standard do not limit the County's discretion to determine an adequate and

safe separation distance. The County asserts, in conclusory fashion, that "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." (DOB 37.) But the County does not point to any actual language in Section 8.A that would limit the County's discretion to meaningfully protect groundwater quality.

The Opinion distinguishes *County of Sonoma*, because the ordinance in that case limited the measures the County could impose do to measures recommended by a biologist, while in the instant case, the County is the "arbiter of 'adequacy.'" (Opinion 14-15.) The County does not show any flaw in this analysis.

Moreover, the separation standard meets the functional test because the *purpose* of Water Code section 13801, subd. (c) and the state bulletin standards, including the separation standard, is to mitigate potential environmental impacts on groundwater quality in a meaningful way.[7] For the Court to hold that Chapter 9.36 and the state bulletin standards do not provide the County with enough discretion to do so would render Water Code section 13801 and the state bulletin standards that it mandates ineffectual and meaningless. This would violate a cardinal rule of statutory construction that "a statute should not be given a construction that results in rendering one of its provisions nugatory." (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 634; see also *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1514 ["It is a cardinal rule of statutory construction that in attempting to ascertain the legislative

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[7]Water Code section 13801, subd. (c), required the County to adopt its ordinance and to incorporate standards that meet or exceed the state bulletin standards.

intention, effect should be given as often as possible to the statute as a whole and to every word and clause, thereby leaving no part of the provision useless or deprived of meaning"].)

2. The Court of Appeal correctly applied the functional test for discretion, not a purported "single standard test."

The County's second criticism of the decision below is that the Court of Appeal purportedly used a "single standard test for discretion." (DOB 37 [Argument § II.A.2].) The County coins the term "single standard test" to convey its view that CEQA does not apply because Chapter 9.36 of the County Code only grants discretion to protect groundwater quality, not groundwater depletion. This position is incorrect, because as noted in *Friends of Westwood, supra*, CEQA applies if the County has the power to address *any*, not necessarily *all*, environmental concerns. "The touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to *any* of the concerns which might be identified in an environmental impact report." (Id, 191 Cal.App.3d at 267 (italics added).)

Many appellate decisions involve ordinances that confer discretion over limited subjects, but were held to trigger CEQA. (See, e.g., *Day v. City of Glendale, supra*, 51 Cal. App. 3d at 822 [grading ordinance allowed city engineer to exercise discretion and impose conditions to reduce traffic, geological instability, and flooding impacts]; *HCD, supra,* 45 Cal.App.3d at 193 [mobilehome park ordinance required judgment regarding "sufficient" artificial lighting, and "adequate" water supply and drainage].) These ordinances did not address the many environmental resources that must be analyzed once CEQA is triggered (e.g., impacts on air quality, wildlife, recreation, etc), yet they triggered CEQA anyway.

The County asks this Court to announce a new rule that CEQA cannot apply where a regulatory statute only addresses one type of environmental impact. The County's argument supporting this request is that in several appellate decisions, local ordinances conferred discretion on the lead agency to address several types of environmental harm. (DOB 37-40, citing *Friends of Westwood*, *Day*, and *HCD*.) The Court should reject the County's proposal to extract a rule of decision from the fact pattern in these cases, none of which held that an ordinance must confer discretion to address more than one type of environmental harm for CEQA to apply.

If the County's argument were correct, the Court of Appeal in *Friends of Westwood* would have held that CEQA did not apply because the building permit ordinance in question only gave the city authority to modify the building's design, not to modify the project to address a host of non-design related environmental impacts. For example, a building's air quality impacts depend in part on the number of people who drive to a building rather than take mass transit. The absence of specific authority in the building design ordinance to require transit friendly employment policies (e.g., a ride share board) did not render the design ordinance in *Friends of Westwood* "ministerial."

Also, the County fails to discuss or resolve the many difficult questions that such a rule would generate. For example, in *Mountain Lion Foundation v. Fish & Game Commission, supra,* 16 Cal.4th at 127, this Court held that CEQA applies to a Fish and Game Commission decision to remove a species (the Mojave ground squirrel) from the threatened species list under the California Endangered Species Act (CESA), because the decision is discretionary. Viewed from one perspective, delisting the Mojave ground squirrel threatens only one type of environmental impact,

namely, extinction of the Mojave ground squirrel. Viewed from a different perspective, delisting the Mojave ground squirrel threatens many types of environmental impacts that could contribute to extinction, including loss of habitat, direct mortality, loss of breeding capability, etc. If the Court adopted the County's proposed rule, would a CEQA delisting decision still be "discretionary" or would it be "ministerial" because CESA represents a "single standard?"

Another example is illustrated by this Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310. In that case, the air quality management district had jurisdiction over air quality only, but it prepared an EIR that studied all potentially significant issues before it issued a permit to expand an oil refinery because an EIR must analyze every issue for which the record provides a "fair argument" of significant impact. (*Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13 (*Visalia Retail*); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (*Amador Waterways*). Adverse air quality impacts can increase the severity of asthma symptoms, cause cancer, cause death from heart disease, reduce visibility in cities and in national parks, and many others. (See e.g., (*Sierra Club v. County of Fresno*, supra, 6 Cal.5th 502.) If the Court adopted the County's proposed rule, would an air district's decision to issue a permit to operate be "discretionary" or would it be "ministerial" because the California Clean Air represents a "single standard?"

The same problems arise in connection with the separation standard. This standard gives the County the authority and obligation to protect groundwater quality from contamination, which in turn protects against

many types of environmental harm, including human health impacts from drinking contaminated water, loss of drinking water supplies, adverse impacts on agriculture if groundwater cannot be used for irrigation, harm to fisheries if contamination enters a fish bearing stream, etc. Therefore, in what sense, exactly, is the separation standard a "single" standard?

The County's proposed rule requires determining whether an ordinance confers discretion by way of a "single" or multiple standards, but without any ready means of defining what constitutes a single standard. Even if one could reliably define what constitutes a "single" standard, the County fails to specify how many discretionary "standards" are required before CEQA is triggered. Would two be enough? Or five?

The County's proposed rule is also inconsistent with CEQA's broad definition of the "environment" because it would limit CEQA's applicability based on the limited number of topics for which a local ordinance requires discretionary decision-making. CEQA defines the "environment" broadly to mean "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (CEQA § 21060.5.) The CEQA Guidelines add to this definition: "The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The 'environment' includes both natural and man-made conditions." (CEQA Guidelines § 15360.) Further, CEQA is concerned not only with "direct" impacts, but also with "indirect" impacts. (See e.g., CEQA Guideline, § 15064, subd. (d).) Also, Under CEQA, "an EIR must include a analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future

expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights Improvement Assn. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 396 (*Laurel Heights I*).)

Moreover, unlike the building permit ordinance in *Friends of Westwood* or the grading ordinance in *Day v. City of Glendale*, the County's well permit ordinance and the state Bulletin standards exist solely to protect an environmental resource, groundwater quality. Therefore, any discretionary provision in these laws—by definition—allows the agency to "shape" a well permit in response to environmental concerns.

These points illustrate the core problem with the County's proposal: it elevates form (i.e., the number of standards—however defined) over substance (i.e., the functional test). The County has shown no flaw in the functional test articulated in *Friends of Westwood* over thirty years ago. Nor has it shown how or why the separation standard does not meet that test.

At a minimum, the ordinance in this case gives the County discretion to protect at least one environmental resource: groundwater quality. And protecting this one resource in turn protects a host of other environmental values: drinking water, human health, fisheries, agriculture, etc. Thus, this case is similar to other decisions in which local ordinances provided discretion to protect a limited set of environmental resources nevertheless triggered CEQA review. (See e.g. *Day v. City of Glendale*, *supra*; *HCD, supra,* 45 Cal.App.3d at 193.)

3. The Court of Appeal correctly applied the functional test for discretion," not a purported "formal test."

The County's third criticism of the decision below is that the Court

of Appeal's purportedly "narrow focus ... substituted a formal test of discretion for the functional test." (DOB 42 [Argument § II.A.3].) It appears the County's "formal" versus "functional" distinction is based on its view that the Court of Appeal "concluded that the Bulletin's 'contamination source spacing standard' (Opinion 12) was discretionary because '[d]etermining whether a particular [well] spacing is 'adequate' inherently involves subjective judgment.' (Id. at 13.)" (DOB 42.) The premise of the County's argument is incorrect, however, because the Court of Appeal also applied the functional test when it found that the separation standard gives Stanislaus County the power to "address impacts revealed by environmental analysis." (Opinion 13-15.)

Throughout this litigation, the County has struggled to define the "kind of discretion" that it contends triggers CEQA. Its characterization of the Opinion's rationale as a "formal test" is a new label for the County's continuing effort to divert attention from the functional test that the Court of Appeal applied. In support of this effort, the County relies on inapposite cases and offers tangential criticisms of the Opinion that fail to explain why the separation standard does not meet the functional test.

To support its contention that the Opinion uses a "formal test" rather than the functional test, the County cites *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934 (*San Diego Navy*). This reliance is misplaced. In *San Diego Navy*, the factual and legal context in which the ministerial-discretionary distinction arose was highly attenuated and easily distinguishable. In *San Diego Navy*, the plaintiff claimed that design review conducted pursuant to a development agreement triggered subsequent environmental review pursuant to CEQA section 21166. *San Diego Navy* is thus one of several

Court of Appeal decisions holding that "design review" for aesthetic compatibility with governing land use plans that occurs after CEQA review of the entire project has been completed is a ministerial approval that does not trigger a subsequent round of environmental review under CEQA section 21166. (See e.g., *Health First v. March Joint Powers Authority, supra,* 174 Cal.App.4th at 1144; citing *Madrigal v. City of Huntington Beach* (2007) 147 Cal.App.4th 1375 and *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 724.) This line of cases is inapposite to the instant case because the County well permit ordinance does not provide"design review" for aesthetic impacts and the County's permit approvals do not follow any previous environmental review under CEQA.

In *San Diego Navy*, the City of San Diego entered into a development agreement with the United States to redevelop a retired Navy base and prepared and certified a complete Environmental Impact Report for the project. The development agreement required that future developers submit construction documents to the Centre City Development Corporation (CCDC) (a public nonprofit corporation created to implement downtown San Diego redevelopment projects) so the CCDC could determine whether the plans were consistent with aesthetic criteria established in the development plan and the urban design guidelines. (*San Diego Navy*, 185 Cal.App.4th at p. 929.)

Years later, a developer submitted construction plans to the CCDC. The plaintiff contended the CCDC and City were required to prepare a subsequent EIR under CEQA section 21166. Under section 21166, once "a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review ... .

While section 21151 is intended to create a 'low threshold requirement for preparation of an EIR' [citation], section [21166] indicates quite a different intent, namely, to restrict the powers of agencies 'by prohibiting [them] from requiring a subsequent or supplemental environmental impact report' unless the stated conditions are met." (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1050; see also, *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 949 ["Once a project has been subject to environmental review and received approval, section 21166 and CEQA Guidelines section 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared. These limitations are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with interests in finality and efficiency"]; *Snarled Traffic Obstructs Progress v. City & County of San Francisco* (1999) 74 Cal.App.4th 793, 797 ["Thus, the initial decision to certify an EIR is 'protected by concerns for finality and presumptive correctness' "].)

The first prerequisite for an agency to require subsequent environmental review under CEQA section 21166 is the need for a new "discretionary approval." (CEQA Guidelines, § 15162(c).) When the *San Diego Navy* Court analyzed whether review of the construction plans for aesthetic consistency required a new discretionary approval, it considered the question in the context of the development agreement between the City and the developer. The purpose of a development agreement is to limit the subsequent exercise of discretionary authority by the local agency. (*Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 649.)

In *San Diego Navy*, the plaintiff argued that the CCDC's authority to review the project plans' consistency with the development agreement's

aesthetic guidelines also gave the CCDC the authority and duty under CEQA to assess the project's impact on *global climate change*. The Court rejected this claim because, by entering the development agreement in 1992, the City had contracted away its authority to impose new restrictions on the project beyond the aesthetic concerns allowed by the development agreement. (*Id.* at 940.)

Thus, the result in *San Diego Navy* reflects legal and CEQA policy concerns for protecting parties to development agreements from later-enacted, more restrictive land use requirements and for protecting the finality of previously certified EIRs. These concerns are not present here. CEQA section 21166 is not involved and there is no presumption of finality for previous CEQA review. Nor has the County contracted away its powers to modify well permits to address environmental concerns. Therefore, the decision in *San Diego Navy* is inapposite and does not support the County's defense.

The County's citation to *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394-95 (*Leach*) is likewise unhelpful. In that case, in 1914, the City acquired Lake Morena, an artificial reservoir, for the purpose of water supply. The City later added two more reservoirs to the system to provide potable water to its residents. Under City law, "the primary purpose of the water impounding system is to supply potable water to municipal consumers. The reservoir recreation program shall operate as a secondary function without detriment to, and with an understanding of, the primary operational responsibilities of the system." (*Id.* at 395.) In 1988, the plaintiff filed an action to stop water withdrawals from Lake Morena, claiming the City's decision to supply potable water to municipal consumers from Lake Morena was discretionary, thereby triggering review under CEQA. The Court held that in light of City policy requiring the use

of Lake Morena water for potable municipal water supply without regard to its other amenities, the City's decision to withdraw water for this purpose was "ministerial," not "discretionary." (Id. ["The only way to accomplish the primary purpose of water supply is to draft water between the reservoirs as needed"].) Here, the County is not so constrained; it has the full range of its discretion under Chapter 9.36 and the state bulletin standards.

4. The scope of the County's discretion under its well permit ordinance and incorporated state standards should be construed with its police power and public trust responsibilities.

The scope of the County's discretion under its well permit ordinance must be construed in the context of "the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Berkeley Hillside I,* 60 Cal.4th at 1099–1100 (internal quotes and citations omitted). Here, the "entire scheme of law" includes the County's police power and public trust authority to protect against threats to groundwater of all kinds, including groundwater depletion. (*Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 173 ["[T]he field of groundwater use is within the municipal police power."]; *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 859 [the County is obligated by the public trust doctrine to consider whether the extraction of groundwater may adversely affect navigable waterways by interfering with contributory flows].)

Therefore, the Court should construe the scope of the County's discretion to protect groundwater resources under its well permit ordinance and the incorporated state bulletin standards in harmony with these sources of authority to "retain effectiveness" in achieving protection of groundwater resources.

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B. The Court Should Reject the County's Argument That a Discretionary Approval Does Not Trigger the Application of CEQA Unless the Public Proves That a Specific Discretionary Standard Applies.

The County argues that "to invalidate the County's policy of issuing permits without complying with CEQA ... Plaintiffs must show that the [separation] standard applies to all or the 'great majority' of the County's well construction permit approvals," citing *County of Sonoma*, *supra*, and *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673 (*San Remo Hotel*). (DOB 59-62.) This argument is legally incorrect. If it is correct, Appellants' action meets this requirement.

The County does not explain what it means for the separation standard "to apply to all or the 'great majority' of the County's well construction permit approvals." Does the County mean that factual circumstances require the County to consider departing from the standard's objective guideposts, or that factual circumstances require the County to actually depart from the standard's objective guideposts and exercise the discretion conferred?

Either way, the discretion conferred by the separation standard "applies" to all well permits applications because the County must decide whether the objective guideposts are "adequate" to protect water quality or require modification. Administrative agencies "may not by the adoption of any rule of policy or procedure so circumscribe or curtail the exercise of [its] discretion under [a] statute as to prevent the free and untrammeled exercise thereof" and "may not refuse to exercise the discretion" conferred by statute. (*Bank of Italy v. Johnson*, supra, 200 Cal. at 15.) Where an agency is required to make a discretionary decision, it is an abuse of discretion not to exercise that discretion. With respect to the separation standard, the County may not lawfully refuse to consider whether the

standard's objective guideposts are adequate to protect groundwater quality or whether site-specific conditions require a different separation distance to protect groundwater quality. Consequently Appellants' action meets the County's purported requirement because the discretionary component of the separation standard applies to all of the County's well construction permit approvals. To the extent the *County of Sonoma* decision is inconsistent with this Court's decision in *Bank of Italy v. Johnson*, it should be disapproved.

Moreover, the County failed to exercise the discretion conferred by the separation standard because it was "misinformed regarding its discretionary authority." (*Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1063 ["a prejudicial abuse of discretion occurs when a public agency is misinformed regarding its discretionary authority and, as a result, does not actually choose whether to exercise that discretionary authority"].) The County did not refuse to apply CEQA to well permits approved under Chapter 9.36 based on *factual determinations* that no well permits presented conditions requiring it to depart from the separation standard's objective guideposts. The County concedes that, except for certain permit applications subject to County Code, Chapter 9.37 (adopted after this case was filed) and which are unaffected by the outcome of this case, it has a policy of not applying CEQA to well permits based solely on the County's long-standing policy that such permits are ministerial, and the County applies this policy without regard to the particular facts pertaining to a well application. (AA 74 [Fact 10].) Thus, the County refuses to apply CEQA based on its policy and belief that it has no such discretion to exercise. This represents a prejudicial abuse of discretion because the County is "misinformed regarding its discretionary authority," which is a failure to proceed in the manner required by law. (*Id.*)

Also, the County's obligation to exercise the discretion conferred by the separation standard is not dependent on Appellants or other members of the public proving, in the first instance, that one or more well permits present conditions requiring a departure from the standard's objective guideposts and the exercise the discretion. Any such rule would contravene well-settled law governing "preliminary review" under CEQA.

The CEQA process begins with the lead agency undertaking a "preliminary review" to determine whether CEQA applies to a proposed activity and, if so, whether the activity is exempt. (*Davidon Homes, supra,* 54 Cal.App.4th at 112-13 ["The first tier is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity ... the Legislature has determined that ministerial projects are exempt from CEQA review"]; *HCD, supra,* 45 Cal.App.3d at 192 ["When the permit application is filed, the granting agency must, as an initial matter, inquire whether the permit is a 'discretionary' or a 'ministerial' project as defined by CEQA"]; CEQA § 21080; Guidelines §§ 15002(k); 15061.)

Further, CEQA lead agencies have an affirmative duty to evaluate the factual basis for whether CEQA applies to a project. (*Berkeley Hillside I, supra,* 60 Cal.4th at 1103; *Muzzy Ranch, supra,* 41 Cal.4th at 386, quoting *Davidon Homes*, *supra*, at 117.) The County's position that it may treat well permits as "ministerially" exempt from CEQA review as a matter of policy, rather than fact, unless and until a member of the public presents evidence that a well permit application present conditions requiring a departure from the standard's objective guideposts and to exercise discretion is inconsistent with this Court's holdings in *Bank of Italy v. Johnson*, *Berkeley Hillside I* and *Muzzy Ranch* and with the Court of Appeal holding in *Valley Advocates.*

The County's reliance on *Sierra Club v. County of Sonoma* is misplaced. In that case, with respect to provisions of the grading ordinance that the Court of Appeal decided did not apply to the project at issue, the Court reasoned that the evidence in the record did not show, as a matter of fact, that these provisions applied to the project. (Id. at 25.) This portion of the *County of Sonoma* decision is both distinguishable and wrongly decided.

County of Sonoma is distinguishable because it was a mandamus action seeking to void the approval of one development project. The Court in *County of Sonoma* did not decide whether the ordinance generally granted the County sufficient discretion to require CEQA review. Rather, the Court framed the relevant question to be "whether the regulations granted the agency discretion regarding the particular project." (*Id.* at 25.) Appellants' claim here does not concern the application of the County's ordinance to a particular well permit. Appellants' declaratory relief claim in this action seeks to change the County's policy of treating well permits as "ministerially" exempt from CEQA regardless of any factual showing. Under current County policy, any factual showing that a permit requires a departure from the standard's objective guideposts and the exercise of discretion is simply irrelevant.

The prayer for declaratory relief seeks to change that policy prospectively. (*Kirkwood v. California State Automobile Assn. Inter–Ins. Bureau* (2011) 193 Cal.App.4th 49, 59 ["Declaratory relief operates prospectively ...]; *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403 ["Declaratory relief operates prospectively and not merely for the redress of past wrongs"].) Thus, assuming arguendo that the public must make such a factual showing, at a minimum, Appellants are entitled, to a judicial declaration that the County's current policy is unlawful.

Moreover, *County of Sonoma* implicitly acknowledged that some provisions of the grading ordinance, where applicable, would require the exercise of discretion and therefore trigger the need for CEQA review. Thus, Sonoma County could not declare that all projects subject to the grading ordinance are ministerial and exempt from CEQA review as a matter of policy.

Also, this portion of the *County of Sonoma* decision is poorly reasoned. By focusing on the absence of facts in the record showing the proposed vineyard's site characteristics and engineering specifications were subject to specific discretionary provisions in the ordinance, the Court in *County of Sonoma* shifted the burden of environmental fact-gathering under CEQA away from the agency and onto the public. For example, with respect to an ordinance provision requiring diversion of storm water runoff 'to the nearest practicable disposal location," *County of Sonoma* states: "By failing to demonstrate that other means of diversion were even available, petitioners have not established that the Commissioner had discretion under this provision." (Id. at 342.) This reasoning is flawed because it does not address how an objecting party can reasonably be expected to obtain such information, which presumably would require detailed knowledge of the site's topographic characteristics, surface water hydrology, terrestrial and aquatic habitat values, soil types, tree and vegetation types, among other physical factors. The holding in *County of Sonoma*, if applied to well permits, would put an impossible burden on the public because the County issues well construction permits without any notice or opportunity to be heard.[8] As discussed above, such a rule is inconsistent with this Court's

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[8]See AA 73 [Fact 6], 80-113; 74 [Fact 12] 115-146; see also and Respondents' Request for Judicial Notice, filed in the Court of Appeal on or

precedents governing preliminary review under CEQA.[9]

The County's reliance on *San Remo Hotel* is also misplaced. *San Remo Hotel* involved a challenge to the constitutionality of San Francisco's residential hotel conversion regulations. This Court noted that for a facial challenge based on the contention that the fee assessed for conversion of residential units to tourist units does not bear a reasonable relationship to the loss of housing, plaintiffs must "demonstrate *from the face of the ordinance* that fees assessed under the HCD bear no reasonable relationship to housing loss in the generality or great majority of cases." (Id. at 673 [italics added].) The County fails to explain why this rule should, or how it could, apply to the functional test for discretion under CEQA.

Also, as noted above, even if this rule applies here, the separation standard does apply to all permits approved under Chapter 9.36 because the County must exercise the discretion it confers, even if it ultimately decides not to deviate from the standard's objective guideposts on any given permit.

C. County Code Chapter 9.36 Incorporates the General Discretionary Standards Set Forth in the State Bulletins.

In its Answer to the Petition for Review, Appellants specified the following additional issue: Does Stanislaus County's local groundwater well permit ordinance incorporate the state Bulletins' general discretionary

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about April 25, 2017; Document 2, ¶ 36. In the Court of Appeal, the County applied for judicial notice of portions of the record on appeal in the related case entitled *Coston v. Stanislaus County*, Supreme Court Case No. S251721, as to which this Court granted a "review and hold" pending decision in the instant case. Appellants have never objected to this portion of the County's request.

[9] Troublingly, the *County of Sonoma* opinion imposes this burden on the public even as it acknowledges that there likely will be no meaningful opportunity for public participation given the 'informal' nature of this type of permit process. (Id. at p. 30, fn. 19.)

standards, and thereby confer discretionary authority triggering CEQA review? These general discretionary standards are described in section II.C of this brief.

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

These general discretionary standards clearly provide the permitting authority without sufficient discretion to "modify" well construction permits to protect the environment. Therefore, these standards meet the functional test for discretion under CEQA. (*Friends of Westwood, supra,* 191 Cal.App.3d at 272.)

The County argues that "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." As discussed in more detail below, this way of framing the issue is too narrow. But even if the County correctly framed the issue, section 9.36.050 incorporates these general discretionary standards.

The County argues that these general grants of discretion are not "standards" as that term is used in section 9.36.050. The County relies on a dictionary definition of "standard" as "[s]omething that is established by authority, custom, or general consent, as a model or example to be followed; criterion; test." (DOB 51.) The Bulletins' general grants of discretion meet this definition because they establish a "criterion" for granting well-permits. This criterion is protection of groundwater quality "equal to that provided by these standards." (AA 129 [Bulletin No. 74,

Chapter II: "Under certain circumstances, adequate protection of groundwater quality may require more stringent standards than these presented here; under other circumstances, it may be necessary to deviate from the standards or substitute other measures which will provide protection equal to that provided by these standards" (italics added)]; AA 150 [Bulletin No. 74-81, Chapter II, Part I, section 3: "the enforcing agency may ... prescribe alternative requirements *which are "equal to" these standards in terms of protection obtained* (italics added)].)

The fact that the general grants of discretion are qualitative rather than quantitative and require the exercise of judgment by the permitting authority does not mean they do not establish a "criterion." Indeed, qualitative criteria that require the exercise of discretion are routine under CEQA. (*Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 201 ["The Guidelines grant agencies 'discretion to determine, in the context of a particular project, whether to: [¶] ... quantify greenhouse gas emissions resulting from a project ... and/or [¶] [r]ely on a qualitative analysis or performance based standards.' (CEQA Guidelines, § 15064.4, subd. (a).)"]; CEQA Guidelines, § 15064.7 subd. (a) ["A threshold of significance is an identifiable, quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant"].)

Another dictionary definition of "standard" is "something set up and established by authority as a rule for the measure of ... value or quality."(Merriam-Webster's Collegiate Dictionary, 11th Ed., p. 1216.) Again, the general grants of discretion "establish a rule for the measure of value" consisting of protection of groundwater quality "equal to that

provided by these standards."

In addition, the County's focus on the word "standard" in isolation is excessive. The state Bulletins use the word "requirement" interchangeably with the word "standard." For example, Bulletin No. 74-81, at Chapter II, Part I, section 3, provides: "If the enforcing agency finds that compliance with any of the *requirements* prescribed herein is impractical for a particular location ... the enforcing agency may ... prescribe alternative requirements *which are "equal to" these standards in terms of protection obtained.*" (AA 150 [Bulletin 74-81, Chapter II, § 3] (emphasis added).) The word "requirement" is defined as "something essential to the existence or occurrence of something else." (Merriam-Webster's Collegiate Dictionary, 11th Ed., p. 1216.) The Bulletins provide both predetermined objective "requirements" or "standards" and general discretionary "requirements" or "standards" as "essential to the occurrence of something else," i.e., protection of groundwater quality.

The County's construction of section 9.36.150 ignores the rule that courts "do not view the language of the statute in isolation." (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.) Also, courts "do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Berkeley Hillside I,* 60 Cal.4th at 1099–1100 (internal quotes and citations omitted).) Also "the 'plain meaning' rule does not prevent a court from determining whether the literal meaning of the statute comports with its purpose" and courts will "not follow the plain meaning of the statute when to do so would frustrate the manifest purposes of the legislation as a whole." (*People v. Young* (2016) 247 Cal.App.4th 972, 978–979 (internal quotes omitted.)

Also, the County's narrow framing of the issue obscures the fact that the County was required to adopt its ordinance by a state law requiring that it adopt an ordinance that "meets or exceeds the standards" adopted by the state. (Water Code § 13801, subd. (c), AA 412-13[DWR Bulletin 74-81].) State law does not discriminate, for purposes of requiring that local ordinances "meet or exceed" its standards, between its quantitative and qualitative standards. The County's view would put the local ordinance at odds with the state law that requires it to "meet or exceed" the state standards and violate the rule of statutory construction against interpreting a statute in a way that defeats its purpose, which in this case is the adequate protection of groundwater.

The County cannot argue for an interpretation of its own ordinance that would put it in conflict with state law because the County cannot validly adopt an ordinance setting standards governing groundwater well permits that conflict with Water Code section 13801. (Cal. Const., Art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*]" (italics added)]; *T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 346–347 [Municipalities "have plenary authority to govern, subject only to the limitation that they exercise this power ... subordinate to state law"].) Here, state law expressly occupies the field of groundwater well permitting standards and, therefore, preempts any construction of the County's well-permit ordinance that does not incorporate all of the state bulletin standards, including the general grants of discretion. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 ["Local legislation enters an area 'fully occupied' by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized

indicia of intent"].)

The County's reliance on *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 254 is misplaced. That decision involved the distinction between automobile emissions standards imposed on manufacturers and mechanisms available to enforce these standards in the context of federal preemption of California's attempt to impose additional emissions standards on manufacturers. The opinion sheds no light on whether section 9.36.150 incorporates the general grants of discretion set forth in Section II of the state bulletins.

D. The State Bulletins' Specific Discretionary Standards Referenced in Footnote 8 of the Opinion Also Confer Discretionary Authority and Trigger CEQA Review.

In its Answer to the Petition for Review, Appellants specified the following additional issue: Do the state Bulletins' specific discretionary standards referenced in footnote 8 of the Opinion confer discretionary authority triggering CEQA review?

Bulletin No. 74-90 provides for locating wells upstream of contamination sources, *if possible*. (AA 184 [Part II, § 8.B (emphasis added)].) In addition, Bulletin No. 74-90 provides for locating the wells outside areas of flooding, *if possible*: (AA 184 [Part II, § 8.C (emphasis added)].) By incorporating these standards by reference, section 9.36.150 requires that the County exercise discretion in deciding whether to issue well construction permits, because the County may deny the permit or require changes in the project as a condition of permit approval to address concerns relating to environmental impacts.

The language used in the above standards demonstrate the need for County authorities to make individualized determinations on the facts and circumstances presented on a range of issues. Indeed, the County must

judge whether the location of the well is appropriate in light of its "opinion" on whether it is "possible" to locate the well up-gradient from contamination sources. (AA 183-84 [Bulletin 74-90].) The County must also "consider" "the possibility of reversal of flow near the well due to pumping." (AA 184 [Bulletin 74-90].)

The Court of Appeal held that standards conditioned on compliance on being "possible" are not discretionary because—in the Court of Appeal's view—whether a directive is "possible" is an "objective" test. This is incorrect because the term "possible" is synonymous with "feasible." (Merriam-Webster's Collegiate Dictionary, 11th Ed., p. 968.) CEQA case law has long held that determinations of feasibility are discretionary and trigger CEQA review. (See e.g., *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1583 ["Having made the final determinations as to whether or not it was feasible to eradicate the AMFF and what method would be most effective in doing so, CDFA cannot validly claim that it was performing purely ministerial functions. The 1985 project was discretionary within the meaning of section 21080, subdivision (a), and therefore subject to regulation under CEQA").]

E. The Opinion Erroneously Suggests That Mitigation Measures Identified in an EIR May Be Found "Legally Infeasible" If They Go Beyond the Measures Authorized by Chapter 9.36 of the County Code.

In its Answer to the Petition for Review, Appellants specified the following additional issue: 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?

Appellants do not argue that the County's legal obligations or

authority under CEQA enlarge the discretion conferred by Chapter 9.36 for purposes of the determining whether well permits approvals are ministerial or discretionary. Instead, Appellants here respond to the Opinion's suggestion that once CEQA is triggered, the limited scope of discretion conferred by the well permit ordinance might limit the legal feasibility of mitigation measures considered for adoption under CEQA. (See Opinion 23-24.) It does not.

The Opinion suggests that mitigation measures identified in an EIR may be found "legally infeasible" if they go beyond the measures authorized by Chapter 9.36 of the County Code, stating:

> The County and Amicus Curiae argue that CEQA review would require the County to analyze a host of environmental impacts it is powerless to address. ... When a lead agency identifies mitigation measures that it lacks legal authority to impose, it may simply make a finding in the environmental document that the measures are legally infeasible.

(Opinion 23-24.) This portion of the Opinion conflates the County's legal authority under Chapter 9.36 with its separate legal obligations under CEQA.

Once CEQA applies, the County lacks authority to approve a project unless and until it complies with CEQA's requirements. (CEQA § 21002, 21002.1; 21081; Guidelines, §§ 15061, 15063, 15091-15093.) For example, if a lead agency is required to prepare an initial study, it cannot approve the project unless and until it adopts a negative declaration or prepares an Environmental Impact Report (EIR). (Guidelines, § 15063, subd. (b).) If the lead agency is required to prepare an EIR and the EIR discloses a significant adverse effect, the County cannot approve the project unless and until it can make the findings required by CEQA section 21081. These findings include a finding that all feasible mitigation measures or

alternatives that substantially reduce the project's significant effects have been adopted, and that any remaining significant effects are "acceptable" due to the project's overriding social or economic benefits. (*City of San Diego v. Board of Trustees of California State University, supra,* 61 Cal.4th at 960-61; *City of Marina, supra,* 39 Cal.4th at 350; *Mountain Lion Foundation, supra,* 16 Cal.4th at 127; CEQA, §§ 21002, 21081; Guidelines §§ 15091-15093.) Thus, if an EIR discloses that operation of a water well would cause significant adverse environmental effects, the County cannot approve the permit unless and until the County makes the findings required by CEQA section 21081, *which could include the adoption of feasible mitigation measures that are not otherwise specified in the ordinance that triggers CEQA review* (i.e., County Code, § 9.36.150.).

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

F. The County's Concerns with the Practical Effects of A Ruling in Appellants' Favor are Overstated and Irrelevant.

The County expresses concern that applying CEQA to all well permits will be expensive and burdensome to counties across the state. The solution for counties with discretionary ordinances is to screen out truly minor permits by using CEQA's many exemptions. For example, the common sense exemption applies "'[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment' (CEQA Guidelines, § 15061, subd.

(b)(3))." There are also categorical exemptions that may apply to truly "minor" permits, including the Class 3 categorical exemption for "new construction of small structures" (CEQA Guideline § 15303) and the Class 4 categorical exemption for "minor alterations to land" (CEQA Guideline § 15304).

These exemptions have the virtue of providing neighboring landowners or other stakeholders at least some opportunity to present evidence to the lead agency that a given well permit may have significant adverse effects. Thus, using—rather than avoiding—CEQA's procedures is consistent with the rule that "CEQA must 'be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Friends of Westwood, supra,* 191 Cal. App.3d at 273.)

The County argues that a decision in Appellants' favor would affect many counties who have well construction permitting ordinances that are similar to that of Stanislaus County. This concern is not relevant to the legal issues presented here. The County's concern is more properly addressed to the Legislature.

V. CONCLUSION

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

Dated: March 15, 2019 LAW OFFICES OF THOMAS N. LIPPE, APC

By: Tom Lippe

Thomas N. Lippe
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WORD COUNT CERTIFICATION

I, Thomas N. Lippe, appellate counsel for Plaintiffs and Appellants, certify that the word count of this Answer Brief on the Merits is 13,391 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief.

Dated: March 15, 2019 LAW OFFICES OF THOMAS N. LIPPE, APC

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Case No. S251709

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,
Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.,
Defendants and Respondents.

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

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

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PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of San Francisco, California. My business address is 201 Mission Street, 12th Floor, San Francisco, CA 94105. I am over the age of 18 years and not a party to the above entitled action. On March 15, 2019, I served the following:

- **Answer Brief on the Merits**

on the parties designated on the attached service list; and

MANNER OF SERVICE
(check all that apply)

[A] By First Class Mail	In the ordinary course of business, I caused each such envelope to be placed in the custody of the United States Postal Service, with first-class postage thereon fully prepaid in a sealed envelope.
[B] By Truefiling Electronic Service	I electronically filed the document(s) with the Clerk of the Court by using 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 March 15, 2019, in the City and County of San Francisco, California.

Kelly Marie

Kelly Marie Perry

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