No. S251709

IN THE SUPREME COURT OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

vs.

STANISLAUS COUNTY et al.,

Defendants and Respondents.

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

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

DEFENDANTS' REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This Court granted the County's Petition to resolve a split of authority on the question whether groundwater well construction permits—building permits for wells—are discretionary and thus subject to the California Environmental Quality Act ("CEQA"). As described in the County's Opening Brief on the Merits ("Open. Br."), courts have uniformly applied a "functional test" for discretion that pragmatically evaluates the extent to which the agency's authority allows it to exercise judgment, and if so, whether the agency can use that judgment to *meaningfully* affect the proposed project and its potential environmental impacts. This test recognizes that virtually any human decision involves the application of some degree of judgment.

By contrast, like the court below, Plaintiffs view this test as mechanical, triggering CEQA compliance if the agency exercises *any* judgment in approving a proposed project and has *any* ability to alter the project and its potential environmental impacts, however minor. No prior court has adopted such a bright-line rule. Rather, courts have taken a case-by-case approach in which they evaluate the authority given the agency by the governing statute or ordinance to determine whether the agency can meaningfully affect the project and its impacts. Indeed, Plaintiffs fail to grapple with the holding in the seminal discretion case, *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 280, that "the sheer quantity and consequences of discretionary decisions" that triggered CEQA, not the existence of a single standard calling for minimal exercise of judgment.

The County well-permitting ordinance, Chapter 9.36 of the Stanislaus County Code ("Ordinance"), and the Department of Water Resources Bulletin's standards it adopts, do allow the County Department of Environmental Resources ("DER") to exercise some minor judgment in evaluating a single parameter of a proposed well: the distance of the well from potential sources of groundwater contamination. This separation standard is one out of dozens of technical standards governing well design and construction, and DER's exercise of judgment in applying it is guided by default specifications for well separation. Moreover, DER can exercise that judgment solely to determine whether default separation requirements are adequate, and if not, to adjust the separation of the well from a source of potential contamination. It cannot regulate the location of wells generally, nor can it regulate "groundwater quality" generally, as Plaintiffs contend. Plaintiffs cannot point to a single case with remotely similar facts in which a court has found an approval to be discretionary. Conversely, several courts have held that similarly limited ability to affect a proposed project falls short of CEQA's threshold for a discretionary approval.

This Court should reject the categorical approach proposed by Plaintiffs and adopted by the Court of Appeal. In its stead, the Court should reaffirm the consistent practice of prior courts in applying the functional test for discretion. Under that test, DER's minimal ability to influence the design and construction of wells does not trigger CEQA.

ARGUMENT

I. The well-separation standard does not satisfy the functional test for discretion.

A. Both Plaintiffs and the Court of Appeal have misconstrued the functional test.

After largely ignoring the functional test for discretion,[1] Plaintiffs now claim to embrace it, asserting that the well-separation standard satisfies it and contending that the County asks the Court to "abandon" it. (Answer Brief on the Merits ("Answer") at 11, 26-27, 32-38.) On the contrary, the functional test has been, and remains, the core of the County's argument that the Ordinance and the Bulletin's standards it incorporates do not give DER sufficient discretion to trigger CEQA. (See, e.g., Open. Br. at 26-30.)

Plaintiffs' view of the functional test bears no resemblance to the version applied in the case law. They contend that any authority to exercise judgment—no matter how narrow—triggers CEQA if the lead agency may alter the project in any respect—no matter how minor—to affect any potential environmental impact—no matter how insignificant. (Answer at 33, 35-37.) This formalistic view of the test is that adopted by the Court of Appeal and led to its erroneous decision below. (See Open. Br. at 42-44.)

The functional test does not establish a bright line rule, despite Plaintiffs' efforts to create one. The test recognizes that any

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[1] In fact, Plaintiffs' Answer to the Petition for Review did not use the word "functional" even once.

human decision, "'even if it involved only the driving of a nail,'" involves some degree of discretion.[2] (*Johnson v. State* (1968) 69 Cal.2d 782, 788 (quoting *Ham v. County of Los Angeles* (1920) 46 Cal.App. 148, 162); see also Open. Br. at 27, fn. 11.) It thus requires pragmatic, case-by-case determinations based on the scope of the lead agency's authority to exercise judgment in deciding whether and how the proposed activity should be carried out. (See Open. Br. at 29, 60-61.) The discretion cases reflect precisely that approval-by-approval approach. (See, e.g., *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 28-29 (*County of Sonoma*) [distinguishing the scope of county agency's discretion from the facts of prior cases finding approvals to be discretionary].)

Those cases reveal two related factors that guide the courts' application of the functional test. The first is the degree to which the terms of the agency's authority allow it to exercise judgment in evaluating the proposed action. For this factor, courts focus on the open-endedness, or conversely the precision, of the standard governing the agency's decision.

In *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 118-19, this Court held that the Commission's decision to "delist" a species, removing it from protection

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[2] Plaintiffs' narrow view of ministerial action "would seem to postulate a class of official acts in which the official is an automaton; the facts and the statute are placed in the machine, a lever is pressed, and out comes the official act. Such an official never was on land or sea. Human action always involves the exercise of some judgment or discretion." (Patterson, *Ministerial and Discretionary Official Acts* (1922) 20 Mich.L.Rev. 848, 854.)

under the California Endangered Species Act, was discretionary for CEQA purposes. (See Open. Br. at 40-41.) The statute directs the Commission to "consider" a petition to determine if delisting is warranted (*Mountain Lion Foundation*, *supra*, 16 Cal.4th at 118 (citing Fish & G. Code §§ 2074.2, 2075)), and its regulations provide that a "species *may* be delisted if Commission determines its existence [is] no longer threatened." (*Id.* at 118, original italics (citing Cal. Code Regs., tit. 14, § 670.1(i)(1)(B)).) That virtually uncabined exercise of judgment, about the fundamental question whether the project (delisting) should proceed, made the Commission's decisions plainly discretionary and subject to CEQA.

On the other hand, in *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162, 180-81 (*Napa County Bd.*), the court found the county's lot-line-adjustments to be ministerial although county staff was required to exercise some modicum of judgment in reviewing them. To approve an adjustment, staff had to determine, among other things, that "the resulting parcel must be connected to a public sewer or be *suitable* for an on-site sewage disposal system . . . ." (*Id.* at 177, fn. 11, italics added.) And in *County of Sonoma*, *supra*, 11 Cal.App.5th at 30-31, the court concluded that provisions requiring diversion of stormwater to the "nearest practicable location" and incorporation of natural drainage features "whenever possible" were insufficient to trigger CEQA though they implicated some insubstantial degree of judgment.

The second factor is the extent to which the agency has authority to use that judgment to meaningfully shape the project in

ways that affect the project's potential environmental impacts. (See *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 933-34 (citing *Friends of Westwood, supra*, 191 Cal.App.3d at 266-67).) Thus, even if the statute's direction to the agency is somewhat open-ended and therefore calls for the exercise of some judgment, the agency must be able to *use* that judgment in a way that could meaningfully affect the project and its environmental outcomes.

It is not enough that the agency may have *some* effect on the project. The many cases applying the functional test uniformly hold that the agency must have some *substantial* ability to alter the project. (See Open. Br. at 28.) In *Friends of Westwood, supra*, 191 Cal.App.3d at 272, the court held that an approval is considered ministerial if "[t]he agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any *significant* way." (Italics added.) In language studiously ignored by Plaintiffs,[3] the court went on to hold that

> discretion to modify a single . . . standard or to impose a single condition or modification does not automatically mean the approval process is a "discretionary project" [for CEQA purposes]. Yet when that discretion is exercised as to several items and in the context of a major project with substantial potential effects on the environment the process moves from a ministerial to a

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[3] Plaintiffs contend that the city in *Friends of Westwood* "only" had authority to "modify the building's design." (Answer at 34.) But as the opinion makes clear, city staff had authority to fundamentally alter that design in myriad ways. And given that construction of the building was the entire project, that meant staff had far-reaching control over the project and its impacts.

> discretionary decision. [¶] . . . [I]t is the sheer quantity and consequences of discretionary decisions . . . that turn this building permit approval process into a "discretionary" project.

(*Id.* at 280.)

Similarly, in *County of Sonoma, supra*, 11 Cal.App.5th at 28, the court repeatedly emphasized that the test is based on the "meaningfulness" of agency's discretion.[4] (See also *ibid.* ["[T]he existence of discretion is irrelevant if it does not confer the ability to mitigate any potential environmental impacts in a meaningful way."]; *Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 308 [permit is discretionary if the agency has "authority to condition the permit in environmentally significant ways"]; *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394-95 [city's decision was ministerial because it "could do *little* or nothing" to mitigate its effects (italics added)].)

In the recent case of *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 94-95, opn. mod. (2019) (petition for review pending), the court held that the city lacked sufficient discretion to trigger CEQA under its design review ordinance.[5] The ordinance plainly called for the city to

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[4] Requiring that the control be "meaningful" is hardly empty rhetoric. In another recent CEQA case, *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, this Court repeatedly used the same term to describe the level of detail about environmental impacts required in an environmental impact report. (*Id.* at 510, 514, 520.)

[5] The case was published after the County filed its Opening Brief but before Plaintiffs filed their Answer Brief. They fail to address it.

exercise judgment on a variety of aesthetic criteria for a housing project, yet the court found that inadequate to require CEQA compliance because the ordinance gave the city no ability to otherwise alter the project to avoid its potential environmental consequences. (*Id.* at 94.)

Contrary to Plaintiffs' suggestion (Answer at 33-34), the County does not contend that an agency approval can be discretionary only if the agency's statutory authority would allow it to pervasively modify the project to address the full panoply of potential environmental impacts. But it is also not enough to show that the agency can make some minor adjustment in a single project parameter that might alter the project's effect on the environment in a single respect. As described in the Opening Brief and in the next section, that is precisely the situation here.

B. The well-separation standard gives DER only minimal authority to affect a proposed well.

The Ordinance allows DER far less leeway to reject or modify proposed wells than any delegation of authority that a court has deemed discretionary under the functional test. The Court of Appeal based its finding of discretion on a single standard in Section 8(A) of the Bulletin under which DER may alter the default required distance between a well and a source of potential contamination if it determines that the default separation required by the Bulletin is inadequate. (Opinion at 12-15.) Given that limited authority, neither factor under the functional test supports a finding that the well-construction permits are discretionary.

First, DER's review of well-construction permits is narrow rather than open-ended. The Ordinance and Bulletin allow DER to

consider only the location and construction of a proposed well, measured against detailed and prescriptive standards, to avoid introducing contaminants to groundwater. (Open. Br. at 37-38, fn. 14.) Neither the Ordinance nor the incorporated Bulletin standards provide the type of wide-ranging agency review that courts have deemed discretionary. (See, e.g., *Mountain Lion Foundation, supra*, 16 Cal.4th at 118; *People v. Dept. of Housing & Community Development* (1975) 45 Cal.App.3d 185, 193-94 (*HCD*); see also Open. Br. at 38-41.)

Even within the well separation standard—the "single standard" on which the Court of Appeal focused to the exclusion of the rest of the standards (Opinion at 15)—Section 8(A) provides two pages of what the Court of Appeal recognized as "objective guideposts" that provide direction for DER's exercise of minor judgment in determining whether the default well-separation distances specified in the Bulletin are "adequate."[6] (*Id.* at 13, fn. 11; see also Open. Br. at 34-37.) These "guideposts" clarify conditions under which default separations should generally apply: "where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water." (AA 3:542.) They also specify how DER should modify wells, for example by increasing the length of the annular seal in response to adverse hydrological circumstances, further

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[6] Plaintiffs contend the court below did not narrowly focus on this single standard (Answer at 33), yet the court used precisely that language. (Opinion at 15; see Open. Br. at 38.)

directing DER's consideration of this one parameter in its review. (AA 3:542-43; Open. Br. at 34-37.)

Plaintiffs complain about the County's citation of *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069. (Answer at 28-29.) But *Tobe* stands for the unremarkable proposition that a statutory term that appears open-ended or vague, such as "adequate" here, may be made more concrete by its context. (See Open. Br. at 35-36.) The Court of Appeal ignored that context, reading the word "adequate" in isolation. (*Id.* at 34-37.)

Taken together with the dozens of other well-construction standards and hundreds of pages of associated technical directions, little of which Plaintiffs or the Court of Appeal acknowledged, DER exercises minimal judgment in reviewing well-construction permits. Rather, it implements a detailed set of standards with only minor authority to exercise judgment at the margin. Any increment of discretion left to DER under this scheme falls far short of any court's finding of discretion applying the functional test. (Compare *HCD*, *supra*, 45 Cal.App.3d at 193-94 [agency exercised uncabined discretion about numerous aspects of the project] with *County of Sonoma*, *supra*, 11 Cal.App.5th at 28 [finding no "meaningful" discretion in review of several project parameters].)

Second, the Ordinance gives DER minimal ability to use its judgment about the adequacy of the default well separation requirements to alter the environmental impacts of a well. It may solely adjust the well's separation from a source of potential contamination or require a deeper well seal. (Open. Br. at 42-45.)

Although the location of a new well may be important to avoid adding new contaminants to the aquifer in some circumstances, authority to adjust this one parameter, with guidance from the Bulletin's standards, falls far short of the extensive changes to a project at issue in *Friends of Westwood, supra*, and other cases that apply the functional test to find discretion. DER cannot conduct a holistic review (much less of a large, complex, and multi-faceted construction project) and require fundamental changes in project design such as building size, density, or parking and traffic configurations. (See *Friends of Westwood, supra*, 191 Cal.App.3d at 273-76 [describing city's exemptions from building design standards and exercise of discretion in establishing ad hoc standards related to ingress, egress, traffic, and parking].) DER has no authority to make any other change to design or construction of a proposed well, or to control its operation, including the quantity of water pumped or the use of that water. Nor can it use its limited power over well separation to address any impact other than the introduction of groundwater contamination from an identified source. It cannot, for example, require relocation of a well to avoid interference with a neighbor's well. (Open. Br. at 44, fn. 16.)

In fact, the Ordinance does not even empower DER to "protect groundwater quality" generally, as Plaintiffs contend repeatedly. (See Answer at 10-12, 25, 32-33, 35, 37, 43-44, 50-51.) DER can adjust separation of a well from a discrete source of potential contamination or require a deeper well seal, but it has no authority to impose other limits on, for example, the land uses that are served with that groundwater, much less to require other

measures to "protect[] against many types of environmental harm," as Plaintiffs contend. (Answer at 35-36; see Opinion at 16, fn. 14 [Ordinance and incorporated standards do "not grant the DER the authority to do anything about" concerns other than the risk that contaminants will enter a well: issues such as "groundwater consumption [are] not a permissible basis for denying a [well construction] permit"].) Thus, for example, DER has no license to deny a permit based on risks to groundwater quality from the application of fertilizers or pesticides to land irrigated by the well. (Open. Br. at 44, fn. 16.) Such limited ability to affect a well and its potential environmental impacts falls far short of the "meaningful" control required by the case law. (See Section I.A, *ante*.)

Plaintiffs' argument relies entirely on DER's ability to determine that some unspecified subset of proposed wells should be located farther from a potential contamination source. (Answer at 26-27.) They never acknowledge just how narrow this grant of authority is as a starting point for DER's review, even before Section 8(A) adds additional direction including default distances and responses to particular circumstances. (See Open. Br. at 32-49.) Plaintiffs certainly never engage in the pragmatic analysis required by the functional test, in which courts consider the practical consequences of the authority granted to the agency. (See, e.g., *Friends of Westwood*, *supra*, 191 Cal.App.3d at 280 ["sheer quantity and consequences of discretionary decisions" determines application of CEQA, not the "discretion to modify a single . . . standard or to impose a single condition or modification"].)

The *County of Sonoma* decision provides just such an analysis, which Plaintiffs unsuccessfully try to distinguish. (Answer at 31-33.) The erosion control ordinance in that case sets a minimum setback unless a wetlands biologist recommends otherwise, requires diversion of stormwater to "the nearest practicable disposal location," and requires use of natural drainage features "whenever possible." (*County of Sonoma, supra*, 11 Cal.App.5th at 27-28.) According to Plaintiffs, the Sonoma ordinance "tightly limit[s] its grants of discretion to specific erosion control features of the project" and does not "provid[e] discretionary authority to generally mitigate potential erosion impacts in a meaningful way," which leaves little enough agency control to result in a ministerial decision.[7] (Answer at 31.) Plaintiffs never actually distinguish these limits from the Ordinance and Bulletin standards. Instead, they studiously ignore both the quantity and tightly circumscribed nature of the standards that limit DER's well permitting authority. And they never even attempt to identify language in the Ordinance that would allow DER "to generally mitigate [well] impacts in a meaningful way." (*Id.* at 31-32.)

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[7] Both the Court of Appeal and Plaintiffs contend that outsourcing the determination of whether the minimum setback is adequate makes the Sonoma ordinance less discretionary than Chapter 9.36 because a private consultant, rather than public agency staff, is the "arbiter of 'adequacy.'" (Answer at 32 (quoting Opinion at 14-15).) This is formalism. Such outsourcing only changes the locus of decision making to an unaccountable private contractor rather than agency staff. There is no reference to a single constraint on that contractor's determination of what constitutes an adequate setback.

Instead, Plaintiffs contend that the County's view of the functional test would immunize agencies that implement a "regulatory statute [that] only addresses one type of environmental impact" from any CEQA compliance. (Answer at 34.) They point to *Mountain Lion Foundation*, *supra*, 16 Cal.4th at 127 and *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 (*CBE*), which apply CEQA to two such agencies. (Answer at 34-35.) Neither case is inconsistent with the County's position.

As discussed above and in the Opening Brief, in *Mountain Lion Foundation*, *supra*, this Court held the Commission exercised broad discretion to determine whether delisting a protected species is "warranted." (16 Cal.4th at 118; see also *ibid.* (citing Cal. Code Regs., tit. 14, § 670.1(i)(1)(B) [Commission "may" delist if species' existence no longer threatened]); Section I.A, *ante*; Open. Br. at 40-41.) Indeed, as the Court later recognized in *Central Coast Forest Assn. v. Fish & Game Com.* (2017) 2 Cal.5th 594, 603, the statute governing delisting "does not prescribe any criteria for determining whether removal is warranted." Even the Commission conceded that it "must not only consider all of the evidence introduced in the proceedings, but also must weigh and evaluate it—that is, it must determine whether evidence received is scientifically credible, reasonable and reliable." (*Mountain Lion Foundation*, 16 Cal.4th at 118.) Applying the functional test, it is clear *Mountain Lion Foundation* is nothing like this case: the Commission had total control over the project; it had sweeping discretion to decide whether delisting is justified. DER, by contrast, may adjust a

single project parameter—well separation—and only if, applying the criteria in the Bulletin, the default quantitative separation standards are not "adequate."

Plaintiffs also contend that the County's position is inconsistent with the fact that an air district performed environmental review of a permit to expand an oil refinery in *CBE*, despite its "jurisdiction over air quality only." (Answer at 35.) But *CBE* is inapposite. The case addresses only the proper baseline for environmental review once CEQA has been determined to apply. (*CBE*, *supra,* 48 Cal.4th at 320-22.) And because neither the decision in *CBE* nor Plaintiffs' Answer Brief lays out the applicable statute or regulation, it is impossible to determine the scope of the district's authority in issuing that permit.[8] (See *ibid.*; Answer at 35.) Thus, *CBE* has no bearing on whether the Ordinance confers sufficiently meaningful discretion on DER to trigger environmental review.

In any event, the County does not argue that authority to affect only a single environmental impact is inherently inadequate to trigger CEQA. Indeed, such a categorical rule is inconsistent with the ad hoc approach to the functional rule discussed above.

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[8] In fact, the Legislature has granted the air district broad authority to regulate stationary sources of air pollution, including authority to require a permit to construct modifications to diesel fuel production facilities, the permit at issue in *CBE*. (See Health & Safety Code § 40506(a) [district shall adopt rules governing permits for "the construction, alteration, replacement, operation, or use of any article, machine, equipment, or other contrivance for which a permit may be required by [the district's] board"].)

So, for example, if DER in fact had discretionary control of multiple aspects of wells to protect "groundwater quality" generally, as Plaintiffs erroneously suggest, that would certainly be sufficient to trigger CEQA even if it could not also limit, say, air emissions.[9]

Plaintiffs also argue that the general purpose of Water Code section 13801 and the Bulletin—preventing contamination of groundwater—requires a finding of discretion. (Answer at 32-33.) This is nonsensical. They contend that the purpose of the Water Code and Bulletin is "to mitigate potential environmental impacts on groundwater quality in a meaningful way," and therefore the Court must hold that the Ordinance "provide[s] the County with enough discretion to do so" or render those provisions "meaningless." (*Id.* at 32.) In fact, section 13801 simply requires the County to adopt an ordinance with standards that "meet[] or exceed[]" those in the Bulletin, which the Ordinance does. (Open. Br. at 15 (quoting Water Code § 13801); § 9.36.150; see also Section II, *post.*) Whether or not the standards leave DER with meaningful discretion to alter a proposed well and its environmental impacts is a distinct question that turns on the language of the Ordinance and the standards.

CEQA requires that the Court look to the Ordinance—"the law providing the controls over the activity"—to assess the degree

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[9] For example, the Ordinance's variance provision gives DER complete discretion to impose "such conditions as, in [its] judgment, are necessary to protect the waters of the state from pollution." (§ 9.36.110.) The County has always considered such variances to be discretionary and subject to CEQA. (Open. Br. at 21.)

to which the legislative body delegated the exercise of judgment to the agency. (Cal. Code Regs., tit. 14 ("CEQA Guidelines"), § 15002(i)(2); Open. Br. at 29-30.) The Court of Appeal based its finding of discretion on a single standard under which DER may adjust the default required distance between a well and a potential source of contamination where the default limits are inadequate. (Opinion at 12-15.) Such limited authority does not allow DER to exercise meaningful judgment in reviewing well-construction permits. Nor does it authorize DER to modify well-construction permits to meaningfully address their environmental impacts. It thus falls short of the discretion that triggers environmental review.

II. The additional provisions of the Bulletin cited by Plaintiffs provide no discretion to DER.

Plaintiffs' arguments that other provisions in the Bulletin give DER sweeping discretion about all of the standards to be applied to construction permits fare no better than their arguments on the separation standard. (See Answer at 48-54.) As explained in the Opening Brief, the general, hortatory language in the Bulletin was never adopted by the Board of Supervisors when it enacted the Ordinance (Open. Br. at 49-54), and the specific standards from the Bulletin identified in footnote 8 of the Opinion are inadequate to create discretion (*id.* at 32-33, 41).

Plaintiffs argue that the term "standards" referred to in section 9.36.150 also includes the general language in the Bulletin suggesting that local governments may need to adopt *other* standards. (Answer at 49-50.) Their interpretation is inconsistent with the plain meaning of the word "standard" as defined by

dictionaries and construed by courts. (See Open. Br. at 51.) It also ignores the plain meaning of "set forth." (*Ibid.*)

The Board's intent in enacting section 9.36.150 was to *specify* the standards that would govern the issuance of well permits: "standards for the construction . . . of wells *shall be as set forth*" in the Bulletin. (§ 9.36.150, italics added.) Under Plaintiffs' interpretation, the standards would merely be guidelines, and DER would have plenary discretion to choose any different standards it found appropriate.[10] Plaintiffs' theory would also mean that section 9.36.150 simply adopted the entirety of Chapter II of the Bulletin, despite the specific language referring to "standards . . . set forth" in it.[11]

Plaintiffs also argue that the Ordinance must be read—contrary to it its plain meaning—to incorporate all language in the Bulletin because to do otherwise would cause the Ordinance to violate Water Code section 13801(c). (Answer at 52.) Not so. Because the Ordinance adopts the standards set forth in the Bulletin, it "meets . . . the standards" in the Bulletin and thus straightforwardly complies with section 13801(c). Plaintiffs' reading of the

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[10] Moreover, if DER could freely modify the standards in the Bulletin as it saw fit, the variance provision in the Ordinance (§ 9.36.110) would be unnecessary. Rather, a permit applicant would merely need to request that DER apply a different standard to its permit.

[11] Plaintiffs also do not answer the County's point that the Board made clear in section 9.36.150 that it, and not DER, would make any modifications to the standards identified in the Bulletin. (Open. Br. at 53.)

word "standards" in section 13801(c) is no more reasonable than their reading of that word in the Ordinance.

Moreover, Plaintiffs' argument assumes that the standards actually "set forth" in the Bulletin could not possibly be adequate on their own and that DER will invariably encounter circumstances that require unique standards. But they offer no evidence in support. Plaintiffs have not provided a single example of how the Ordinance falls below the minimum protection required by section 13801(c) or why local conditions might require the County to adopt any particular, more stringent requirement for well-construction. In any event, the Board has, in the Ordinance, adopted differences to address local circumstances. (See Open. Br. at 53.)

Nor does the Bulletin support Plaintiffs' view. It says only that "Local enforcing agencies *may* need to adopt more stringent standards for local conditions to ensure ground water quality protection." (AA 3:537 [Bulletin No. 74-90, at 6], italics added; see also AA 2:206 [Bulletin No. 74, at 13 (noting that "[u]nder certain circumstances, adequate protection of ground water quality *may* require more stringent standards"), italics added].) In fact, DWR stated that the Bulletin's standards are adequate "for most conditions encountered in the State."[12] (Open. Br. at 53 (quoting AA 3:447).) And nothing in the Bulletin indicates that the Board itself cannot adopt the different standards "for local conditions." (AA

[12] Plaintiffs also fail to respond to the County's point that DWR's use of the word "standard" comports with the County's interpretation of it. (See Open. Br. at 53.)

3:537.) Plaintiffs thus have not come close to showing that the Ordinance would violate section 13801 if it is read to incorporate only the "standards set forth" in the Bulletin.

Plaintiffs also argue that the Court of Appeal erred in concluding, in footnote 8 of the Opinion, that the Bulletin's standards requiring that wells be located upstream of contamination sources and outside flood-prone areas "if possible" do not create discretion under CEQA.[13] (Answer at 53-54; see also Opinion at 10, fn. 8.)

Applying the functional test, the Court of Appeal was right to hold that these standards do not trigger CEQA. (See Open. Br. at 41.) They impose clear requirements on permit applicants, which DER may alter based on an objective determination that it is not "possible" to comply.

Indeed, *County of Sonoma* rejected the argument that the terms "practicable" and "possible" created sufficient discretion, and in *Napa County Board,* the use of the broader word "suitable" similarly failed to create it. (*County of Sonoma, supra,* 11 Cal.App.5th at 30-31 [provisions requiring diversion of stormwater "to the nearest practicable disposal location" and "incorporation of natural drainage features 'whenever possible'"]; *Napa County Bd.*, *supra*, 205 Cal.App.4th at 177, fn. 11, 180 [whether the site was "suitable" for an onsite sewage disposal system].) These terms are indistinguishable from the word "possible."

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[13] Because these are in fact "standards," the County agrees with Plaintiffs that section 9.36.150 adopted them.

Plaintiffs misplace reliance on *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575. They claim the case shows that the use of the similar word "feasible" creates discretion. (Answer at 54.) The statute at issue in that case called for the agency to develop a policy for controlling or eradicating the apple maggot fruit fly. (187 Cal.App.3d at 1579, 1583.) In addition to determining whether control of the fly was feasible, the agency determined "what method would be most effective in doing so." (*Id.* at 1583.) That broad policymaking discretion is nothing like DER's technical determination whether it is "possible" to locate a well up-gradient of a source of potential contamination.

III. The County's longstanding interpretation of the Ordinance and Bulletin is entitled to deference.

Plaintiffs contend that the standard of review is de novo, and that the County's interpretation of its Ordinance and the Bulletin's standards deserves no deference. (Answer at 23-24.) The County agrees the independent judgment standard applies, but disagrees that the Court should give no deference to the County's conclusion that well-construction permits are ministerial.[14] (Open. Br. at 54-

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[14] As noted in the Opening Brief, that standard is fully consistent with affording deference to the County's interpretation. (Open. Br. at 57-58.) Moreover, neither of the cases Plaintiffs cite suggest that no deference is due. (Answer at 23 (citing *Friends of Juana Briones House*, *supra*, 190 Cal.App.4th at 303, and *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1142).) In *Friends of Juana Briones House*, the court stated expressly that it

58.) The County has identified those permits as ministerial in its local CEQA Procedures since 1983 and consistently treated them as such. (*Id.* at 56.)

Plaintiffs neglect to mention the statement in Guidelines section 15268 that "[t]he determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws." (CEQA Guidelines § 15268(a).) They note one of the several cases that apply that provision to give deference to the agency's position, but attempt to downplay the holding as only that "some weight may be given" to the agency's position "if warranted." (Answer at 23.) Nothing in the cases supports those provisos. (See Open. Br. at 54-55 (discussing cases applying deference).)

Instead of applying these CEQA cases, Plaintiffs rely on cases addressing deference to public agencies' interpretations of state statutes in general. (Answer at 24 (discussing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1).) But they misapply *Yamaha* and misconstrue the County's position.

The County's conclusion that well-construction permits are ministerial is based on interpretation of both the Ordinance and the Bulletin. As to the Ordinance, the County's position, enshrined

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did not reach the question of deference. (190 Cal.App.4th at 305, fn. 6.) And in *Health First,* the court explicitly followed Guideline section 15268, holding that "[t]he determination of what is ministerial is most appropriately made by the public agency." (174 Cal.App.4th at 1144.)

in the CEQA Procedures adopted by the Board of Supervisors in 1983, is an interpretation of its own legislative enactment. This is the clearest circumstance in which deference is appropriate because the agency has some comparative advantage in interpreting its own enactment.[15] (See Open. Br. at 55-56; see also *Yamaha, supra*, 19 Cal.4th at 12 ["A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute . . . ."].) Guidelines section 15268(a) recognizes that advantage. (See *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015.) Accordingly, the Court should, at a minimum, give broad deference to the County's conclusion that its own Ordinance did not incorporate the general, hortatory language in the Bulletin about the potential necessity to adopt different standards. (See Section II, *ante*.)

The County's reading of the Bulletin is also entitled to some deference, albeit less than that owed to its reading of the Ordinance. Local agency interpretations of state enactments are also entitled to deference. (See Open. Br. at 58.) The County recognizes that the degree of that deference lies on a continuum and is "situational." (*American Coatings Assn., Inc. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 461.) The County is not arguing that it is entitled to deference at the farthest end of the spectrum—where a statute implicitly delegates authority to the agency to fill gaps in the statute. (See, e.g., *Assn. of Cal. Insurance*

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[15] None of Plaintiffs' cases involve an agency's interpretation of its own enactment.

Cos. v. Jones (2017) 2 Cal.5th 376, 393; *Yamaha, supra*, 19 Cal.4th at 17-18 (conc. opn. of Mosk, J.).) However, even short of that, a local agency's construction is entitled to "great weight and respect." (*Yamaha*, 19 Cal.4th at 12 (citation omitted); see also Open. Br. at 55-56.)

Here, the County's interpretation of the Ordinance and Bulletin satisfy many of the criteria for deference. That interpretation is unquestionably "longstanding," as it has been consistent for over 30 years. (See *Yamaha, supra*, 19 Cal.4th at 25.) The County also has long experience with implementing the Bulletin's standards, which it adopted in 1973. It is therefore in a position to know the extent to which the Bulletin calls for DER to exercise judgment in approving permits. Finally, as Plaintiffs recognize, the Bulletin's standards are "'technical' and the County's permitting department possesses expertise and technical knowledge regarding these standards." (Answer at 24.) Plaintiffs are mistaken in believing that to be irrelevant, however. The functional test requires evaluation of the extent to which the applicable standards—here, technical standards—allow the agency to shape the project and its environmental outcomes. (See Section I, *ante.*) Accordingly, the agency's expertise in interpreting and applying those standards is surely relevant.

IV. Neither the police power nor the public trust doctrine is relevant to whether DER has discretion in issuing well-construction permits.

Plaintiffs contend that 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.'" (Answer at 42 (quoting *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1099-1100).) According to Plaintiffs, "the 'entire scheme of law' includes the County's police power and public trust authority." (*Ibid.*) On the contrary, neither the police power nor the public trust doctrine is relevant for determining whether the Ordinance and Bulletin give DER discretion in approving well-construction permits.

The County's constitutional police power authorizes the Board of Supervisors to adopt legislation to regulate groundwater—a power the Board exercised when it adopted Chapter 9.36. (See *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 173.) But the police power cannot enlarge DER's delegated authority, which is dictated solely by Chapter 9.36. "[T]he application of CEQA to a local ordinance is dependent upon the scope and interpretation of *the ordinance* . . . ." (*Friends of Davis, supra,* 83 Cal.App.4th at 1014-15, italics added.) Because DER's authority is created entirely by the Ordinance, the County's police power—its power to develop some *other* kind of groundwater regulation—is irrelevant.[16] Indeed, relying on the police power as a source of discretion would lead to the absurd result that every local government approval would be discretionary because every local government

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[16] In fact, the Board did adopt another kind of groundwater regulation in Chapter 9.37. Permits issued under that program are discretionary and subject to CEQA. (Open. Br. at 22-23.)

has the police power to legislate to mitigate environmental impacts.

Plaintiffs' invocation of the public trust doctrine is similarly inapt. They fail to explain how the doctrine is relevant to the question whether well-construction permits are discretionary for CEQA purposes. On the contrary, the very case they cite, *Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844, 852, fn. 2, suggests that the CEQA question is distinct from the application of the trust. (*Ibid.* (citing *Cal. Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666).)

In any event, the record does not support any application of the public trust doctrine to this case. The trust applies to the extraction of groundwater only insofar as it "adversely impacts a navigable waterway to which the public trust doctrine does apply." (*Id.* at 859.) Thus, whether the County must consider the public trust when issuing a well-construction permit turns on the factual question whether DER has issued permits for wells that may adversely affect navigable waters. There is no evidence whatsoever in this case on that question. (See AA 3:715-17 [stipulated facts containing no evidence of the location of proposed wells relative to navigable waterways].) The public trust doctrine, like the police power, is therefore irrelevant here.

V. Even if the separation standard were discretionary, it could not invalidate the County's entire permitting process because the record does not show that the standard is relevant to most or all of DER's permitting decisions.

As the County demonstrated in the Opening Brief, even if the separation standard did confer discretion (it does not), it could not justify invalidating DER's entire practice of issuing well-construction permits because Plaintiffs cannot show that the standard applies at all in most or all those permitting decisions. (Open. Br. at 59-63.) In their Answer, Plaintiffs misunderstand the County's point. They argue instead that whether factual circumstances require DER to "consider departing from the standard's objective guideposts" or those circumstances require DER to "actually depart" from those objective guideposts, DER has discretion to decide whether to so depart. (Answer at 43.)

But the problem in Plaintiffs' claim is far more fundamental: they have not shown that the separation standard is even *relevant* to all or some (or hardly any) of the well-construction permits DER approves. The standard provides in part that "[a]ll water wells shall be located an adequate horizontal distance from known or potential sources of pollution or contamination." (AA 3:542.) Thus, if there is no potential source of pollution or contamination in the vicinity of a proposed well, this provision simply does not apply to the permit for that well. The standard has no application, for example, to a well isolated in the middle of a field. In that setting, DER does not need to decide whether the well separation is "adequate" to prevent groundwater contamination because there is no separation to consider at all. DER need not even consider whether

to "depart" from the objective standards in the Bulletin because those standards are entirely inapplicable and irrelevant to such a well. Because the record provides no evidence from which the Court can determine how often this sort of scenario prevails, Plaintiffs cannot show that DER's permitting program is so pervasively defective as to be facially unlawful. (See Open. Br. at 60 (citing *San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal.4th 643, 673 and *Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1418).)

"The relevant question in evaluating whether the approval of a particular project was discretionary is not whether the regulations granted the local agency some discretion in the abstract, but whether the regulations granted the agency discretion regarding the particular project." (*County of Sonoma*, *supra*, 11 Cal.App.5th at 25.) In *County of Sonoma*, the governing ordinance contained allegedly discretionary provisions. Some of these potentially applied to the project at issue, while others did not. (*Id.* at 25, 27-28.) The court found that the provisions inapplicable to the project were irrelevant in determining whether the permit for the project was discretionary. (*Id.* at 27.) For example, potentially discretionary provisions "concerning the treatment of watercourses, lakes, and trees were inapplicable because the . . . property ha[d] no such features." (*Id.* at 26.)

Similarly here, the well-separation standard is inapplicable for every well proposed in an area without any of the potential sources of contamination addressed by the standard. Plaintiffs thus err in contending that the separation standard necessarily

applies to every permit application. (Answer at 43, 48.) The County simply does not have discretion to find that a proposed well is an adequate or inadequate distance from a source of contamination that does not exist.

Plaintiffs attempt to distinguish *County of Sonoma* because it involved a single project and the court "did not decide whether the ordinance generally granted the County sufficient discretion to require CEQA review." (Answer at 46.) To the contrary, although the court was confronted with a single project, it expressly rejected the argument that the ordinance meant that "issuing an erosion-control permit is *always* a discretionary act." (*County of Sonoma, supra*, 11 Cal.App.5th at 24-26, italics added.) Here too, the mere existence of the separation standard—without evidence that it is actually relevant to all or most of DER's permit decisions—is insufficient to establish that DER's entire practice of issuing permits violates CEQA.

County of Sonoma, supra, is also consistent with CEQA and longstanding precedent. As the court noted, "[t]he principle that a discretion-conferring provision must have been relevant to the project grows directly out of CEQA's focus on individual projects." (11 Cal.App.5th at 26 (citing Pub. Resources Code § 21080(a)); *see also Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 97 [holding that a city's authority to exercise discretion when issuing permits to historical homes that did not comply with the Uniform Building Code was inapplicable to a particular home that *did* comply with the Code, emphasizing that "[t]he fact that discretion

could conceivably be exercised . . . does not mean that *respondents'* project was discretionary"].)

Plaintiffs have chosen to challenge the County's entire practice of issuing well-construction permits—in fact they abandoned a challenge to individual permits (Open. Br. at 59-60, fn. 22)—and they must litigate the case they brought. Because they have provided no evidence that the well-separation standard was relevant to most or all of the permits DER issues, their pattern and practice claim must fail even if that standard conferred discretion.

Finally, Plaintiffs contend that the County, and the court in *County of Sonoma,* improperly place the burden on a plaintiff to show facts demonstrating that a challenged approval is discretionary. (Answer at 47.) They argue that a party wishing to challenge the approval will have little ability to develop the evidence necessary for such a challenge because no hearing or other public process will occur if the agency determines the approval is ministerial. (*Ibid.*) But of course this is true for all approvals that a public agency determines to be ministerial. None of the cases Plaintiffs cite (*id.* at 45) suggests that CEQA creates a right to a hearing or other public process on an agency's initial determination that an approval is ministerial.[17]

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[17] In fact, Plaintiffs' premise is flawed. In this case, they obtained under the Public Records Act the permit application documents for hundreds of well permits, each of which includes a diagram of the property depicting the location of potential contamination sources. (See AA 1:080-82 [well construction permit application including Plot Plan and map]; see also AA 3:715-16 [Stipulated Facts 5, 11].)

VI. The Court need not reach Plaintiffs' question about the scope of authority to mitigate environmental impacts once CEQA applies.

Plaintiffs also ask the Court to consider what DER could do if its review of well-construction permits were discretionary and thus subject to CEQA. (Answer at 54-56.) Specifically, they complain that the Court of Appeal held that an agency can reject mitigation measures as legally infeasible because they are outside the scope of authority conferred by the statute governing the approval. (*Ibid.*) This Court need not reach that question. The question of what the agency can do *after* CEQA is triggered by a discretionary approval is not presented here. Rather, the question here is whether the approval is discretionary in the first instance. The cases and Guidelines make clear that question is answered by looking solely to the scope of the agency's underlying statutory authority, and not at CEQA itself.

As described in the Opening Brief, CEQA requires courts to evaluate "the authority granted by the law providing the controls over the activity" to determine whether that law affords discretion that triggers environmental review. (CEQA Guidelines § 15002(i)(2); Open. Br. at 29-30.) And Plaintiffs concede the point: "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 permit[] approvals are ministerial or discretion"—i.e., *whether CEQA applies.* (Answer at 54-55.)

Indeed, assuming *arguendo* that Plaintiffs are correct that CEQA provides authority for agencies to impose mitigation for the

full range of the project's environmental impacts after CEQA has been triggered and environmental review performed, that cannot be relevant to application of the functional test to determine whether CEQA is triggered in the first instance. If it were, then *every* agency approval would be discretionary because agencies could require mitigation for all environmental impacts in every case. The functional test would be meaningless.

The Court thus need not reach Plaintiffs' additional question to resolve the split of authority between the Opinion and *California Water* on the question whether well-construction permits are discretionary for purposes of triggering CEQA. Whether this Court affirms or reverses, the Court of Appeal's statements about legal infeasibility in its unpublished Opinion will have no effect.

CONCLUSION

For the reasons explained above and in the Opening Brief, the Court should reverse the Court of Appeal's judgment.

April 11, 2019

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 8,142 words, including footnotes but not including the caption, this certificate, the tables of contents and authorities, the quotation of the issues presented for review, and the attachment, according to the word count function of the computer program used to produce the brief. The length of this brief therefore complies with the requirements of Rule 8.520(c) of the California Rules of Court.

April 11, 2019

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PROOF OF SERVICE

Protecting Our Water and Environmental Resources et al. v. Stanislaus County et al.
California Supreme Court No. 251709

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

On April 11, 2019, I served true copies of the foregoing document on the parties in this action as follows:

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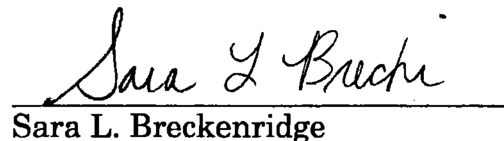
Executed on April 11, 2019, at San Francisco, California.



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