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December 5, 2020

Monterey County Board of Supervisors
County of Monterey
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Re: **Proposed revision to Chapter 15.08 re CEQA for well permitting**
Proposed well moratorium and replacement wells
Proposed elimination of conditions on Deep Aquifer wells

Dear Members of the Board of Supervisors:

LandWatch Monterey County recommends that the Board of Supervisors:

- Reject the proposed revision of the County's well permitting ordinance in Chapter 15.08 of the County Code, which regulates issuance of well permits, until the California Supreme Court and the 5th District Court of Appeal resolve two pending cases challenging issuance well permits without CEQA review. The California Supreme Court has already held that a county may not categorically exempt well permits from CEQA compliance, yet that is what the proposed ordinance purports to do.

- Reject the provision in the proposed coastal well moratorium that would still permit additional wells in the Deep Aquifers.

- Reject a request from the MCWRA Board of Directors to remove conditions in existing permits for wells in the Deep Aquifers.

Background and summary

The County faces extraordinary water challenges, which have been worsening over the past 70 years. The State of California issued a Cease and Desist Order limiting groundwater pumping in the Carmel River watershed. The State also determined that Salinas Valley groundwater subbasins are overdrafted and the coastal 180/400-Foot Aquifer Subbasin is *critically* overdrafted. Continued pumping of overdrafted aquifers induces more and more seawater intrusion, reducing the capacity of those aquifers to supply municipal and agricultural water supplies.

Final approvals of Groundwater Sustainability Plans under the Sustainable Groundwater Management Act are several years away. Achieving sustainable groundwater basins will take decades. In the interim, the County must administer its well permitting system to protect the groundwater resources that are so essential to agriculture, housing, and commerce. CEQA is not an impediment to addressing the County's water challenges. It is an essential tool to make smart decisions now about groundwater use.

Summary of comments regarding proposed revision of Chapter 15.08.

Revision of the Monterey County well permitting ordinance is premature because Courts have yet to resolve critical issues. The County should postpone any revision until pending cases are resolved. In the interim, the County should simply follow the law to apply CEQA to well permits as recently mandated by the California Supreme Court.

The California Supreme Court held that a county may not categorically exempt all well permits from CEQA as ministerial because at least *some* permits are clearly discretionary. The Court did not reach the question whether *all* permits are discretionary, but instead remanded that question to the 5th District Court of Appeal, where briefing is now underway. Despite this, the County staff have jumped the gun to propose a revision to Chapter 15.08 that is intended to categorically exempt a set of well permits as ministerial and to require those permits be issued without CEQA review.

This is wrong as a matter of law because, as the 5th District Court of Appeal is likely to decide, all permits are discretionary based on the County's obligation to adopt discretionary state well standards. It is also wrong as a matter of law because the County's own standards, including the standards that remain in the proposed ordinance, are discretionary. Finally, the proposed revision at this time is simply imprudent in light of the pending litigation that will clarify these matters.

The problem not recognized in the proposed revision of Chapter 15.08, is that, regardless of CEQA considerations, the County may not abdicate its obligation to apply the state well permit standards on a discretionary basis. Those standards are expressly discretionary because they call for professional judgment in each instance to determine whether and how the standard should apply, whether the typical standard should be made more or less stringent, and whether other equally effective conditions should be applied. The state standards simply cannot be administered ministerially by checklist. Since the County is required to implement the state standards and those standards are discretionary, the County's ordinance may not require that any permits be issued on a ministerial basis.

Because well permits are necessarily discretionary, CEQA will require that, at minimum, the County consider whether each permit has the potential to cause significant adverse environmental effects. If it does not, the County may treat it as exempt under CEQA, e.g., using CEQA's common sense exemption. CEQA review may also be streamlined by referencing Groundwater Sustainability Plans under the Sustainable Groundwater Management Act. But the County may not simply ignore CEQA for any class of permits

The proposed ordinance is inconsistent with General Plan Policies PS-3.3, 3.4, and 3.5. Policies PS-3.3 and 3.4, adopted in 2010, were supposed to have been implemented by an ordinance that sets out criteria for well interference, in-stream flow impacts, water quality, production capability, recovery rates, existing groundwater conditions, and the technical, managerial, and financial capability of the water purveyor of a water system. Because no ordinance was adopted, County staff now administer these policies on a discretionary basis. Presumably in order to allow for ministerial well approvals without CEQA review using a checklist approach, the proposed ordinance sets out criteria for well interference and instream flow impacts. However, it does not set out criteria for the other factors, and even its instream flow criteria are incomplete. The proposed ordinance simply ignores PS-3.5, barring wells in seawater intruded areas, with discretionary exceptions. The incomplete specification of criteria to implement these policies will either result in well permits that are inconsistent with the policies or will require continued discretionary permit review to implement the policies.

Adoption of the proposed ordinance itself is not exempt from CEQA because its elimination of discretion in the current ordinance and its changes to existing well permitting practices have the potential to cause physical changes in the environment**.** These changes are enumerated below. So, contrary to its recital, the proposed ordinance is not exempt from CEQA as a mere clarification of existing regulations.

Summary of comments regarding replacement wells.

The County should heed its expert hydrogeological staff's repeated recommendations, based on comprehensive 2017 and 2020 technical reports, and not permit any further wells in the Deep Aquifers pending a study of sustainability. In 2003 when Deep Aquifer pumping was only 2,400 AFY, WRIME concluded that increasing pumping to just 4,000 AFY would damage the aquifers. Since then, the County has permitted dozens of Deep Aquifer wells and pumping in 2019 has exceeded 10,000 AFY. It is now expected to increase another 2,400 AFY based on additional well permits. Deep Aquifer groundwater levels are dropping and this is inducing vertical migration of seawater intruded water into the upper aquifers. MCWRA staff are clear that "increased pumping in the Deep Aquifers will likely result in increased leakage from overlying aquifers with impaired groundwater."[1]

It is time to halt the short-sighted destruction of this resource. The moratorium on new wells is essential, and it should not exempt "replacement wells" into the Deep Aquifers. And if permitted at all, the County should certainly not exempt these wells from CEQA review.

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[1] MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin: 2020 Update, May 2020, p. 35, https://www.co.monterey.ca.us/home/showdocument?id=90578.

Summary of comments regarding conditions on Deep Aquifer well permits.

The MCWRA Board of Directors offers no technical justification for eliminating the conditions imposed on these wells after professional hydrogeolgical review. MCWRA's professional staff do *not* recommend removing conditions. If previously imposed conditions are removed, the County must undertake a CEQA review first.

I. Proposed revision of well permitting ordinance.

A. Introduction: CEQA obligation under *Protecting Our Water*

On August 27, 2020, the California Supreme Court held in *Protecting Our Water and Environmental Resources et al., v. County of Stanislaus* that applications for well permits require CEQA review if the decision to issue the permit involves the exercise of discretion by the decision-making authority. At issue in that case was whether Stanislaus County's well permitting ordinance was discretionary and therefore subject to CEQA, notwithstanding its incorporation of certain Department of Water Resources standards, including standards from DWR Bulletin 74-81. (*Protecting our Water and Environmental Resources et al. v. County of Stanislaus*, 2020 WL 5049384 at 3, n. 5.)

The Court explained that under the so-called "functional test," a project is discretionary "if the agency is empowered to disapprove or condition approval of a project based on environmental concerns that might be uncovered by CEQA review." (*Id.* at 6.) The Court considered only whether the incorporation in the County's ordinance of specific DWR standards set out in paragraphs in 8.A, 8.B, and 8.C of a DWR Bulletin precludes categorical exemption of all well permits. The Court analyzed just one of the specific DWR standards, the standard in paragraph 8.A., which applies to well separation from contamination sources. The Court found that Standard 8.A permits a health officer to approve lesser separation distances that the usual standards "on a case-by-case basis," and it confers discretion on the county health officer to deviate from the general standard "if he or she determines the distance between a proposed well and a contamination source is inadequate." (*Id.* at 8.) The Court held that a "permit issuance in which the County is required to exercise independent judgment under Standard 8.A cannot be classified as ministerial."

The Court then held that "when an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not *categorically* classify the issuance of permits as ministerial." (*Id*. at 10, original emphasis.) At most, the agency "may classify a *particular* permit as ministerial (CEQA Guidelines, § 15268, subd. (a)), and develop a record supporting that classification." (*Id.* at 10, emphasis added.)

Classification of a particular permit as ministerial cannot occur in advance because it depends on facts on the ground that are particular to a specific permit application. The Court held that whether the DWR standards in paragraphs 8.A, 8.B, or 8.C "come into

play" so as to render the permit issuance discretionary depends on such issues as whether "a contamination source is near a proposed well whether the well is "downhill from a contamination source," or whether a well is "in a flood area." (*Id*. at 10.)

In effect, the Court held that an agency may not *categorically* classify well permits as ministerial if issuance of the permits include compliance with the specific DWR standards. The Court held that the obligation to comply with CEQA must be made on a case-by-case basis when an application is made for a particular well at a particular time and location based on the conditions that obtain at that time and location.

The County of Monterey's current well permitting ordinance in Monterey Municipal Code Chapter 15.08 incorporates the specific Bulletin 74-81 standards considered by the Court. (MCC, § 15.08.110.) Thus, as long as the County's ordinance continues to include those DWR standards, the County cannot categorically classify well permits as ministerial.

Furthermore, as County staff advised the Board of Supervisors, Monterey County's well ordinance does require broad and general discretionary review:

> Chapter 15.08 of the Monterey County Code sets forth the application and decision-making process for the County in considering applications for the drilling and construction of water wells. The Chapter sets forth some regulations that would appear to be purely ministerial in their application; however, the Chapter also allows the Health Officer (the approving authority for water well permits) to impose other, unspecified conditions, grant variances, and deny an application if in his/her judgment it would defeat the purposes of the Chapter, which could be considered discretionary authority making the approval of such permits subject to environmental review.[2]

In response to this advice, the Board of Supervisors adopted urgency Ordinance No. 5339 suspending the processing of all applications for construction of water wells for 90 days.[3]

County staff have now proposed to revise the County's well permitting ordinance as codified in Chapter 15.08 of the County Code. The stated purpose of the revision is to "distinguish between ministerial well permits that will be issued by the Health Officer if an applicant meets certain standards, as opposed to well permits that do not meet certain

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[2] Board Report, Sept. 15, 2020, https://monterey.legistar.com/View.ashx?M=F&ID=8787359&GUID=D807A13D-BCD3-4F31-B3BC-6AF7D15CDB51.

[3] Board Order, https://monterey.legistar.com/View.ashx?M=F&ID=8849725&GUID=F11B83BA-E2AB-43E1-99C0-E5D81A9CE03E.

standards that are discretionary and will be subject to CEQA." (Draft Revision of Chapter 15.08, § I.D.)

B. Revision of the Monterey County well permitting ordinance is premature because Courts have yet to resolve critical issues.

In *Protecting Our Water*, the Court affirmed a 5th District opinion granting declaratory relief that Stanislaus County's blanket categorization of well permits as ministerial was unlawful. In doing so, the Court considered only the issue evaluated by the 5th District: whether incorporation of DWR's paragraph 8.A standards for well separation from contamination sources precludes classifying *all* well permitting as ministerial. The Court did *not* consider the effect of the incorporation of DWR's standards in other paragraphs, e.g., paragraphs 8.B and 8.C. Nor did the Court consider the arguments made by plaintiffs and appellants in *Protecting Our Water* that the incorporation of DWR's *general* discretionary standards or requirements *always* trigger some form of CEQA review. The Court declined to address these issues because the 5th District had not found it necessary to reach them in order to grant declaratory relief that Stanislaus County's classification of all well permits as ministerial was unlawful.

Accordingly, the California Supreme Court remanded *Protecting Our Water* to the 5th District to "evaluate the questions it declined to answer." (*Id*. at 11.) The unanswered questions are before the Court of Appeals on remand and briefing has begun. (See *Protecting Our Water and Environmental Resources et al., v. County of Stanislaus*, Appellants' Opening Supplemental Brief On Remand, Oct. 29, 2020, Exhibit 1.) Resolution of those questions is critical here because Monterey County's current and proposed well permitting ordinances also incorporates DWR's general discretionary standards and therefore, as argued by plaintiffs and appellants in *Protecting Our Water*, and as explained below, CEQA review is always required.

Furthermore, revision of the County ordinance is premature because the California Supreme Court has granted a petition for review in the 2nd District case, *California Water Impact Network v. County of San Luis Obispo*, but deferred briefing pending disposition of the related issues in *Protecting Our Water*. (*California Water Impact Network v. County of San Luis Obispo* (Cal. 2018) 239 Cal.Rptr.3d 662.) The issues in this 2nd District case are substantially the same, but that case challenges a number of specific well permits via writ of mandate. (*California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666.) The Supreme Court may defer briefing and resolution of *California Water Impact Network* pending a decision in the *Protecting Our Water* remand. At any rate, the County's proposed revision of Chapter 15.08 should be deferred pending judicial resolution of both *Protecting Our Water* and *California Water Impact Network* because resolution of the unaddressed issues will certainly affect the Monterey County ordinance.

C. The DWR Bulletin's general discretionary standards provide the County with discretion in well permitting that *always* requires the application of CEQA, and this precludes requiring by ordinance that any permits shall be issued ministerially.

As does the Stanislaus County ordinance, Monterey County's current and proposed ordinance incorporates the DWR Bulletin standards that describe counties' general discretion to modify or create new standards to ensure protection of water quality based on site specific facts. This discretion *always* requires that the County apply CEQA to water well construction permits. Because of these discretionary standards, well permitting is a project subject to CEQA, and the County must always undertake at least a preliminary CEQA review. If that review results in an exemption determination, e.g., under the common-sense exemption, the County may determine that the permit is exempt, although the County does have the burden to support that determination with substantial evidence. However, the County may not simply determine in advance by ordinance that some subset of permits shall be granted ministerially because the DWR's general discretionary standards are always discretionary.

1. The County's ordinance includes DWR's general discretionary standards, as it is required to do under Water Code section 13801.

Water Code section 13800 mandates that DWR promulgate recommended standards for well permitting.[4] Water Code section 13801 mandates that each County adopt a well permitting ordinance that meets or exceeds the DWR standards.[5]

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[4] "The department, after the studies and investigations pursuant to Section 231 as it finds necessary, on determining that water well, cathodic protection well, and monitoring well construction, maintenance, abandonment, and destruction standards are needed in an area to protect the quality of water used or that may be used for any beneficial use, shall so report to the appropriate regional water quality control board and to the State Department of Public Health. The report shall contain the recommended standards for water well, cathodic protection well, and monitoring well construction, maintenance, abandonment, and destruction as, in the department's opinion, are necessary to protect the quality of any affected water." (Water Code, § 13800.)

[5] "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." (Water Code, § 13801.)

DWR Bulletin No. 74 was updated in 1981 in Bulletin No. 74-81 and supplemented again in 1990 in Bulletin No. 74-90. Bulletin No. 74-81 explains DWR's authority and purpose in issuing well standards by reference to Water Code section 13800.

The DWR Bulletins include not just the specific recommended standards for such matters as separation, groundwater gradients, and flooding set out in paragraphs 8A, 8.B, and 8.C but also general discretionary standards. The DWR Bulletin's general discretionary standards were initially stated in Chapter II of Bulletin No. 74 and later updated in Bulletin 74-81 to read:

> The standards presented in this chapter are intended to apply to the construction (including major reconstruction) or destruction of water wells throughout the State of California. However, *under certain circumstances, adequate protection of groundwater quality may require more stringent standards than those presented here; under other circumstances, it may be necessary to substitute other measures which will provide protection equal to that provided by these standards. Such situations arise from practicalities in applying any standards or, in this case, from anomalies in groundwater geology or hydrology. Since it is impractical to prepare standards for every conceivable situation, provision has been made for deviation from the standards as well as for additional ones.*

(Italics added.)

Bulletin No. 74-81 also provides the County with discretion to grant an "Exemption Due to Unusual Conditions:"

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

(Chapter II, Part I, § 3 (italics 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." (Chapter II, § 5, italics added.)

State Bulletin 74-90, issued in 1990, updates Bulletin 74- 81. This Bulletin also recognizes that local authorities must exercise judgment in approving well construction permits:

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

(Emphasis in original.)

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 County's well permitting is *required* to incorporate DWR's general discretionary standards because Water Code section 13801(c) requires that it adopt standards that "meet or exceed the standards" adopted by the state. The County's ordinance may not conflict with state law including 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 cannot argue that the Bulletin's general grants of discretion are not "standards" as that term is used in its ordinance. 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 are not "standards." Qualitative standards 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).)"].)[6]

A 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.) Here, 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." Furthermore, regardless whether the general grants of discretion in the DWR Bulletins are called 'standards," they establish that well permits cannot be administered ministerially.

2. The DWR's general discretionary standards provide the County with discretion that always requires the application of CEQA.

The general discretionary standards provide the County with sufficient discretion to "modify" well construction permits to protect the environment. The question is whether the general standards *always* require the application of CEQA to well construction permits or like the standard in paragraph 8.A, only when the circumstances make them "relevant."

The general standards always require the application of CEQA to well construction permits because these standards express the state Legislature's general delegation to the County, in Water Code sections 13800 and 13801, of an administrative and quasi-judicial function; i.e., the protection of groundwater quality.

> where the legislative policy has been expressly fixed by the state and the execution of that policy has been specifically imposed by the state law on the board of supervisors as an administrative function ... It would be beyond the powers of a board of supervisors to repeal or amend the state-declared policy.... The board cannot escape the duty imposed upon it by the state through the medium of declining to act.

(*Simpson v. Hite* (1950) 36 Cal.2d 125, 131.) Thus, for the County to fully discharge its delegated responsibility, it must exercise its discretion to decide for every permit whether construction of the proposed well threatens groundwater contamination. (*Bank of Italy v.*

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[6] See also, 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"].

Johnson (1926) 200 Cal. 1, 15 (administrative agencies may not "so circumscribe or curtail the exercise of [their] discretion under [a] statute as to prevent the free and untrammeled exercise thereof" and "may not refuse to exercise the discretion" conferred by statute); *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"].)

In contrast to the standards in paragraphs 8.A, 8.B, and 8.C, the grants of general discretion are not limited in scope to particular topics (i.e., separation distance, groundwater gradient, or flood risk). Because they empower and obligate the County to protect groundwater quality from all threats posed by a proposed well, the grants of general discretion are different in kind from the standards in paragraphs 8.A, 8.B, and 8.C, and thus do not fall within the rule, adopted by the Supreme Court for the standards in those paragraphs (i.e., that they only trigger CEQA when circumstances make them applicable). Instead, these general grants of discretion are subject to the traditional and well-established rule, discussed above, that when an agency has discretion, it must exercise it.

Thus, for each permit issuance, the County must assume the burden to apply its discretion to determine if a proposed well may harm groundwater quality. The County cannot refuse to exercise its discretion unless an objector presents evidence of harm. To do so would impermissibly shift the burden of carrying out the administrative mandate of Water Code section 13801 from the County to the general public. This would also put an impossible burden on the public because the County issues well construction permits without any notice to the public or opportunity to be heard. As a result, any such rule would frustrate achieving this statute's purpose and the Legislature's chosen means of achieving that purpose, in violation of the cardinal rule of statutory construction requiring the courts "to determine what interpretation best advances the Legislature's underlying purpose," which in this case is protecting groundwater quality. (*Reilly v. Marin Housing Authority*, *supra*, 10 Cal.5th at 609.)

Furthermore, in CEQA's three-tier evaluation system, lead agencies must first undertake a "preliminary review" of projects to evaluate the factual basis for whether CEQA applies. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2007) 41 Cal.4th 372, 380 (*Muzzy Ranch*); *People v. Department of Housing & Community Dev*. (1975) 45 Cal.App.3d 185, 192; CEQA § 21080; Guidelines § 15002(k).) If CEQA applies, the agency must in a second step determine if there is a basis for exemption. (Guidelines § 15061(a); *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1103; *Muzzy Ranch, supra,* 41 Cal.4th 386-387; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106,112-13.) Thus, lead agencies have an affirmative duty to determine whether and how CEQA applies to a project. (*Berkeley Hillside, supra,* 60 Cal.4th at 1103; *Muzzy Ranch, supra,* 41 Cal.4th at 386, quoting *Davidon Homes, supra*, at 117.)

The Supreme Court's recent decision in *Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171 (*Medical Marijuana*) is instructive as to the requirement for at least an initial review of each permit under CEQA. *Medical Marijuana* concerns the two criteria an "activity" must meet to be considered a "CEQA project" subject to environmental review pursuant to CEQA. One criterion is that the public agency must have discretionary authority to approve, carry out, or modify the activity. (*Medical Marijuana, supra,* 7 Cal.5th at 1183, 1188; 1191; CEQA § 21080(a) [CEQA "shall apply to discretionary projects proposed to be carried out or approved by public agencies"].) The other criterion is that the public agency must approve or carry out an activity that may change or lead to changes in the physical environment, as provided in CEQA's definition of the term "project." (*Id*. 7 Cal.5th at 1182, 1191; CEQA § 21065.) It is clear from DWR's Bulletins and from the County's existing and proposed permitting ordinance that the County has discretionary authority to condition or deny a permit whenever it may lead to adverse changes in the environment. *Medical Marijuana* makes it clear that no detailed factual showing of actual impacts is required for an agency to find that an activity is subject to CEQA in its first-tier preliminary review.

Medical Marijuana concerned an amendment to a zoning ordinance allowing medical marijuana dispensaries in the city of San Diego. The City argued that its adoption of the ordinance was not a CEQA project because it would not change or lead to changes in the environment. The CEQA plaintiff argued to the contrary that adoption of the ordinance was a CEQA project because subdivision (a) of CEQA section 21080 refers to "the enactment and amendment of zoning ordinances" as a "discretionary project." The Court agreed with the CEQA plaintiff that the zoning ordinance was a CEQA project, but for a different reason, holding that, as a matter of statutory construction, a zoning ordinance is not a "CEQA project" unless it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" as provided in CEQA section 21065. (*Medical Marijuana,* supra, 7 Cal.5th at 1191.) The Court then turned to whether the zoning ordinance at issue meets the definition of "project" because it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The Court's analysis was heavily grounded in the legal and statutory policy considerations engaged at this most preliminary stage of review for CEQA's applicability. Thus, the Court observed that:

> "a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur."

(*Id*. at 1197, citing *Muzzy Ranch, supra,* 41 Cal.4th at 383.) The Court reiterated this point several times. (*Medical Marijuana, supra,* 7 Cal.5th at 1198-1200.) For example, the Court noted that:

> *Muzzy Ranch* clearly requires a public agency to consider the substance of a proposed activity in determining its status as a project. *What need not be considered is the activity's actual impact in the specific circumstances presented.*

(*Id*. at 1198, italics added.)

The Court then explained why the inquiry regarding the possibility that an activity may lead to environmental impacts is very different at this preliminary, first stage of the CEQA process, where the purpose is to determine whether CEQA applies. The Court explained that

> The somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree" because this determination "occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity.

(*Id*. at 1197–1198.) The Court explained that the question posed at that point in the CEQA analysis: is not whether the activity *will* affect the environment, or *what those effects might be*, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA. (*Id*. at 1197–1198, italics added.)

Applying this rule of decision to the facts, the Court held that the CEQA plaintiffs and the Court of Appeal had incorrectly analyzed whether the zoning ordinance may have environmental impacts "in the context of the specific circumstances it claimed to prevail in the City, hypothesizing various City-specific reasons why the Ordinance might indirectly produce physical changes." (*Id*. at 1199.) The Court explained that the plaintiff's "framing of the arguments in this manner and the court's rejection of them put the cart before the horse" because:

> *The likely actual impact of an activity is not at issue in determining its status as a project.* Further, at this stage of the CEQA process virtually any postulated indirect environmental effect will be "speculative" in a legal sense — that is, unsupported by evidence in the record (citation) — *because little or no factual record will have been developed*.

(*Id*. at 1199–1200, italics added.)

These considerations apply with equal force to whether the Bulletin's general grants of discretion always trigger CEQA review, or only do so after some detailed factual investigation shows them to be "relevant." As the Court explained in *Medical Marijuana*, the purpose of the preliminary, first stage of the CEQA process is to determine whether CEQA applies. With respect to the criterion relating to the possibility of environmental impact, the Court recognized that the "somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree" because

"[d]etermination of an activity's status as a project occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity." (*Id*. at 1197–1198.) The same is true for the determination whether the agency has discretionary authority. This inquiry occurs "before any formal inquiry has been made into the actual environmental impact of the activity." (*Id*. at 1198.) As noted, DWR's Bulletins as well as the County's existing and proposed permitting ordinance provide that the County has discretionary authority to condition or deny a permit whenever it may lead to adverse changes in the environment.

3. The County may not mandate ministerial approval of wells "if the applicant can meet the standards set forth" by DWR and incorporated in the County's ordinance because DWR's standards cannot be administered ministerially.

The proposed ordinance provides that the "Health Officer *shall approve issuance of a permit ministerially* if the applicant can meet the standards set forth in Sections 15.08.110, 15.08.120, and 15.08.130 of this Chapter." (Draft 15.08 Ordinance, § 5A, emphasis added.) The proposed ordinance would require CEQA review of a permit only if the applicant cannot meet those standards or cannot meet the requirements for a variance. (*Id.*, § 5C.) The purpose of the draft ordinance is to carve out a set of well permits that would ostensibly not be subject to CEQA. (*Id*., § 1D [the " purpose of this ordinance is to distinguish between ministerial well permits that will be issued by the Health Officer if an applicant meets certain standards, as opposed to well permits that do not meet certain standards that are discretionary and will be subject to CEQA].)

The standards set forth in Section 15.08.110 include the DWR California Well Standards, as is required by Water Code Section 13801. (Draft 15.08 Ordinance, § 8A.) DWR's standards include the general discretionary standards that empower and obligate the County to protect groundwater quality by considering more or less stringent measures, alternative measures to achieve groundwater protection, and measures for special situations.

For example, Standard 8.B provides authority for the County to determine whether it is "possible" to locate a well "up the ground water gradient from potential sources of pollution" because this measure "can provide an extra measure of protection [from contamination] for a well." The term "possible" is synonymous with "feasible." (Merriam-Webster's Collegiate Dictionary, 11th Ed., p. 968.) Under CEQA, agency determinations of the "feasibility" of measures to protect the environment are discretionary and trigger CEQA review.

> 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.

(*Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1583.)

Protecting Our Water holds that "[a] permit issuance in which County is required to exercise independent judgment under Standard 8.A cannot be classified as ministerial." (*Protecting Our Water and Environmental Resources et al., supra,* WL 5049384 at 8.) The County's determination of whether it is "possible" to locate a well "up the ground water gradient from potential sources of pollution" requires both the applicant and the County to use their "independent judgment." For purposes of determining how to protect groundwater from pollution, the County may disagree with a project applicant on this question. In that event, the County's judgment would prevail and it could condition its approval on locating the well up-gradient from a source of pollution. In this circumstance, a project applicant cannot compel the County to issue a permit where the County has determined that, in its judgment, the standard requires modification of the proposed project to protect groundwater quality. The same analysis applies to the standard in paragraph 8.C, which provides authority for the County to determine whether it is "possible" to locate a well outside of areas of flooding, or to determine if it is "necessary" to build the area around the well up "so that drainage moves away from the well." Again, determining whether it is "possible" (i.e., "feasible") to do these things involves the County's independent judgment, which it may impose on the project applicant.

Furthermore, DWR's general discretionary standards are not limited to the provisions for well spacing, groundwater gradients, and flood risk contained in paragraphs 8A, 8B, and 8C. DWR's general discretionary standards empower and obligate the County to consider and mitigate all threats to groundwater quality. These threats might include threats such as seawater intrusion and nitrate contamination that are common in Monterey County. As discussed below, the County has routinely exercised its discretion to condition or deny wells based on these groundwater threats.

Because DWR's general discretionary standards provide the County with discretion that *always* requires the application of CEQA, the County may not simply characterize some set of permits as ministerial in Section 5A of the proposed ordinance and therefore not subject to CEQA. Indeed, the language of the proposed ordinance is simply unworkable in practice. The draft ordinance provides that the "Health Officer shall approve issuance of a permit ministerially if the applicant can meet the *standards* set forth in Sections 15.08.110, 15.08.120, and 15.08.130 of this Chapter." (Draft 15.08 Ordinance, § 5A, emphasis added.) But those standards are not the kind of objective or checklist standards that *can be* administered ministerially. The DWR "standards" adopted in section 15.08.110 for well spacing, groundwater gradients, and flood risk are not ministerial because they are expressly subject to discretion. And the DWR general discretionary standards cauterize and obligate the County to consider and address other threats to groundwater.

The County may not rely on its own fixed standards for well spacing, groundwater gradients, and flood risk in an effort to eliminate the exercise of discretion conferred and mandated by the DWR Bulletins. The proposed ordinance identifies certain "County standards" that are "in addition to the state standards." (Draft 15.08 Ordinance, § 8B.) These standards purport to provide "minimum distance" from contamination sources, to specify certain flood zones in which wells may not be located, to specify annular spacing and seals, and to specify well casing. Meeting these minimum standards may be sufficiently protective for some wells, but that determination must be made using the discretionary authority conferred by the DWR Bulletins. The presence of County minimum standards does not obviate the Health Officer's duty to apply discretion.

Furthermore, to the extent that these County standards purport to *restrict* the Health Officer's discretion, they conflict with, and are therefore preempted by, the state standards. If wells require more than the minimum spacing, or should not be permitted in a flood area that has not yet been identified by FEMA as a 100-year flood zone, or require a longer seal than specified to prevent pollution, the Health Officer may not refuse to exercise discretion to condition the permit on more stringent standards. For example, the proposed revision of the annular seal provision strikes the language in the current ordinance that permits the Health Officer to condition the well on a seal "as required by the Health Officer *for groundwater protection,*" leaving only the 50-foot minimum seal provision. (*Id.*, § 8B.4.) If that revision is intended to restrict the Health Officer's discretion to require a longer seal for groundwater protection, it is inconsistent with the DWR's general discretionary standards and violates Water Code section 13801.

D. The County may not mandate ministerial approval of wells if the applicant can meet the standards set forth in the ordinance because some of the *County's own standards* require discretionary judgment and therefore cannot be administered ministerially.

The proposed ordinance mandates ministerial approval of wells that meet the standards in sections 15.08.110, 15.08.120, and 15.08.130. (Draft 15.08 Ordinance, § 5A.) However, some of the standards in those and other sections clearly call for discretionary judgment by professional staff and therefore cannot be administered ministerially. For example, Section 8B.5 of the proposed ordinance requires that well seals "shall do all of the following:"

> a. Restore, as far as feasible, the controlling hydrogeological conditions that existed before the well was drilled and constructed, including the elimination of physical hazards.
> b. Prevent pollution of groundwater.
> c. Conserve the yield and hydrostatic head of aquifers.
> d. Prevent intermingling of desirable and undesirable waters.

(Draft 15.08 Ordinance, § 8B.5.) These are simply not objective, checklist criteria that can be administered without the exercise of considerable discretionary professional

judgment. For example, the determination as to how much restoration of "the controlling hydrogeological conditions that existed before the well was drilled and constructed" is "feasible" clearly requires exercise of professional judgment. Furthermore, agency determinations of the "feasibility" of measures to protect the environment are discretionary and trigger CEQA review. (*Citizens for Non-Toxic Pest Control, supra,* 187 Cal.App.3d at 1583.)

Or for example, Section 8B.8 bars "significant erosion" from test pumping, but does not provide any objective measure of significance. That is therefore left to professional discretion.

Or for example, Section 8C requires that all "wells shall be cased *and constructed* so as to prevent pollution." While the draft ordinance provides casing specifications, it is not clear that these specifications are always sufficient to "prevent pollution." Furthermore, Section 8C provides no standards for well *construction* that will "prevent pollution." Unless Section 8C is simply ignored, these unspecified well construction standards to "prevent pollution" are effectively discretionary.

Because these "County standards" cannot be administered on a ministerial basis the proposed ordinance cannot mandate ministerial approval of wells that must meet these standards.

Furthermore, the proposed ordinance focuses on standards in Section 15.08.110, 15.08.120, and 15.08, 130 but fails to address the requirements in Section 15.08.140A, which provides that special seals are required in "areas where groundwater quality problems are known to exist and where a well will penetrate more than one aquifer." This is a matter based on discretionary professional judgment:

> In areas where groundwater quality problems are known to exist and where a well will penetrate more than one aquifer, the Health Officer shall require special well seal(s) to prevent mixing of aquifers. If required by the Health Officer, the applicant shall provide a hydrologist, geohydrologist, engineer or other qualified person approved by the Health Officer to identify strata containing poor water quality and recommend the location and specifications of the seal or seals needed to prevent the entrance of poor-quality water or its migration into other aquifers. Interpretation of aquifers shall be based upon data obtained from the litholog, multiple probe electric log and spontaneous potential logs of the well hole.
>
> If a hydrologist, geohydrologist, engineer or other such qualified person is required, the well shall be completed with the seal or seals specified by the hydrologist, geohydrologist, engineer or other such qualified person. Any person performing and evaluating a multiple probe electric log or spontaneous potential log shall submit copies of the logs and analysis to the Health Officer. The Health Officer may require other types of well logs such as caliper logs, acoustic logs, and cement bond logs.

(MCC 15.08.140.A.) Regardless of a well's compliance with standards in Sections 15.08.110, 15.08.120, and 15.08.130, the proposed ordinance cannot lawfully mandate ministerial approval of wells that penetrate more than one aquifer in areas where groundwater quality problems are known to exist. As discussed below, coastal Deep Aquifer wells are examples of such wells. Wells in the 400-foot aquifer in areas in which the 180-foot aquifer is seawater intruded are also examples of such wells.

Generally, any well that is subject to the "special groundwater protection" provisions of Section 15.08.140 cannot lawfully be ministerially approved, despite Section 5A of the proposed ordinance. Discretionary review is particularly complex in areas of "groundwater quality problems" under Section 15.08.140(A) because seawater intruded areas are mapped only biannually and the groundwater problems are not necessarily stable. (See MCWRA, Seawater Intrusion, https://www.co.monterey.ca.us/government/government-links/water-resources-agency-old/documents/seawater-intrusion-maps#wra..)

The proposed ordinance fails to incorporate or address MCWRA ordinances that provide for discretionary conditioning and denial of permits. MCWRA's own ordinances regulating well construction require discretionary determinations. MCWRA Ordinance No. 3790 bars construction of new wells in Zone 2B, the area benefitted by the Castrovillle Seawater Intrusion Project, unless that well is in compliance with the ordinance and the General Manager of MCWRA finds that the construction "will be consistent with the purposes of this ordinance." (Ord. 3790, §. 1.02.07.) MCWRA Ordinance No. 3709 bars wells in certain coastal areas at certain depths unless the MCWRA General Manager grants a variance, in which case the General Manager "may impose any conditions in order to ensure that the variance is consistent with the overall goals of this ordinance." (Ord. No. 3709, § 1.01.15.D.) That goal is to prevent overdraft and seawater intrusion. The criteria for variances and conditional approval are not set out in these MCWRA ordinances, but are matters for professional discretion. Thus, the proposed ordinance cannot lawfully compel ministerial approval of wells subject to the MCWRA ordinances.

By way of example, application of professional judgment in applying discretionary conditions is evident in permits for Deep Aquifer wells in the coastal area. Because those wells penetrate multiple aquifers and have the potential to induce seawater intrusion into the upper aquifers, MCWRA recommended, and Environmental Health required, monitoring wells to determine the new well's effects on upper aquifers in the well vicinity. (Testimony of Howard Franklin to Board of Directors of MCWRA, Oct. 20, 2020, available at https://monterey.granicus.com/MediaPlayer.php?view_id=21&clip_id=4076..) Wells are reviewed and approved by or under the direction of professional geologists or hydrologists. (*Id.*) In issuing permits for Deep Aquifer wells, MCWRA staff undertakes an application review that includes an "Impact Assessment." (MCWRA, Well Construction Application Review – Permit # 18-13073; MCWRA, Well Construction

Application Review – Permit # 18-13060.) The Impact Assessment summary adverts to the discretionary application of criteria to implement General Plan Policy PS-3.4:

> The proposed high capacity, at its current location and with its proposed design and pumping rate, does not indicate potential for significant adverse impact to existing domestic wells, water system wells, or in-stream flows based on an assessment using regional aquifer parameters and the methodology applied to meet the criteria of PS-3.4 of the 2010 Monterey County General Plan.

(MCWRA, Well Construction Application Review – Permit # 18-13073, Exhibit B, p. 1.) Such wells are approved with numerous conditions. (*Id.*, Exhibit B; MCWRA, Well Construction Application Review – Permit # 18-13060.)

In effect, the Court in *Protecting Our Waters* requires that the County conduct this kind of "Impact Assessment" as part of a CEQA review, with all of CEQA's attendant provisions for public notice, adequate analysis and disclosure, adequate mitigation, public participation, and accountable decision making. At its November 16, 2020 meeting, members of the MCWRA Board of Directors objected to a lack of transparency in its staff's analysis and recommendations for conditions on Deep Aquifer wells. An accountable and transparent CEQA process will correct these shortcomings.

E. The proposed ordinance's provisions for CEQA review are inadequate.

The proposed ordinance *requires* ministerial permit approval, therefore without CEQA review, if the applicant can meet standards in Sections 15.08.110, 15.08.120, and 15.08.130. As explained above, those standards cannot be administered ministerially because they require discretionary judgment. Accordingly, the draft ordinance would improperly result in permit approval without CEQA review.

Furthermore, the draft ordinance improperly limits CEQA review. The draft ordinance's only provisions for CEQA review are to "*require conditions of approval* to address potential environmental impacts of a well or issue a variance under Section 15.08.090 of this Chapter." (Id, § 5C.) Permit *denial* is mandated only if the well cannot meet the standards in Sections 15.08.110, 15.08.120, and 15.08.030 or cannot meet the requirements for a variance. (*Id.*, § 5B.) The apparent limitation of CEQA review to "requiring conditions of approval" is improper. CEQA compliance requires that an agency retain its discretion to *deny* approval where a project has significant environmental impacts that cannot feasibly be mitigated and approval is not justified by overriding considerations. (Guidelines, §§ 15091, 15093, 15043.)

F. The proposed variance procedure fails to mandate equally protective conditions.

The proposed ordinance provides for a variance procedure under which the "Health Officer may exercise discretion and grant a variance from any provision of the standards

incorporated into this Chapter." (Proposed Ordinance, § 6A.) The only requirements for a variance are that special circumstances exist, that enforcement would result in practical difficulties and unnecessary hardship, and that approval would not "defeat the purposes of this Chapter." (*Id.*, § 6B.) Because these provisions do not mandate that any alternative standard shall provide equal protection, the variance procedure fails to comply with DWR's general discretionary standards and therefore violates Water Code section 13801.

G. The proposed ordinance is inconsistent with General Plan Policies.

Under the General Plan and existing practice, wells are not to be permitted unless they meet the broadly stated objectives in General Plan Policies PS-3.3 and 3-4. Policy PS-3.3 provides:

> Specific criteria shall be developed by ordinance for use in the evaluation and approval of adequacy of all domestic wells. The following factors shall be used in developing criteria for both water quality and quantity including, but not limited to: *a. Water quality. b. Production capability. c. Recovery rates. d. Effect on wells in the immediate vicinity as required by the Monterey County Water Resources Agency or Environmental Health Bureau. e. Existing groundwater conditions. f. Technical, managerial, and financial capability of the water purveyor of a water system. g. Effects of additional extractions or diversion of water on in-stream flows necessary to support riparian vegetation, wetlands, fish, and other aquatic life including migration potential for steelhead, for the purpose of minimizing impacts to those resources and species*. This policy is not intended to apply to replacement wells. (Amended by Board Resolution 13-028)

(Emphasis added.)

Policy PS-3.4 provides:

> The County shall request an assessment of impacts on adjacent wells and instream flows for new high-capacity wells, including high-capacity urban and agricultural production wells, where there may be a potential to affect existing adjacent domestic or water system wells adversely or in-stream flows, as determined by the Monterey County Water Resources Agency. In the case of new high-capacity wells for which an assessment shows the potential for significant adverse well interference, the County shall require that the proposed well site be relocated or otherwise mitigated to avoid significant interference. The following factors shall be used in developing criteria by ordinance for use in the evaluation and approval of adequacy of all such high-capacity wells, including but not limited to: *a. Effect on wells in the immediate vicinity as required by the Monterey County Water Resources Agency or Environmental Health Bureau. b. Effects of additional extractions or diversion of water on in-stream flows necessary to support riparian vegetation, wetlands, fish, and other aquatic life including migration potential for*

> *steelhead, for the purpose of minimizing impacts to those resources and species.* This policy is not intended to apply to replacement wells. (Amended by Board Resolution 13-028)

(Emphasis added.)

Both Policy PS-3.3 and 3.4 call for development of specific criteria by ordinance to implement their broadly stated objectives. However, the County has not yet enacted implementing ordinances for Policies PS-3.3 and 3.4. Instead, the broad objectives are implemented based on professional judgment at the time that well permit is sought, not on the basis of any objective checklist that might support a ministerial review process:

> Chapter 15.08 of the Monterey County Code sets forth the application and decision-making process for the County in considering applications for the drilling and construction of water wells. The Agency serves as a technical advisor to the Monterey County Health Department, Environmental Health Bureau (EHB) in the well permit application review process, per the 2010 Monterey County General Plan and a Memorandum of Understanding between the Agency and the EHB (Attachment 1).
>
> The Agency reviews permit applications for well construction, destruction, and repair activities throughout the County. The nature and extent of the Agency's role in the permit review process varies depending upon the location of the activity to be permitted, expected annual pumping volume from the proposed well, expected pumping rate of the well, and well use type (e.g. domestic or irrigation). *Agency staff also conduct well impact evaluations for new domestic and high capacity wells as part of the well permit application review, as a means of implementing policies PS-3.3 and PS-3.4 from the 2010 Monterey County General Plan*.

(MCWRA Board Report, Item No. 11, WRAG 20-488, Nov. 16, 2020, emphasis added, https://monterey.legistar.com/View.ashx?M=F&ID=8908644&GUID=DDE74785-5019-422E-9AB2-CFF81AF73039.)

MCWRA's overview of its well permitting process also explains that MCWRA staff implement Policies PS-3.3 and 3.4 as part of their well impact assessments:

> There are policies within the 2010 Monterey County General Plan which require that MCWRA conduct well impact assessments for new domestic and high capacity wells. Policy PS-3.3 pertains to new domestic wells and Policy PS-3.4 to new high capacity wells. The well impact assessment is a threshold analysis, intended to determine if a proposed well indicates potential for significant adverse impact to existing domestic wells, water system wells, or in-stream flows. MCWRA conducts well impact assessments for all new domestic and high capacity wells in Monterey County.

(MCWRA, Well Permit Application Review, visited Nov. 25, 2020, available at https://www.co.monterey.ca.us/government/government-links/water-resources-agency-old/programs/well-permit-application-review/overview#wra.)

The proposed ordinance adds a section captioned "new well impact standards," which may be intended to provide some of the objective criteria that the County has not previously implemented via ordinance:

> H. New well impact standards. All new wells must meet the below standards to avoid significant adverse impacts to existing domestic wells or water system wells, and instream flows of surface water bodies designated as critical habitat by the National Marine Fisheries Service.
> 1. All of the following must be demonstrated for new wells:
> a. Pumping shall not result in drawdown in existing domestic or water system wells exceeding five (5) percent of an existing well's saturated thickness, or drawdown equal to five (5) feet or more in an existing well after one (1) year of pumping at the proposed pumping rate for the assumed pumping cycle in Subsections 2 or 3 of this Subsection.
> b. Pumping shall not decrease the instream flows of surface water bodies designated as critical habitat by more than two (2) cubic feet per second at the proposed pumping rate for the assumed pumping cycle in Subsections 2 or 3 of this Subsection.
> 2. The assumed pumping cycle for a domestic or water system well shall be twelve (12) hours per day, seven (7) days per week, for twelve (12) months of the year.
> 3. The assumed pumping cycle for an agricultural well shall be eight (8) hours per day, six (6) days per week, for twelve (12) months of the year.

(Draft 15.08 Ordinance, § 8H.) These standards address only drawdown in domestic wells under Policy PS-3.3 and instream flow effects. These standards do not fully implement or even address all of the factors specified in General Plan Policies PS-3.3 and 3-4.

For example, there are no criteria for domestic wells related to "water quality," "production capability," "recovery rates," "existing groundwater conditions," or "technical, managerial, and financial capability of the water purveyor of a water system," even though Policy PS-3.3 expressly mandates criteria for these factors. The provision for considering well-interference assesses only impacts to existing domestic or water system wells and lacks criterion for impacts to existing high-capacity wells. The instream flow provision is limited to interference with "surface water bodies designated as critical habitat" and simply ignores the mandate in both PS-3.3 and 3.4 to consider effects on instream flows on surface water bodies that may *not* be designated as critical habitat. Nothing in Policies PS-3.3 or 3.4 limit consideration of in-stream flow impacts to water bodies designated as critical habitat. The policies apply more generally: to any

instream flow that is "necessary to support riparian vegetation, wetlands, fish, and other aquatic life including migration potential for steelhead, for the purpose of minimizing impacts to those resources and species."

In addition, the proposed ordinance fails to make any provision to implement Policy PS-3.5, which bars wells in areas identified as suffering from saltwater intrusion:

> The Monterey County Health Department shall not allow construction of any new wells in known areas of saltwater intrusion as identified by Monterey County Water Resources Agency or other applicable water management agencies: a. Until such time as a program has been approved and funded that will minimize or avoid expansion of salt water intrusion into useable groundwater supplies in that area; or b. Unless approved by the applicable water resource agency. This policy shall not apply to deepening or replacement of existing wells, or wells used in conjunction with a desalination project.

Determination of saltwater intruded areas is based on periodic mapping of intruded areas which occurs only every two years. (MCWRA, Seawater Intrusion, available at https://www.co.monterey.ca.us/government/government-links/water-resources-agency-old/documents/seawater-intrusion-maps#wra.) Because that mapping is not maintained on a current basis, the determination of saltwater intruded areas is necessarily determined on the basis of professional judgment and is therefore discretionary. Furthermore, the potential approval of a well despite its being in an area of saltwater intrusion is based on approval "by the applicable water resource agency," which, in the absence of objective standards for such approval in Policy PS-3.5, is also necessarily a matter of discretionary professional judgment.

In sum, the "new well impact standards" in Section 8H of the proposed ordinance do not implement General Plan Policies PS-3.3, 3.4, or 3.5. Accordingly, mandating ministerial permitting of wells that meet the incomplete standards in Section 8H of the proposed ordinance would be inconsistent with the General Plan.

Alternatively, if the "new well standards" in Section 8H of the proposed ordinance are not intended to implement *fully* the provisions of Policies PS-3.3, 3.4, and 3.5, then the Health Officer will have to continue to apply discretion in order to condition or deny well permits with respect to the provisions of those policies that are not reflected in the "new well standards." For that reason alone, the proposed ordinance may not require ministerial approval of wells that meet the standards in 15.08.110, 15.08.120, and 15.08.130.

H. Regardless of CEQA considerations, the elimination of existing discretion by the proposed ordinance is inconsistent with DWR's general discretionary standards.

As explained above, Counties are *required* to adopt the DWR'S general discretionary standards. (Water Code, § § 13801(c).) The state law expressly occupies and therefore preempts any construction of the County's ordinances that does not incorporate the DWR standards, including the general grants of discretion. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150.)

The general standards always require the application of CEQA to well construction permits because these standards express the state Legislature's general delegation to the County, in Water Code sections 13800 and 13801, of an administrative and quasi-judicial function; i.e., the protection of groundwater quality. (*Simpson v. Hite* (1950) 36 Cal.2d 125, 131.) Thus, for the County to fully discharge its delegated responsibility, it must exercise its discretion to decide for every permit whether construction of the proposed well threatens groundwater contamination. (*Bank of Italy v. Johnson* (1926) 200 Cal. 1, 15; *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1063.)

Thus, the County cannot specify or rely on ministerial criteria for well spacing, groundwater gradients, and flood risk instead of exercising its discretion under DWR's general discretionary standards and the provisions in paragraphs 8.A, 8.B, and 8.C. For example, the well spacing provisions in paragraph 8.A does not limit the County's discretion to deny or condition a well based on *any* particular distance from a source of contamination. And the general grant of discretion in the DWR Bulletins does not limit the County's discretion to impose other conditions to address other water quality problems. Thus, regardless whether the County prepares a CEQA document to evaluate the impacts of restricting its discretion in applying the DWR standards to some set of objective standards before it adopts the proposed ordinance doing so, the County still may not abdicate its mandatory exercise of discretion to apply the DWR standards on a case-by-case basis.

I. Adoption of the proposed ordinance itself is not exempt from CEQA because its elimination of existing discretion and changes to existing practices have the potential to cause physical changes in the environment.

To the extent that the proposed ordinance restricts discretion to condition or deny wells to protect groundwater by substituting purportedly objective ministerial standards, it has the potential to cause physical changes to the environment. As such, adoption of the proposed ordinance is itself a project that is subject to CEQA. (*Medical Marijuana, supra,* 7 Cal.5th at 1191, 1197-1200.) Furthermore, the proposed ordinance weakens the existing discretion in the current ordinance to enforce the broad purposes of the ordinance, a discretion that is in fact currently practiced by the County.

The broadly stated purposes of Chapter 15.08 include ensuring "that the groundwater of this County will not be polluted or contaminated and that water obtained from such wells will be suitable for the purpose for which used and will not jeopardize the health, safety or welfare of the people of the County." (MCC, § 15.08.010.) Under the existing ordinance, the Health Officer "*shall deny* an application for a permit if, in his or her

judgment, its issuance would tend to defeat the purposes of this Chapter." (MCC, § 15.08.060, emphasis added.) The proposed ordinance strikes that language. (Draft 15.08 Ordinance, § 5.)

The proposed ordinance only permits discretionary denial of a permit where the permit issuance defeats the purposes of the Chapter, and that denial is only permitted through the variance procedure. (Proposed Ordinance, § 6B. 3.**)** Since the variance procedure could not be pursued for applications that meet the purportedly ministerial standards in Section 15.08110, 15.08.120, and 15.08.130 – because the "Health Officer shall approve" such permits – the Health Officer would no longer have discretion to condition or deny permits that, despite meeting these standards, nonetheless "would tend to defeat the purposes of this Chapter." Thus, the new terms reduce the Health Officer's discretion.

Furthermore, the proposed language is also more restrictive because it requires that the permit *would* defeat, nor merely "tend to defeat" the purposes of the Chapter. One implication is that the Health Officer may be restricted from considering the significance of incremental pumping that contributes to a cumulatively significant impact, such as overdraft of seawater intrusion.[7] Overdraft and sweater intrusion are quintessentially cumulative impact issues.

As discussed below, the County has in the past conditioned well permits, regardless of their ability to meet those standards, on the basis of their tendency to defeat the Chapter purposes. For example, the County has conditioned wells in areas of seawater intrusion or that would induce seawater intrusion or damage aquifers, but the current ordinance would mandate ministerial permit issuance for such wells as long as they meet the standards in 15.08.110, 15.08.120, and 15.08.130.

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[7] CEQA recognizes that significant impacts may be caused by cumulative effects of multiple projects affecting the same resource. (Guidelines, §§ 15065(a)(3), 15355.) Thus, cumulative impact analysis requires an agency to make two determinations: (1) whether the impact of *the project in combination other projects* exceeds the significance threshold, and (2) if so, whether the project's effect is a considerable contribution. (Guidelines, § 15130(a); Kostka and Zischke, *Practice Under the California Environmental Quality Act* (2nd Ed., 2019 Update), § 13.39.) The step-one determination is necessary because the impacts of individual projects may be "individually minor but collectively significant." (*Communities for a Better Environment v. California Resources Agency* ("*CBE v. CRA*") (2002) 103 Cal.App.4th 98, 120.) In step two, if the cumulative effect *is* significant, the agency must consider whether the contribution of the project under review is "considerable," i.e., "whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect." (*Id.* at 120.) The step-two determination depends on the severity of the cumulative impact identified in step one, because the "greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Id.*)

Or for example, the County has imposed the criteria for General Plan Policies PS-3.3 and 3.4 on replacement wells. Since the General Plan provides that these criteria need not be applied to replacement wells, the application of these criteria was clearly based on a discretionary determination that the criteria were necessary to ensure the broad purposes of the ordinance are met. The proposed ordinance would not apply the PS-3.3 and 3.4 criteria to replacement wells. Eliminating this kind of discretion would make the ordinance less protective of human health and the environment.

The proposed ordinance restricts the discretion in the current ordinance in a number of additional ways.

- Section 8H of the proposed ordinance apparently restricts the discretion to apply all of the provisions of General Plan Policies PS-3.3 and 3.4 by eliminating consideration of impacts related to "water quality," "production capability," "recovery rates," "existing groundwater conditions," and "technical, managerial, and financial capability of the water purveyor of a water system."
- Section 4A.5 of the proposed ordinance strikes out the current ordinance's provision that the Health Officer may require "such additional data as may be necessary, in the Judgment of the Health Officer, to insure public health, safety, and welfare." (MCC, § 15.08.050A.5; Draft 15.08 Ordinance, § 4A.5.)
- Section 8B.4 strikes out the discretion of the Health Officer to specify the well seal that is necessary for "groundwater protection."
- Section 8C apparently eliminates the discretion of the Health officer to specify casings to "prevent pollution."
- Section 8G eliminates current discretion to require special sounding tubes for wells with turbine pumps.
- Section 8H eliminates current discretion to determine allowable drawdown and instream flow impacts.
- The draft ordinance eliminates current discretion to deny permits for the reasons set out in MCWRA Ordinances Nos. 3709 and 3790.
- The draft ordinance eliminates current discretion to deny permits for the reasons set out General plan Policy PS-3.5.

In sum, the proposed ordinance fundamentally changes the permissible discretion in well permitting with respect to previous County standards, the broadly stated purposes of the ordinance, and General Plan policies intended to protect the environment.

The Health Officer does now routinely exercise plenary discretion to deny or condition well permits under its ordinances. For example, the Health Officer may now exercise discretion to deny or condition well permits by limiting pumping to reduce seawater intrusion or overdraft conditions, as it has with Deep Aquifer wells discussed above. Well permit denials may be necessary in areas of seawater intrusion. The County has barred such wells in the past by ordinance, e.g., Ordinances No. 3709, 3790, 5302, and 5303, and may need to do so on a permit-by-permit basis as the seawater intrusion front moves inland.

Well permit conditions or denials may be necessary in areas that may not be seawater intruded but from which increased pumping would exacerbate seawater intrusion. The County has banned such pumping by ordinance in the past (e.g., Ordinance No. 3790), and it has imposed conditions on wells in the Area of Impact under Ordinance 5303. The County may need to continue to exercise discretion to condition or deny wells on a permit-by-permit basis in the future. Such discretionary regulation is particularly important prior to the adoption and effective implementation of groundwater sustainability plans under the Sustainable Groundwater Management Act (SGMA). Until the SGMA plans are effectively implemented, CEQA review may be the only means to protect the County's groundwater resources. It is foreseeable that CEQA review may be streamlined when SGMA groundwater sustainability plans have been adopted and implemented.

Furthermore, regardless whether the Health Officer routinely exercises the discretion conferred by the existing ordinance to condition or deny well permits, this discretion *may* now be exercised. Amending Chapter 15.08 to restrict that discretion would potentially render the ordinance less protective of the environment

Accordingly, the County must undertake CEQA review of the proposed ordinance itself because it is a discretionary action with the potential to adversely affect the environment. The County cannot simply eliminate existing discretion under the ordinance without environmental review of the consequences.

Contrary to the recitals, the proposed ordinance does not merely "clarify existing regulations." (Draft 15.08 Ordinance, § 1E.) Because it does in fact change existing regulations in a way that may result in physical changes in the environment it is not exempt under Guidelines section 15378(b)(5).

The County may argue that revising its well permitting ordinances would be exempt as an action to protect natural resources or the environment under CEQA Guidelines, §§ 15307 or 15308. However, actions that may result in damage to natural resources or the environment are not subject to these exemptions. (*California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1241-1246; *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 656-658 [exemption not available because it cannot be seen with certainty that regulatory action will reduce emissions]; *International Longshoremen's & Warehousemen's Union v. Board Of Supervisors* (1981) 116 Cal.App.3d 265, 276.) Thus, the County must demonstrate that any proposed revisions to its well permitting ordinances do not relax existing standards. Even if proposed ordinance revisions do not change the stated standards in the ordinance, the ordinance revisions are subject to CEQA review if they reduce the Health Officer's discretion to alter those standards or to deny or otherwise condition well permits. Thus, the County cannot find that the purportedly ministerial criteria are as protective of the environment as the current fully discretionary review would be.

Nor may the County exempt the enactment of a revision to Chapter 215.08 as an emergency under CEQA Section 21080(b)(4), which exempts "[s]pecific actions necessary to prevent or mitigate an emergency." (*See also*, Guidelines, § 15269(c).) Under CEQA Section 21060.3, emergencies include occurrences such as fire, flood, earthquake, landslide, riot, accident, or sabotage, not a condition, and that occurrence "must involve a clear and imminent danger, demanding immediate action." (*Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257, 1267-1268; *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1681-1682.) The longstanding legal condition recently recognized by the California Supreme Court – CEQA's requirement for well permit review – is not an emergency occurrence that would warrant an exemption.

II. Replacement wells in the proposed moratorium ordinance.

A. The County should not permit additional wells in the coastal Deep Aquifers in a moratorium ordinance; but, if it does, it must review that provision under CEQA.

Regardless whether the County adopts a well permitting moratorium, it should not permit new wells in the Deep Aquifers, including replacement wells for failed wells in the 180 or 400-foot aquifers, in the coastal area. And the Board of Supervisors should not approve the replacement well provision in the proposed moratorium ordinance.

In the 1990s, the only significant user of the Deep Aquifers was the City of Marina, whose wells in the 180- and 400-foot aquifers had become seawater intruded. In 2003, a WRIME study for MCWD found that existing pumping was about 2,400 AFY and that increasing pumping of the Deep Aquifers to 4,000 AFY would (1) induce further seawater intrusion into the upper aquifers (the 180 and 400), which were vertically connected, and (2) risk contamination of the Deep Aquifers themselves. By 2016, there were more than 40 wells in the Deep Aquifers, including high production agricultural wells, and pumping had reached 8,900 AFY.[8]

In a 2017 study, MCWRA recommended a moratorium on new wells in the Deep Aquifers pending a sustainability study.[9] At the direction of the MCWRA Board of Directors and the County Board of Supervisors, a working group was convened for 90 days to develop an interim urgency ordinance. Based on some of this group's

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[8] MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin, Oct. 2017, https://www.co.monterey.ca.us/home/showdocument?id=57396.

[9] *Id.*

recommendations, in May 2018, the County enacted Ordinance No. 5302 imposing a moratorium on new wells in the 180, 400, and Deep Aquifers in the "Area of Impact," generally northwest of Davis Road. However, that moratorium exempted both municipal supply wells and so-called "replacement wells," i.e., wells drilled to replace the water supply previously obtained from wells in the upper aquifers that have failed due to seawater intrusion. On June 26, 2018, the Board adopted Ordinance No. 5303 which extended Ordinance No. 5302 until May 21, 2020.

Since 2016, numerous new Deep Aquifer wells have been drilled or permitted in the Area of Impact. Those that were permitted as replacement wells after enactment of Ordinance No. 5302 contain conditions imposed by the Department of Environmental Health, based on the recommendation of MCWRA, including restrictions on pumping quantities, acreage, and implementation of monitoring wells.

On May 19, 2020, MCWRA reported to the Board of Supervisors that the conditions described in the Findings and Declarations of Ordinance Nos. 5302 and 5303, which supported their adoption, continue to exist and worsen, and thus continue to pose an immediate threat to the public peace, health and safety.[10] Based on those recommendations, the Director of Health recommended continuing the Ordinance's restrictions *and also prohibiting replacement wells* because such wells are contributing to seawater intrusion. The report recommends that the prohibitions continue until such time as the Deep Aquifers can be studied to determine its sustainable yield.

Despite this, County staff are now proposing "An Ordinance Of The County Of Monterey, State Of California, Prohibiting New Wells In Seawater Intruded Aquifers, With Specified Exemptions Including An Exemption For Replacement Wells." The Board should reject the replacement well provisions in the proposed moratorium.

The moratorium itself is an emergency that would warrant an exemption under CEQA because it is needed urgently to protect the aquifers. (CEQA, § 21080(b)(4).) However, the exception of replacement wells from that moratorium is *not* urgently needed to protect the aquifers; indeed, it will harm them. If the County plans to treat the moratorium as exempt from CEQA, it should specify that replacement wells shall not be permitted in the Deep Aquifer in the Area of Impact.

Replacement wells are not now permitted by right in the Area of Impact because Ordinance No. 5303 has lapsed. MCWRA staff are free to recommend denial of replacement wells, as they have indeed done. The Health Officer currently has discretion to follow that advice to deny replacement well permits. Before the County adopts an

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[10] MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin: 2020 Update, May 2020, https://www.co.monterey.ca.us/home/showdocument?id=90578.

ordinance that eliminates that discretion, it must evaluate the effect of permitting additional replacement wells and additional pumping in the Deep Aquifers.

B. Replacement well permits in the Deep Aquifers, if allowed, must be subject to CEQA.

If the County does not adopt a moratorium, or if it adopts a moratorium with an exception for replacement wells, it must ensure that individual well permits in the Deep Aquifers are subject to CEQA review.

If an ordinance were adopted to continue the moratorium on new wells in the Area of Impact, the moratorium might be exempt from CEQA review as an emergency measure because additional wells are damaging the aquifers. (CEQA, § 21080(b)(4) [exempting "[s]pecific actions necessary to prevent or mitigate an emergency"]; Guidelines, § 15269(c).) However, if replacement wells were excepted from a moratorium ordinance, those future replacement well permits would *not* be subject to CEQA's emergency exemption. The emergency is the aquifer damage creating the need for the moratorium. The exception from that moratorium is not an emergency.

The need for a replacement well is not an unanticipated emergency that would justify the CEQA exemption for actions to prevent or mitigate an emergency. The County has long regulated well drilling, including replacement wells, in the Area of Impact and in the coastal zone, and water users are aware of the long-standing water problems that may compromise existing wells. Regardless, the County cannot exempt future replacement well permits from CEQA because it is not in a position now to determine that the time required to conduct environmental review of any or all future replacement wells would create a risk to public health, safety or welfare. (Guidelines, § 15269(c).)

Nor are replacement well permits subject to CEQA's exemption for actions to protect natural resources or the environment. Again, enactment of a moratorium to protect the aquifer may be exempt as an action to protect natural resources or the environment. (CEQA Guidelines, §§ 15307, 15308.) However, if the moratorium permits replacement wells, future issuance of permits for those wells would not qualify for such an exemption because, as an exception to the moratorium, they are clearly *not* protective of natural resources or the environment. Actions that may result in damage to natural resources or the environment are not subject to these exemptions. (*Dunn-Edwards Corp., supra,* 9 Cal.App.4th at 656-658; *International Longshoremen's & Warehousemen's Union, supra,* 116 Cal.App.3d at 276.) Furthermore, the County cannot exempt replacement wells from CEQA because it is not in a position now to determine that allowing replacement wells will not cause significant adverse effects. (*California Unions for Reliable Energy, supra,* 178 Cal.App.4th 1225, 1241-1246.)

The evidence is that additional replacement wells will cause significant adverse effects by harming the aquifers. As noted, MCWRA has reported to the Board of Supervisors that the conditions described in the Findings and Declarations of Ordinance Nos. 5302 and

5303, and which supported their adoption, continue to exist and worsen, and thus continue pose an immediate threat to the public peace, health and safety.[11] MCWRA concluded that increased pumping from the Deep Aquifers "will likely result in increased leakage from overlying aquifers with impaired groundwater."[12] Based on those recommendations, the Director of Health recommended continuing the Ordinance's restrictions "and also prohibiting replacement wells because such wells are contributing to seawater intrusion in the aquifers (180/400 and deep)."[13]

It appears from the draft Chapter 15.08 revision that the County may intend to treat replacement wells as emergencies. Language regarding the circumstances in which permit fees are doubled in Section 2B of the draft Chapter 15.08 revision may imply this:

> Any person who shall commence any work for which a permit is required by this Chapter without having obtained a permit therefor, shall, if subsequently granted a permit, pay double the permit fee for such work; provided, however, that this provision shall not apply to emergency work that is necessary to replace, repair, or destroy an existing well that has experienced a catastrophic collapse or other condition that renders the well physically incapable of operating, or such collapse or condition is imminent, as determined by the Health Officer. In all cases in which emergency work is necessary, a permit shall be obtained within three working days after commencement of the work. The applicant for a permit for any such emergency work shall, in any case, demonstrate that all work performed is in compliance with the technical standards of this Chapter. Emergency work includes but is not limited to wells necessary for the operation of a water system or agricultural operation.

(Draft 15.08 Ordinance, Section 2B.) Replacement wells costing in excess of one million dollars are not undertaken on an emergency basis. The parties in a position to install replacement wells, i.e., the agricultural water users in the Area of Impact, are well aware of groundwater conditions and can reasonably be charged with responsibility to plan ahead and to expect CEQA review will be required.

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[11] MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin: 2020 Update, May 2020, https://www.co.monterey.ca.us/home/showdocument?id=90578.

[12] *Id.* at 35.

[13] Monterey County Director of Health, Board Report, Legistar File Number ORD 20-006, May 19, 2020, https://monterey.legistar.com/View.ashx?M=F&ID=8440192&GUID=82376A3E-8C46-417B-8ABB-B0FE8785FDA9.

The Court in *Castaic Lake Water Agency* explained how narrow the emergency exemption is, and that it does not apply to a "condition:"

> In Western Mun. Water Dist. v. Superior Court (1986) 187 Cal.App.3d 1104 [232 Cal.Rptr. 359], the court reasoned: "The 'emergency' exception of section 21080, subdivision (b)(4) is obviously extremely narrow. 'Emergency' as defined by section 21060.3 is explicit and detailed. We particularly note that the definition limits an emergency to an 'occurrence,' not a condition, and that the occurrence must involve a 'clear and imminent danger, demanding immediate action.' [¶] ... '... The theory behind these exemptions is that if a project arises for which the lead agency simply cannot complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the EIR requirements is justifiable. For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper.' [Citation.] [¶] Although SBVMWD urges that 'CEQA, including its environmental impact report requirements, shall not apply to specific actions necessary {Page 41 Cal.App.4th 1268} to prevent or mitigate earthquakes or other soil or geological movements,' this interpretation is unsupported by the text of the exemption. Such a construction completely ignores the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature and would be in derogation of the canon that a construction should give meaning to each word of the statute. [Citation.] Moreover, in the name of 'emergency' it would create a hole in CEQA of fathomless depth and spectacular breadth.

(*Castaic Lake Water Agency, supra*, 41 Cal.App.4th 1257, 1267-1268. The condition of seawater intrusion in the upper aquifers that may prompt replacement wells is not an emergency.

The proposed revisions in Section 2B of the draft Chapter 15.08 revision should be removed because it implies that replacement wells are an emergency. Water users in the Area of Impact should understand that any replacement wells will be subject to CEQA. In light of the known harm from increased pumping of the Deep Aquifers, it would be absurd to permit replacement wells without evaluating their impacts under CEQA.

III. The County should not remove or alter conditions in Deep Aquifer well permits; but if it does so, it must comply with CEQA.

At its October 19, 2020 meeting the MCWRA Board of Directors discussed permit conditions on Deep Aquifer wells and directed staff "to provide an opportunity to make revised conditions on certain Deep Aquifers well applications to the Monterey County

Water Resources Agency Board of Supervisors."[14] In response, staff advised the MCWRA Board that no revisions should be made:

> Agency Staff does not recommend revisions or modifications to the application conditions. These recommended permit application conditions are supported by findings that are detailed in the attached Well Application Review package, which were submitted to the EHB (Attachment 2).[15]

At the November 16, 2020 meeting, staff explained that their initial recommendations for Deep Aquifer well conditions were based on their professional understanding of aquifer conditions.[16] In addition to the detailed reports staff prepared in 2017 and 2020 recommending a moratorium on all Deep Aquifer wells, staff pointed to additional justification for imposing conditions on the Deep Aquifer wells. For example, the minimum thresholds for chronic lowering of the Deep Aquifer groundwater levels established in the Groundwater Sustainability Plan adopted by Monterey County and by the Salinas Valley Groundwater Basin Groundwater Sustainability Agency (SVGBGSA) have been exceeded. In addition, Priority Management Action Number 5 in that Groundwater Sustainability Plan is to support and strengthen restrictions on additional wells in the Deep Aquifers in order to prevent additional wells from being drilled.[17] That Groundwater Sustainability Plan is based on the careful assessment of existing and projected groundwater conditions by SVGBGSA technical staff. In short, professional staff have recommended that no new wells be drilled in the Deep Aquifers, but if such wells are nonetheless permitted, they have recommended certain conditions to reduce harm.

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[14] MCWRA Board Report, Legistar File Number: WRAG 20-488, Nov. 16, 2020, https://monterey.legistar.com/View.ashx?M=F&ID=8908644&GUID=DDE74785-5019-422E-9AB2-CFF81AF73039; MCWRA Board Report, Legistar File Number: WRAG 20-488, Nov. 16, 2020, Attachment 2, Well Application Packet, https://monterey.legistar.com/View.ashx?M=F&ID=8907484&GUID=39B0D897-7DEE-407E-8EAA-923861F64659.

[15] *Id.*

[16] MCWRA Board of Directors meeting video, Nov. 16, 2020, at 1:40 to 1:42,[testimony of Howard Franklin], available at https://monterey.legistar.com/MeetingDetail.aspx?ID=814875&GUID=5FF96791-0B22-4EDB-97F9-B7598B2EA11E&Options=&Search=#.

[17] SVGBGSA, Salinas Valley Groundwater Basin 180/400-Foot Aquifer Subbasin Groundwater Sustainability Plan, Jan. 9, 2020, p. 9-19, https://svbgsa.org/wp-content/uploads/2020/04/SVBGSA-Combined-GSP-2020-0123-rev-032520-1.pdf.

Despite this, the MCWRA Board voted on November 2016 to recommend that the Board of Supervisors eliminate the three critical conditions that have been imposed on Deep Aquifer well permits, even though these conditions were based on the professional recommendations of MCWRA staff and accepted by the Department of Environmental Health. In particular, the MCWRA Board voted to recommend that three conditions on existing permits issued since January 2018 be removed: (1) the condition that these wells extract no more water than the wells they replace; (2) the condition that these well serve no more acreage than the wells they replace; and (3) the condition that the applicants implement monitoring wells to determine if the replacement wells are contaminating the aquifers. Members of the MCWRA Board of Directors objected to the "lack of transparency" in imposing these conditions, noting that some applicants for well permits that were granted had somehow failed even to inform *themselves* of these permit conditions.

The MCWRA Board of Directors did not discuss or provide any technical justification for their recommendation, which was opposed by their professional staff. The basis of the MCWRA Board's recommendation was apparently the concern that the permit conditions might reduce land values or that applicants would incur expenses that some believed should be borne by other parties.

Regardless whether the Board of Supervisors finds these arguments persuasive, abandonment or alteration of these permit conditions would require CEQA review. Even though these conditions were not imposed as mitigation through a CEQA process, MCWRA recommended these conditions, and Environmental Health accepted these conditions, as a form of mitigation based on an assessment of environmental impacts. An agency may modify or delete a previously adopted mitigation measure only if the agency follows specific steps, including identifying the mitigation measures that may change, reviewing the continuing need for those mitigation measures, and making required findings. (*Napa Citizens for Honest Gov't v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 359; *Katzeff v. Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 614.) The lead agency must address the reason for altering mitigation measures and the effect of doing so in a legally adequate CEQA document. An agency may not modify a mitigation measure in a way that reduces its effectiveness without preparing an EIR to assess the effects of the change. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1174; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.)

Furthermore, the California Supreme Court has explained in *Protecting Our Water* that well permits involving any discretionary conditions are subject to CEQA review. Altering existing well permit conditions would clearly be a discretionary decision since the requested alterations are not dictated by any objective criteria or ministerial mandate.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.

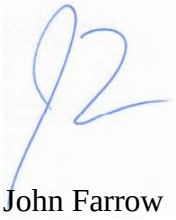

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EXHIBIT 1

Protecting Our Water and Environmental Resources et al., v. County of Stanislaus, Appellants' Opening Supplemental Brief On Remand, Oct. 29, 2020

No. F073634

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

vs.

STANISLAUS COUNTY et al.,

Defendants and Respondents.

APPELLANTS' OPENING SUPPLEMENTAL BRIEF ON REMAND [CRC 8.200(b)(1)]

The Honorable Roger M. Beauchesne, Department 24; tel: (209) 530-3121
Stanislaus County Superior Court, Case No. 2006153

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Miscellaneous:

Plaintiffs and Appellants Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance ("Appellants") submit this supplemental brief pursuant to CRC 8.200(b)(1) to address questions that the California Supreme Court, in its August 27, 2020, decision ("Decision"), remanded to this Court for decision.

INTRODUCTION

In its Answer to the Petition for Review, Appellants asked the Supreme Court to review two issues:

- "Do the state Bulletins' specific discretionary standards referenced in footnote 8 of [this Court's] Opinion confer discretionary authority triggering CEQA [California Environmental Quality Act] review?"
- "Does Stanislaus County's local groundwater well permit ordinance incorporate the state Bulletins' general discretionary standards, and thereby confer discretionary authority triggering CEQA review?"

The Supreme Court declined to fully resolve either issue, remanding both to this Court for decision. (Decision, 23, n.11; 24-25 ["[t]he matter is remanded to the Court of Appeal for it to evaluate the questions it declined to answer and to reassess plaintiffs' entitlement to relief"].)[1]

As discussed below, standards 8.B and 8.C provide Respondent County with "discretion" that may require the

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[1]*Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 500–501 (*POWER*.)

application of CEQA to water well construction permits, depending on the circumstances.

In contrast, however, the state Bulletins provide Respondent County with "discretion" that always requires the application of CEQA to water well construction permits.

Therefore, Appellants are entitled to a declaratory judgment incorporating three points:

- As ordered by the Supreme Court, Appellants are entitled to a declaration that Respondent County's blanket categorization of water well construction permits as "ministerial," and therefore, not subject to CEQA is unlawful, because standard 8.A provides Respondent County with "discretion" that may, depending on circumstances, require applying CEQA to a water well construction permit. (Decision, 24-25 ["plaintiffs are entitled to a declaration that County's blanket ministerial categorization is unlawful. The Court of Appeal holding that plaintiffs were entitled to such relief is affirmed"].)
- Appellants are also entitled to a declaration that Respondent County's blanket categorization of water well construction permits as "ministerial," and therefore, not subject to CEQA, is unlawful because standards 8.B and 8.C provide Respondent County with "discretion" that may, depending on circumstances, require applying CEQA to a water well construction permit.
- Finally, Appellants are entitled to a declaration that Respondent County's blanket categorization of water well construction permits as "ministerial," and therefore, not subject

to CEQA is unlawful because the state Bulletin's general discretionary standards are incorporated into the County Code and provide Respondent County with "discretion" that always requires applying CEQA to water well construction permits.

ARGUMENT

A. Standards 8.B and 8.C provide Respondent County with "discretion" that may require the application of CEQA to water well construction permits.

1. Statement of the issue.

The first question is whether standards 8.B and 8.C, in state Department of Water Resources Bulletin No. 74-90 ("Bulletin 74-90"), provide Respondent County with "discretion" that could, depending on circumstances, require applying the environmental review procedures of CEQA to a water well construction permit.

2. Statement of Facts Pertinent to the Issue.

Standard 8.B provides for locating wells upstream of contamination sources "where possible."

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

(AA 543 [Bulletin 74-90, Part II, § 8.B (emphasis added)].)

Standard 8.C provides for locating the wells outside areas

of flooding "if possible."

> Flooding and Drainage. *If possible*, a well *should be located* outside of areas of flooding. The top of the well casing shall terminate above grade and above known levels of flooding caused by drainage or runoff from surrounding land. For community water supply wells, this level is defined as the: "... floodplain of a 100 year flood..." or above "... any recorded high tide...", (Section 64417, Siting Requirements, Title 22 of the California Code of Regulations.) If compliance with the casing height requirement for community water supply wells and other water wells is not practical, *the enforcing agency shall require alternate means of protection*. ¶ Surface drainage from areas near the well shall be directed away from the well. *If necessary*, the area around the well shall be built up so that drainage moves away from the well.

(AA 543 [Bulletin 74-90, Part II, § 8.C (emphasis added)].)

In its August 24, 2018, Opinion ("Slip Opinion"), this Court ruled that these standards do not trigger CEQA review because they are conditioned on compliance being "possible." The Slip Opinion viewed whether a performance goal is "possible" as a non-discretionary, "objective" question. (Slip Opinion, 10, n. 8.)

3. Standards 8.B and 8.C provide Respondent County with "discretion" that may require the application of CEQA.

While the Supreme Court declined to decide if Standards 8.B and 8.C contemplate the exercise of discretion that may require the application of CEQA, the Decision does provide guidance on certain aspects of the issue. The Decision observes

that "Even if Standards 8.B and 8.C might be understood to grant discretionary authority in some cases, we could not conclude that they would always do so" for the same reasons that apply to Standard 8.A. (Decision, 23.)[2]

The Decision also affirms long-standing principles that bear on the question presented. The Decision affirms that "Ministerial projects are those in which the agency merely determines "conformity with applicable statutes, ordinances, regulations, or other fixed standards" and that "If the law requires an agency 'to act on a project in a set way without allowing the agency to use its own judgment,' the project is ministerial." (Decision, 11.)[3]

The Decision affirms that:

> [t]he 'touchstone' [for discretion] is whether the relevant 'approval process ... allows the government to shape the project in any way [by requiring modifications] which could respond to any of the concerns which might be identified' by environmental review

and that

> a project is ministerial 'when a private party can legally compel approval without any changes in the design of its project which might alleviate adverse environmental consequences.'

(*Ibid*, quoting *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App.3d 259, 267 (*Friends of Westwood*).)

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[2]*POWER,* 10 Cal.5th at 500–501.

[3]*POWER*, 10 Cal.5th at 493.

Standard 8.B provides authority for the County to determine whether it is "possible" to locate a well "up the ground water gradient from potential sources of pollution" because this measure "can provide an extra measure of protection [from contamination] for a well." The term "possible" is synonymous with "feasible." (Merriam-Webster's Collegiate Dictionary, 11th Ed., p. 968.) Under CEQA, agency determinations of the "feasibility" of measures to protect the environment are discretionary and trigger CEQA review.

> 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.

(*Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1583.)

The Decision holds that "[a] permit issuance in which County is required to exercise independent judgment under Standard 8.A cannot be classified as ministerial." (Decision, 17.)[4] The County's determination of whether it is "possible" to locate a well "up the ground water gradient from potential sources of pollution" requires both the applicant and the County to use their "independent judgment." For purposes of determining how to

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[4]*POWER*, at 497.

protect groundwater from pollution, the County may disagree with a project applicant on this question. In that event, the County's judgment would prevail and it could condition its approval on locating the well up-gradient from a source of pollution. In this circumstance, a project applicant cannot compel the County to issue a permit where the County has determined that, in its judgment, the standard requires modification of the proposed project to protect groundwater quality.

The same analysis applies to Standard 8.C, which provides authority for the County to determine whether it is "possible" to locate a well outside of areas of flooding, or to determine if it is "necessary" to build the area around the well up "so that drainage moves away from the well." Again, determining whether it is "possible" (i.e.,"feasible") to do these things involves the County's independent judgment, which it may impose on the project applicant.

Moreover, Standard 8.C requires that the County exercise discretion to determine the predicate facts upon which application of the standard depends, namely, whether a well is proposed in an "area of flooding." Judging flood risk and balancing that risk against the need to protect groundwater quality from contamination requires the exercise of judgment.

Therefore, the determinations are discretionary and require the application of CEQA, albeit in circumstances where these regulations "are relevant."

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B. The County Code Incorporates the State Bulletins' General Discretionary Standards, Which Trigger CEQA Review.

1. Statement of the Issue.

The second question is whether Stanislaus County Code section 9.36.150 incorporates the standards in Bulletin 74-90 that describe counties' general discretion to modify or create new standards to ensure protection of water quality based on site-specific facts; and if so, does this discretion *always* require that Respondent County apply CEQA to water well construction permits?

With respect to Standard 8.A of the state bulletin, the Supreme Court held that because this standard "gives County sufficient authority, at least in some cases, to render those issuances discretionary, County's blanket [ministerial] classification violates CEQA." (Decision, 21.)[5] The Supreme Court also held, however, that this standard does not make all water well construction permits discretionary for purposes of applying CEQA. The Court noted that the "relevant question" is whether the regulation in question grants "the agency discretion regarding the particular project" and is "relevant to the project." (Decision, 22.)[6]

Therefore, assuming the County Code incorporates the

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[5]*POWER*, *supra*, 10 Cal.5th at 499.

[6]*POWER*, *supra*, 10 Cal.5th at 500.

state Bulletins' general discretionary standards, the question arises on remand as to whether these general discretionary standards *always* trigger CEQA review or only trigger CEQA review when they grant discretion "regarding the particular project" or when "relevant to the project." Appellants' position is that these general grants of discretion *always* trigger CEQA review; but if not, at a minimum, they trigger CEQA review when relevant to a project.

2. Statement of Facts Pertinent to the Issue.

Water Code section 13800 provides:

> The department, after the studies and investigations pursuant to Section 231 as it finds necessary, on determining that water well, cathodic protection well, and monitoring well construction, maintenance, abandonment, and destruction standards are needed in an area to protect the quality of water used or that may be used for any beneficial use, shall so report to the appropriate regional water quality control board and to the State Department of Public Health. The report shall contain the recommended standards for water well, cathodic protection well, and monitoring well construction, maintenance, abandonment, and destruction as, in the department's opinion, are necessary to protect the quality of any affected water.

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.

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

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

(AA 150.)

DWR Bulletin No. 74 (at AA 176) was updated in 1981 in Bulletin No. 74-81 (at AA 416, 419), and supplemented again in 1990 in Bulletin No. 74-90 (AA 519, 522, 537). Bulletin No. 74-81 explains DWR's authority and purpose in issuing well standards by reference to Water Code section 13800. (AA 426-27.)

The state Bulletin's general discretionary standards were initially stated in Chapter II of Bulletin No. 74 (at AA 206) and later updated in Bulletin 74-81 to read:

> The standards presented in this chapter are intended to apply to the construction (including major reconstruction) or destruction of water wells throughout the State of California. However, *under certain circumstances, adequate protection of groundwater quality may require more stringent standards than those presented here; under other circumstances, it may be necessary to substitute other measures which will provide protection equal to that provided by these standards. Such situations arise from*

> *practicalities in applying any standards or, in this case, from anomalies in groundwater geology or hydrology. Since it is impractical to prepare standards for every conceivable situation, provision has been made for deviation from the standards as well as for additional ones.*

(AA 447 (italics added).)

Bulletin No. 74-81 also provides the County with discretion to grant an "Exemption Due to Unusual Conditions:"

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

(AA 449, Chapter II, Part I, § 3 (italics 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 450, Chapter II, § 5] (italics added).)

State Bulletin 74-90, issued in 1990, updates Bulletin 74-81. (AA 522, 537.) This Bulletin also recognizes that local authorities must exercise judgment in approving well construction permits:

> Well standards contained in Bulletin 74-81 together with well standards in this supplement (Bulletin 74-90) are recommended ***minimum*** statewide standards

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

(AA 537 (emphasis in original).)

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.

3. The County Code incorporates the state Bulletin's general discretionary standards.

County Code section 9.36.150 incorporates the state Bulletin's general discretionary standards because it must. The County was required to adopt its ordinance by state law requiring that it adopt an ordinance that "meets or exceeds the standards"

adopted by the state. (Water Code § 13801, subd. (c), AA 522.) 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 contrary 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 requiring the courts "to determine what interpretation best advances the Legislature's underlying purpose," which in this case is protecting groundwater quality. (*Reilly v. Marin Housing Authority* (2020) 10 Cal.5th 583, 609.)

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.) Courts must "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 Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1099-1100 (*Berkeley Hillside I*) (internal quotes and citations omitted).)[7]

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

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[7]"[T]he '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.)

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"].)

Previously in this Court and in the Supreme Court the County argued that the Bulletin's general grants of discretion are not "standards" as that term is used in section 9.36.050. 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, however, mean they are not "standards." Qualitative standards 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).)"].)[8]

A 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.) Here, 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."

The County's focus on the word "standard" in isolation is excessive. The state Bulletin uses the word "requirement" interchangeably with the word "standard." For example, Bulletin No. 74-81, 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 449, Chapter II, § 3] (emphasis added).) The word "requirement" is defined as "something essential to the existence or occurrence of something

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[8]See also, 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"].

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.

4. The state Bulletin's general discretionary standards provide Respondent County with discretion that always requires the application of CEQA.

The general discretionary standards provide the County with sufficient discretion to "modify" well construction permits to protect the environment. Respondent County's argument to the contrary has primarily been that County Code section 9.36.150 does not incorporate these general standards, which is rebutted in the previous section.

Therefore, the remaining question is whether the general standards *always* require the application of CEQA to well construction permits or like Standard 8.A, only when the circumstances make them "relevant."

The general standards always require the application of CEQA to well construction permits because these standards express the state Legislature's general delegation to the County, in Water Code sections 13800 and 13801, of an administrative and quasi-judicial function; i.e., the protection of groundwater quality.

> where the legislative policy has been expressly fixed by the state and the execution of that policy has been specifically imposed by the state law on the board of

> supervisors as an administrative function ... It would be beyond the powers of a board of supervisors to repeal or amend the state-declared policy.... The board cannot escape the duty imposed upon it by the state through the medium of declining to act.

(*Simpson v. Hite* (1950) 36 Cal.2d 125, 131.)[9] Thus, for the County to fully discharge its delegated responsibility, it must exercise its discretion to decide for every permit whether construction of the proposed well threatens groundwater contamination. (*Bank of Italy v. Johnson* (1926) 200 Cal. 1, 15 (administrative agencies may not "so circumscribe or curtail the exercise of [their] discretion under [a] statute as to prevent the free and untrammeled exercise thereof" and "may not refuse to exercise the discretion" conferred by statute); *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"].)

In contrast to Standards 8.A, 8.B, and 8.C, the grants of general discretion are not limited in scope to particular topics (i.e., separation distance, groundwater gradient, or flood risk). Because they empower and obligate the County to protect

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[9]"It has been recognized from an early date in the history of the state that in the exercise of their functions under particular statutes 'the board of supervisors is a special tribunal, with mixed powers—administrative, legislative and judicial.' " (*Newsom v. Board of Sup'rs of Contra Costa County* (1928) 205 Cal. 262, 269.)

groundwater quality from all threats posed by a proposed well, the grants of general discretion are different in kind from Standards 8.A, 8.B, and 8.C, and thus do not fall within the rule, adopted by the Supreme Court for Standards 8.A, 8.B, and 8.C (i.e., that they only trigger CEQA when circumstances make them applicable). Instead, these general grants of discretion are subject to the traditional and well-established rule, discussed above, that when an agency has discretion, it must exercise it.

For the Court to hold that Respondent County may refuse to exercise its discretionary authority to determine if a proposed well may harm groundwater quality unless an objector presents evidence of harm would impermissibly shift the burden of carrying out the administrative mandate of Water Code section 13801 from the County to the general public. This would put an impossible burden on the public because the County issues well construction permits without any notice or opportunity to be heard.[10] As a result, any such rule would frustrate achieving this statute's purpose and the Legislature's chosen means of achieving that purpose, in violation of the cardinal rule of statutory construction requiring the courts "to determine what

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

interpretation best advances the Legislature's underlying purpose," which in this case is protecting groundwater quality. (*Reilly v. Marin Housing Authority*, *supra*, 10 Cal.5th at 609.)

Any such rule would also 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 I, supra,* 60 Cal.4th at 1103; *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.) The County's argument that it may ignore this policy unless and until a member of the public presents evidence that a specific permit application requires the general 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 Supreme Court's recent decision in *Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171 (*Medical Marijuana*) also supports Appellants' position. *Medical Marijuana* concerns one of the two criteria an "activity" must meet to be considered a "CEQA project" subject to environmental review pursuant to CEQA. One criterion is that the public agency must have discretionary authority to approve, carry out, or modify the activity. (*Medical Marijuana, supra*, 7 Cal.5th at

1183, 1188; 1191; CEQA § 21080(a) [CEQA "shall apply to discretionary projects proposed to be carried out or approved by public agencies"].)

The other criterion is that the public agency must approve or carry out an activity that may change or lead to changes in the physical environment, as provided in CEQA's definition of the term "project." (*Id*. 7 Cal.5th at 1182, 1191; CEQA § 21065.)

The instant case involves the "discretionary authority" criterion, while the Court's decision in *Medical Marijuana* focuses on the criterion relating to changes in the physical environment. The Court's discussion of this criterion, nevertheless, sheds considerable light on the "discretionary authority" criterion.

Medical Marijuana concerned an amendment to a zoning ordinance allowing medical marijuana dispensaries in the city of San Diego. The City argued that its adoption of the ordinance was not a CEQA project because it would not change or lead to changes in the environment. The CEQA plaintiff argued to the contrary that adoption of the ordinance was a CEQA project because subdivision (a) of CEQA section 21080 refers to "the enactment and amendment of zoning ordinances" as a "discretionary project."

The Court agreed with the CEQA plaintiff that the zoning ordinance was a CEQA project, but for a different reason, holding that, as a matter of statutory construction, a zoning ordinance is not a "CEQA project" unless it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" as provided in CEQA section

21065. (*Medical Marijuana*, supra, 7 Cal.5th at 1191.)

The Court then turned to whether the zoning ordinance at issue meets the definition of "project" because it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The Court's analysis was heavily grounded in the legal and statutory policy considerations engaged at this most preliminary stage of review for CEQA's applicability. Thus, the Court observed that:

> "a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur."

(*Id*. at 1197, citing *Muzzy Ranch, supra,* 41 Cal.4th at 383.)

The Court reiterated this point several times. (*Medical Marijuana*, *supra*, 7 Cal.5th at 1198-1200.) For example, the Court noted that:

> *Muzzy Ranch* clearly requires a public agency to consider the substance of a proposed activity in determining its status as a project. *What need not be considered is the activity's actual impact in the specific circumstances presented.*

(*Id*. at 1198 (italics added).)

The Court then explained why the inquiry regarding the possibility that an activity may lead to environmental impacts is

very different at this preliminary, first stage of the CEQA process, where the purpose is to determine whether CEQA applies. The Court explained that

> The somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree" because this determination "occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity.

(*Id*. at 1197–1198.) The Court explained that the question posed at that point in the CEQA analysis:

> is not whether the activity *will* affect the environment, or *what those effects might be*, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA.

(*Id*. at 1197–1198 (italics added).)

Applying this rule of decision to the facts, the Court held that the CEQA plaintiffs and the Court of Appeal had incorrectly analyzed whether the zoning ordinance may have environmental impacts "in the context of the specific circumstances it claimed to prevail in the City, hypothesizing various City-specific reasons why the Ordinance might indirectly produce physical changes." (*Id*. at 1199.) The Court explained that the plaintiff's "framing of the arguments in this manner and the court's rejection of them put the cart before the horse" because:

> *The likely actual impact of an activity is not at issue in determining its status as a project.* Further, at this

> stage of the CEQA process virtually any postulated indirect environmental effect will be "speculative" in a legal sense — that is, unsupported by evidence in the record (citation) — *because little or no factual record will have been developed*.

(*Id*. at 1199–1200 (italics added).)

These considerations apply with equal force to whether the Bulletin's general grants of discretion always trigger CEQA review, or only do so when they are shown to be "relevant." As this Court explained in *Medical Marijuana*, the purpose of the preliminary, first stage of the CEQA process is to determine whether CEQA applies. With respect to the criterion relating to the possibility of environmental impact, the Court recognized that the "somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree" because "[d]etermination of an activity's status as a project occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity." (*Id*. at 1197–1198.)

The same is true for the the agency's discretionary authority. This inquiry occurs "before any formal inquiry has been made into the actual environmental impact of the activity." (*Id*. at 1198.)

In the context of the limited grant of discretion in Standards 8.A, 8.B, and 8.C, the Decision approved the holding in *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23 (*County of Sonoma*)) that CEQA applies only when the specific

facts show the agency must exercise its discretion in some fashion. But this rule should not apply to the Bulletin's general grants of discretion. The facts that could trigger such action would be facts about the environmental impacts of the project, which as this Court observed in *Medical Marijuana* are simply not developed at this stage of the process. For agencies or the courts to determine if CEQA applies based on whether an agency *will* exercise its discretionary powers as compared to whether it *could* exercise its discretionary powers, "puts the cart before the horse." (*Id*. at 1199.) While the *County of Sonoma* rule may be appropriate in the context of narrow grants of discretion related to precisely defined factual circumstances, it is inappropriate in the context of the Bulletin's general grants of discretion for all the reasons discussed in this section.

CONCLUSION

Appellants are entitled to a declaratory judgment incorporating the three points described in the Introduction to this brief.

Dated: October 29, 2020

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WORD COUNT CERTIFICATION

I, Thomas N. Lippe, appellate counsel for Plaintiffs and Appellants, certify that the word count of this Appellants' Supplemental Brief on Remand is 5,490 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief.

Dated: October 29, 2020

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PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of San Francisco, California. My business address is 201 Mission Street, 12th Floor, San Francisco, CA 94105. I am over the age of 18 years and not a party to the above entitled action. On October 29, 2020, I served the following document(s) on the parties designated on the attached service list:

●**Appellants' Opening Supplemental Brief on Remand**

MANNER OF SERVICE
(check all that apply)

[A] By Overnight FedEx	I caused such envelope to be placed in a box or other facility regularly maintained by the express service carrier or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided.
[**B**] By Truefiling Electronic Mail (e-mail)	I caused such document to be served electronically via Truefiling using electronic mail (e-mail) on the parties in this action by uploading and transmitting a true copy from my address: kmhperry@sonic.net to the following e-mail addresses listed under each addressee below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 29, 2020, in the County of Contra Costa, California.

Kelly Marie Perry

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