Case No. S251709

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

v.

STANISLAUS COUNTY et al.,
Defendants and Respondents.

Court of Appeal of the State of California
Fifth Appellate District, Case No. F073634

Superior Court of the State of California
County of Stanislaus, Case No. 2006153
The Honorable Roger M. Beauchesne, Judge, Presiding

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT STANISLAUS COUNTY

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I. INTRODUCTION

In addition to granting review in this case, the California Supreme Court granted review in the case *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666, review granted November 14, 2018, S251056 ("*CWIN*"). The current case was given lead case status, even though its appeal followed that of *CWIN*. Accordingly, *CWIN* parties, including the County of San Luis Obispo ("SLO County") and Real Parties in Interest JUSTIN Vineyards and Winery LLC, Lapis Land Company, LLC, Paso Robles Vineyards, Inc. and Moondance Partners, LP (collectively, "Real Parties") submit this amicus curiae brief, along with the concurrently filed application for permission to file an amicus curiae brief.

This brief is filed in support of Defendant and Respondent Stanislaus County ("Stanislaus County"), on the basis that a decision in this case will directly impact SLO County and similarly situated counties throughout the State, and the Court's pending review of the Second District's decision in *CWIN*. SLO County and Real Parties join in and incorporate by reference the Statement of the Case found at pages 18 through 26 of Stanislaus County's Opening Brief.

II. ARGUMENT

A. Affirming the Fifth District Court of Appeal's Decision Will Negatively Impact Public Agencies Throughout California

While not identical, Stanislaus County's well construction ordinance (Stanislaus County Code, Chapter 9.36 or "Stanislaus Ordinance") is sufficiently similar to the well construction ordinance of SLO County (San Luis Obispo County Code, Chapter 8.40 or "SLO Ordinance")[1] that an

[1] SLO County's well construction ordinance, County Code Chapter 8.40, is submitted for the Court's information as Exhibit B to the Motion for

(continued . . .)

affirmation of the Fifth District Court of Appeal's decision in this case will negatively impact SLO County. A decision in favor of Plaintiffs and Appellants would also negatively impact counties throughout the State and thousands upon thousands of well permit applicants.

As discussed in Section IV of Stanislaus County's Opening Brief (pp. 59-63), the Fifth District held that the issuance of *any* well construction permit under the Stanislaus Ordinance is a discretionary approval under CEQA, based solely on the incorporated standard contained within Section 8 of Department of Water Resources ("DWR") Bulletin No. 74, related to minimum horizontal separation distances from known or potential sources of pollution or contamination – *notwithstanding whether the standard applies to a particular well permit application.* If this interpretation stands, there would be no principled basis for distinguishing Stanislaus County's duty to perform environmental review for well construction permits (not requiring a variance) and the obligations of all other California local agencies with similar well permitting ordinances, including SLO County.

Statewide application of a decision that fails to consider the extent to which Section 8 of DWR Bulletin No. 74, or any other standard incorporated into the challenged ordinance, applies to a particular approval is alarming for two reasons. First, the standard contained within Section 8 will not apply in the great majority of cases. For example, Section 8 did not apply to any of the well permits challenged in the *CWIN* case – none of the wells were proposed to be located near a potential source of contamination. (*CWIN*, *supra*, 25 Cal.App.5th at p. 677 ["The effect of [Real Parties'] wells on ground water quality is not at issue here, and nothing in the DWR

(. . . continued)
Judicial Notice.

Bulletins gives County discretion to impose limitations on water usage."].) Additionally, even where there is a potential source of contamination located on a site, Section 8 itself recognizes that the defined minimum separation distances will be "adequate" in a great many circumstances: "The following horizontal separation distances are generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water." (DWR Bulletin No. 74-90, p. 12.)

The fact that Stanislaus County (through a variance process) and SLO County (through SLO County Code section 8.40.060(b) related to seal distances) have adopted only minimal deviations from the State standards in their ordinances supports the conclusion that the defined minimum separation distances are likely to be adequate in most cases, i.e., "unusual conditions" or "anomalies related to groundwater geology or hydrology" are uncommon in these localities, given the mandate in the introduction to Chapter II of DWR Bulletin No. 74-81:

> The standards presented in this chapter are intended to apply to construction (including major reconstruction) or destruction of water wells *throughout the State of California*. However, under certain circumstances, adequate protection of ground water 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, *anomalies in ground water 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. *However, the Department believes that for most conditions encountered in the State, the standards presented in this report are satisfactory for the protection of ground water quality.*

(DWR Bulletin No. 74-81, p. 23 (emphasis added); see also DWR Bulletin No. 74, p. 6 ["It was almost immediately apparent at the start of the

program that many standards could, in general, be applied practically anywhere in the State."].) In fact, SLO County did not require a single permittee to exceed the defined minimum separation distances identified in Section 8 with respect to a single well construction permit that it issued in 2018. (Declaration of Elizabeth A. Pozzebon ("Pozzebon Decl.") ¶ 8. submitted concurrently herewith as Exhibit A to the Motion for Judicial Notice.)

Second, and as discussed in more detail below, assuming the standard does not apply to a particular approval, application of the Fifth District's decision would nonetheless require that an agency review a panoply of environmental impacts, none of which it would have the power to address, including any impact related to groundwater quality under the authority of the incorporated standard within Section 8.

B. The Limited and Technical Purpose of DWR Bulletin No. 74 Supports a Ministerial Approval Process

The purpose of DWR Bulletin No. 74 is to "formulate recommendations for *minimum* standards to protect the quality of the State's groundwater resources from impairment that might result from inadequately constructed, defective, or improperly abandoned wells." (DWR Bulletin No. 74, p. 6 (emphasis added).) The Forward to Bulletin No. 74 provides that, "The standards presented in this report are issued as guides to good practice for those engaged in the construction of water wells or in the regulation of water well construction and the destruction of abandoned wells in California." (*Id.* at p. iii.) Chapter 1 further provides that although "the construction industry, advisory groups, and regulatory agencies obviously intend to prevent any impairment of the quality of the State's ground water supplies which might result from improperly constructed or abandoned wells," the absence of a uniform approach "requires the development of standards for water well construction and

destruction [...] capable of execution by the average well driller." (*Id.* at p. 6.) In addition, because neither the purpose of "assur[ing] the protection of the quality of the State's ground waters as they exist in the ground or as they pass through the well for use" nor the construction standards developed in response thereto depend on the nature of the use, the construction, alteration, maintenance, and destruction standards "apply to all water wells, monitoring wells, and cathodic protection wells...." (*Id.* at p. 6; DWR Bulletin No. 74-90, p. 6.) When Bulletin No. 74 was first adopted in 1968, approximately 10,000 water wells were constructed or rehabilitated each year throughout the State. (DWR Bulletin No. 74, p. 1.) The first supplement in 1981 noted that the average number of new wells had increased to 15,000 annually, with a sharp increase to 28,000 during the 1976-1977 drought. (DWR Bulletin No. 74-81, p. 1.)

DWR Bulletin No. 74 and its subsequent updates, and as described by the Second District in *CWIN*, is intended to provide technical specifications for "well construction, including the required distance between wells and sources of contamination (sewers, sewage leech fields, cesspools, animal enclosures); well seals; surface features; casing material, etc." (*CWIN*, *supra*, 25 Cal.App.5th at p. 676.) As a result, the Second District correctly observed that, "A well building permit is a type of building permit. So long as technical standards and objective measurements are met, County must issue a well permit to licensed contractors." (*Id.* at p. 677; see Cal. Code Regs., tit. 14, § 15268(b) [building permits are "presumed to be ministerial"].)

Given both the limited purpose of the Standards ("they are only incidentally related to the effective use of [the State's ground water] resources") and their technical nature, a ministerial approval process makes practical sense and is consistent with the way in which local agencies ensure compliance with the State standards. (DWR Bulletin No. 74-81,

p. 14.) By way of example, the SLO Ordinance identifies the Health Officer rather than the Planning Director as the permitting authority, and it is administered through the Environmental Health Service Division ("EHS") of the County Health Department. (SLO County Code, §§ 8.40.030(a), 8.40.020.) As a general matter, both the Health Officer and EHS are concerned with issues related to health and safety rather than with whether use of a particular resource is sustainable.[2] By contrast, SLO County's water use regulations are codified in its Land Use and Building Ordinances and administered by the Planning and Building Department. (See, e.g., SLO County Code, § 22.30.204 [regulating new or expanded irrigated crop production overlying the Paso Robles Groundwater Basin].) Unlike EHS staff, Planning Department staff routinely processes approvals that implicate a broad range of environmental resource issues, including discretionary approvals that require CEQA review. EHS, on the other hand, processes simple health and safety permits associated with food facilities, tattoo parlors, public swimming pools, and facilities that handle hazardous materials/waste, none of which require CEQA review. (Pozzebon Decl. ¶ 10.)

A ministerial approval process is also consistent with the nature of the underlying resource and the fact that neither the State standards nor the Stanislaus and SLO Ordinances distinguish between different types of use for wells. The same construction standards apply to a domestic well designed to serve a single-family residence and an irrigation well that will serve a 500-acre vineyard, because the use is irrelevant to the manner in

[2] See, e.g., Health & Saf. Code, § 101030 ("The county health officer shall enforce and observe in the unincorporated territory of the county, all of the following: (a) Orders and ordinances of the board of supervisors, *pertaining to the public health and sanitary matters*. (b) Orders, including quarantine and other regulations, prescribed by the department. (c) Statutes relating to public health." (emphasis added).)

which the construction is completed.

Of the thousands of well construction permits issued throughout the State each year, many are for domestic water use. (DWR Bulletin No. 74-81, p. 1). In its ordinance regulating groundwater "exports," SLO County found that, "Areas of the county are entirely dependent on groundwater" and in 2018, approximately 70 percent of the well construction permits for production wells that EHS issued (164 out of 232 permits) were for private domestic wells. (SLO County Code, § 8.95.10; Pozzebon Decl. ¶ 5.) In addition, EHS estimates that it issued 133 well construction permits during the most recent drought (from January 1, 2014 to April 30, 2017) to replace private domestic wells that had gone dry (based on voluntary reports). (Pozzebon Decl. ¶ 6.) As a result, EHS must be able to quickly process well construction permits that do not present "unusual conditions," including permits for wells that are not proposed to be located anywhere near a contamination source or in an area that presents "anomalies" in soil conditions. (DWR Bulletin No. 74-81, pp. 23, 25.)

In sum, although the Fifth District Court of Appeal appropriately notes that a decision based solely on practical ramifications would be imprudent, neither should it ignore real world effects that are both significant and largely avoidable. For example, if the Fifth District had more closely followed the reasoning in *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 [217 Cal.Rptr.3d 327] ("*Sonoma County*") (which it should have for the reasons discussed below) and limited its determination that well permits are discretionary (which SLO County and Real Parties dispute) to circumstances in which Section 8 applies to the approval or there is reason to believe that soil conditions are such that the minimum horizontal separation distances may be inadequate, homeowners requiring deeper drinking water wells during drought occurrences would not all be subjected to CEQA review.

C. The Fifth District's Application of the Functional Test Undermines the Rationale Behind It

As discussed at length in Stanislaus County's briefing, a ministerial project is one "involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project." (Cal. Code Regs., tit. 14, § 15369.) Courts have long acknowledged the statutory distinction between discretionary and ministerial projects under CEQA, recognizing "that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 299 [118 Cal.Rptr.3d 324] (citations omitted).) This is often referred to by courts as the "functional" test for discretion. (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272 [235 Cal.Rptr. 788].) In applying the functional test, the court evaluates "the authority granted by the law providing the controls over the activity" to determine whether the agency has the ability to deny or meaningfully modify the project based on the environmental impacts that CEQA review might uncover. (Cal. Code Regs., tit. 14, § 15002(i)(2).)

In *Sonoma County*, the court held that issuance of an erosion control permit was a ministerial act exempt from CEQA. The court explained, "[m]ost of the [erosion control] ordinance's provisions that potentially confer discretion did not apply to the [ ] project, and petitioners fail to show that the few that might apply conferred the ability to *mitigate potential environmental impacts to any meaningful degree.*" (*Sonoma County, supra,* 11 Cal.App.5th at p. 16 (emphasis added).) The court found the ordinance's requirement for a 50-foot setback for wetlands, as potentially modified at the recommendation of a biologist, insufficient to confer discretion upon the county because it did not allow for the ability to mitigate any potential

environmental impacts in a meaningful way. (*Id.* at p. 28.) The court explained that the provisions of the ordinance were "technical"; "[a] provision that appears to a lay person to grant discretion to an agency might, as understood by a person with technical knowledge, grant little or none in the context of a particular proposed project." (*Id.* at p. 29.)

The default wetlands setback in *Sonoma County* is fundamentally the same as the well separation standard at issue in this case. Each provision is applicable only to a subset of permit applications and specifies technical standards, while neither granted the permitting agency authority to mitigate environmental impacts associated with the permit in any meaningful way.

The Fifth District incorrectly distinguished *Sonoma County* by claiming that the setback determination was ministerial because the ordinance required county deference to a technical determination by a wetlands biologist. (*Protecting Our Water & Environmental Resources v. Stanislaus County* (Cal. Ct. App., Aug. 24, 2018, No. F073634) 2018 WL 4042782, at *8 (citing *Sonoma County, supra*, 11 Cal.App.5th at p. 30).) Plaintiffs-Appellants incorrectly rely on this flawed analysis that *Sonoma County* is distinguishable, by stating that "the ordinance in that case limited the measures the County could impose do [sic] to measures recommended by a biologist, while in the instant case, the County is the 'arbiter of "adequacy."'" (Answer at p. 32.)

Both the Fifth District and Plaintiffs-Appellants ignore the language in *Sonoma County* immediately preceding that upon which they rely: "The first provision that potentially conferred discretion requires a 50-foot setback for wetlands unless a wetlands biologist recommends a different setback [. . . .] The provision required the Commissioner to allow the 35-foot setback *in the absence of some reason to reject the biologist's report.*" (*Sonoma County, supra,* 11 Cal.App.5th at pp. 29-30 (emphasis added).) The court did not hold that the county's decision was ministerial because

the county had to accept the biologist's report – the county could have rejected the report if it had "some reason" for doing so. Under the erosion control ordinance, the county still had some level of discretion related to determining appropriate wetlands setbacks. Yet that was still insufficient to render it a discretionary approval rather than a ministerial one. The key factor in both *Sonoma County* and the instant case is that the ordinances at issue do not allow either permitting authority to meaningfully mitigate the potential environmental impacts *that CEQA review of the permit application might uncover.*

D. The *CWIN* Decision Correctly Applies *Sonoma County*'s Functional Test

Given that *CWIN* was styled as a challenge to the issuance of four permits rather than as a general declaratory relief action, it serves to highlight the potential consequences of the Court's decision. More specifically, the circumstances in *CWIN* illustrate the impact of a ruling that ignores the rationale underlying *Sonoma County*.

CWIN involves a petition for writ of mandate challenging the issuance of four well construction permits for irrigation wells. (Pozzebon Decl. ¶ 9.) As indicated by the Second District Court of Appeal in *CWIN*, "[t]he effect of [the challenged] wells on groundwater quality is *not* at issue here," and none of the plot plans submitted with the applications identify any potential sources of pollution or contamination on any of the four sites, which are all large in size (160 acres to over 400 acres). (*c*; Pozzebon Decl. ¶ 9.) In fact, as pointed out in the Second District hearing and papers in *CWIN*, the well dug by Real Party JUSTIN Vineyards and Winery LLC ("JUSTIN") under its permit yielded no water and was immediately abandoned. Yet under the Fifth District's decision, SLO County would be obligated to conduct CEQA review with respect to all four permits (including Real Party JUSTIN's subsequent abandonment permit) even

though SLO County lacked the ability to exercise *any* discretion under Section 8 (or otherwise). This outcome epitomizes the flawed reasoning the court sought to avoid in *Sonoma County* – treating the mere existence of *some* discretion as conclusive, without considering its meaningfulness in the context of a particular project approval. (*Sonoma County*, *supra*, 11 Cal.App.5th at p. 28.)

Sonoma County summarized the "environmentally meaningful mitigation" that results where public agencies have authority to influence projects' environmental impacts, in *People v. Department of Housing & Community Development* (1975) 45 Cal.App.3d 185 [119 Cal.Rptr. 266] ("*Department of Housing*"), *Friends of Westwood, supra,* 191 Cal.App.3d 259, and *Day v. City of Glendale* (1975) 51 Cal.App.3d 817 [124 Cal.Rptr. 569]. (*Sonoma County*, *supra*, 11 Cal.App.5th at pp. 28-29.) The agency in *Department of Housing* had broad discretion to impose a variety of conditions on use and occupancy through a conditional use permit, including conditions related to water supply, drainage, and method of sewage disposal at a particular site. (*Department of Housing*, *supra*, 45 Cal.App.3d at p. 193.) In stark contrast, SLO County's only authority under Section 8 of DWR Bulletin No. 74 and the SLO Ordinance is to determine whether the horizontal distance between a potential source of contamination and a proposed well should differ from the guideline distances provided in Bulletin No. 74. For Real Parties' wells at issue in *CWIN*, to which Section 8 did not apply, this limited authority of SLO County would be entirely moot, regardless of any determinations that might be reached under CEQA. Thus, irrespective of whether SLO County prepares an EIR or a negative declaration, whether SLO County determines Real Parties' wells would cause significant direct, indirect, or cumulative impacts to any number of resource areas analyzed under CEQA, or whether SLO County can identify measures (from other agencies) to mitigate such

hypothetical significant impacts, the outcome for Real Parties' well permit applications would be exactly the same in terms of form and substance as approved by SLO County in 2016.

There would, however, be consequences if SLO County were forced to undertake an essentially meaningless CEQA review. There would be a substantially increased administrative burden for SLO County and increased cost, delay from a considerably longer permitting horizon, and uncertainty for Real Parties, including potentially costly litigation. All of these consequences would flow from following the Fifth District Court of Appeal decision, without furthering CEQA's goal to compel mitigation of significant environmental impacts associated with a project where feasible. *Sonoma County* recognized that where an agency lacks the ability to mitigate potential environmental impacts to any meaningful degree, the agency's permitting decision is ministerial under CEQA. These practical ramifications underlie application of the functional test in *Sonoma County* and by the Second District in *CWN*, and are just as relevant here.

III. CONCLUSION

For any and all of these reasons, SLO County and Real Parties respectfully request that the Court overturn the Fifth District Court of Appeal's decision and find that Stanislaus County's issuance of groundwater well permits, not involving a variance, constitutes a ministerial approval.

May 10, 2019

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CERTIFICATE OF LENGTH

This brief complies with the word count limitation for a brief produced on a computer as set forth in rule 8.504(d) of the California Rules of Court because this brief contains 3,530 words, excluding the parts of the brief exempted by rule 8.504(d)(3).

May 10, 2019

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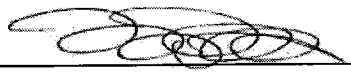
By: 

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DECLARATION OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of Sacramento and my business address is 500 Capitol Mall, Suite 1600, Sacramento, California 95814.

On May 13, 2019, at Sacramento, California, I served the attached document(s):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on May 13, 2019, at Sacramento, California.

Dawn R. Forgeur, CCLS