

## Danielle Espinosa

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**From:** Johnson, Aaron@Wildlife <Aaron.Johnson@Wildlife.ca.gov>  
**Sent:** Friday, August 12, 2022 1:26 PM  
**To:** Queenie Barnard; Danielle Espinosa; BOS  
**Cc:** Wendy Sugimura; Marquez, Alyssa@Wildlife; Moyer, Patricia (Trisha)@Wildlife; Ellsworth, Alisa@Wildlife; Louis Molina; Wood, Brandy@Wildlife  
**Subject:** CDFW comments regarding proposed well ordinance  
**Attachments:** Proposed\_Ordinance\_Amendment\_Mono\_County.pdf

### [EXTERNAL EMAIL]

Hello,

CDFW would like to submit the attached comment letter for the upcoming Mono County Board of Supervisors meeting scheduled for Tuesday August 16, 2022. This is comment letter is regarding the proposed well ordinance as discussed at the August 9 meeting as agenda item 7G.

Thanks,

Aaron Johnson  
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GAVIN NEWSOM, Governor  
CHARLTON H. BONHAM, Director



August 12, 2022

Mono County Board of Supervisors  
c/o Clerk of the Board  
PO Box 715  
Bridgeport, CA 93517  
[BOS@Mono.ca.gov](mailto:BOS@Mono.ca.gov)

*Sent via electronic mail*

**Subject: Proposed Ordinance Amending Mono County Code Regarding the Processing of Well Permits and Application of the California Environmental Quality Act**

Dear Members of the Mono County Board of Supervisors:

The California Department of Fish and Wildlife (CDFW) attended the August 9, 2022, Mono County Board of Supervisors (Board) meeting during which Agenda Item G, Ordinance Amending Chapter 7.36 of the Mono County Code - Wells, was discussed. CDFW has reviewed the proposed Ordinance amending Chapter 7.36 of the Mono County Code and is providing the following comments.

**CDFW ROLE**

CDFW is California's trustee agency for fish and wildlife resources and holds those resources in trust for all the people of the state. (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines, § 15386, subd. (a).) CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. (*Id.*, § 1802.) Similarly, in its trustee role for purposes of the California Environmental Quality Act (CEQA), CDFW is charged by law to provide, as available and applicable, biological expertise during public agency environmental review efforts, focusing specifically on aspects of projects that have the potential to adversely affect fish and wildlife resources over which CDFW has jurisdiction.

**RECOMMENDATIONS**

CDFW provides the following comments and suggested changes to *Exhibit A - Chapter 7.36 Wells, Section 7.36.041 Classification of Permits*. ***Bold italics*** indicate language additions:

Subsection A

“...That presumption shall be rebutted where discretion must **or may** be exercised in accordance with the following authorities, as same may be amended from time to time:”

1. California Department of Water Resources Bulletin No. 74, Chapter II, Section 8.A;
2. California Department of Water Resources Bulletin No. 74, Chapter II, Section 8.B;
3. California Department of Water Resources Bulletin No. 74, Chapter II, Section 8.C;
4. California Department of Water Resources Bulletin No. 74, Chapter II, Section 9;
5. Other legally binding authorities, such as, but not limited to, State of California Executive Orders **and applicable law regarding public trust doctrine obligations and considerations.**”

CDFW Comment 1: CDFW recommends further revisions to Subsection A to indicate that Mono County may also exercise discretion in issuing well permits to consider and avoid or mitigate impacts to environmental and fish and wildlife resources, including but not limited to, sensitive habitats, sensitive or special-status species, groundwater dependent ecosystems, and sensitive water bodies. CDFW believes this suggestion is consistent with the recommendations presented by Mono County staff at the August 9, 2022, Board meeting.

Subsection B

“If any of the standards set forth by the authorities stated in 7.36.041(A) apply and the health officer utilizes **or may utilize** discretion in issuing well permits in accordance with those authorities, then the issuance of the well permit shall be a discretionary act under CEQA, and permit applicants shall be responsible for the cost and preparation of any reports and documentation required by CEQA in accordance with policy established by the health officer or his or her designee.”

CDFW Comment 2: As currently written, the proposed Ordinance classifies a well permitting decision by the Mono County Environmental Health Department’s Health Officer as discretionary under CEQA only if the Health Officer exercises discretion in issuing the permit. Under CEQA Guidelines section 15357, the key question in distinguishing discretionary projects from ministerial ones is whether “...the public agency *can* use its subjective judgment to decide whether and how to carry out or approve [the] project.” (Emphasis added; see also *Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 493 [hereinafter, *POWER*].) Under the *POWER* case, a project is discretionary if the public agency is “...empowered to disapprove or condition approval of a project based on environmental concerns that might be uncovered by CEQA review...” (*POWER, supra*, 10 Cal.5th at p. 494.) In sum, the legal standard for determining whether a project is discretionary under CEQA is not whether the public agency actually exercises its independent judgment and discretion based on environmental concerns, but whether it has the ability to do so.

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If Mono County revises Ordinance Subsection A per CDFW's comments above, CDFW recommends making corresponding revisions to Subsection B to account for the additional bases upon which the Mono County Environmental Health Department's Health Officer may exercise discretion in issuing well permits.

Questions regarding this letter or further coordination should be directed to Alyssa Marquez at [Alyssa.Marquez@wildlife.ca.gov](mailto:Alyssa.Marquez@wildlife.ca.gov).

Sincerely,

DocuSigned by:

*Brandy Wood*

4D759253408941E...

for

Alisa Ellsworth

Environmental Program Manager

ec:

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