

Existing Regulatory Policies Related to Groundwater

This appendix provides an overview of federal, state, and local environmental laws, policies, plans, regulations, and guidelines (referred to generally as “regulatory requirements”) relevant to groundwater resources and applicable to the MGA member agencies. The text is almost entirely from Pure Water Soquel’s Draft Environmental Impact Report (EIR). The full Draft EIR document can be found at: <https://www.soquelcreekwater.org/PWS-CEQA>.

Federal and State Regulations

CLEAN WATER ACT (1972)

The federal Clean Water Act (CWA) of 1972’s primary objective is to restore and maintain the integrity of the nation’s waters. The objective translates into two fundamental national goals:

- to eliminate the discharge of pollutants into the nation’s waters, and
- to achieve water quality levels that are fishable and swimmable.

To achieve the second objective, Designated Uses have been established for individual water bodies (e.g., lake, stream, creek, river) with typical designated uses including:

- Protection and propagation of fish, shellfish and wildlife;
- Recreation;
- Public drinking water supply; and
- Agricultural, industrial, navigational and other purposes.

The Clean Water Act includes an Antidegradation Policy (40 CFR 131.12).

Federal Antidegradation Policy

Section 303 of the Clean Water Act (CWA) (33 U.S.C. § 1313) requires that states adopt water quality standards for waters of the United States within their applicable jurisdiction. Such water quality standards must include, at a minimum, (1) designated uses for all waterbodies within their jurisdiction, (2) water quality criteria necessary to protect the most sensitive of the uses, and (3) antidegradation provisions. Antidegradation policies and implementing procedures must be consistent with the regulations in 40 C.F.R. § 131.12. Antidegradation is an important tool that states use in meeting the CWA requirement that water quality standards protect public health and welfare, enhance water quality, and meet the objective of the Act to “restore and maintain the chemical, physical and biological integrity” of the nation’s waters. The CWA requires that states adopt

antidegradation policies and identify implementation methods to provide three levels of water quality protection to maintain and protect (1) existing water uses and the level of water quality, (2) high quality waters, and (3) outstanding national resource waters.

SAFE DRINKING WATER ACT (1972)

The Safe Drinking Water Act (SDWA) is the federal law that is intended to protect public drinking water supplies throughout the nation (see: <https://www.epa.gov/sdwa>). Under the SDWA, EPA sets standards for drinking water quality and, with its partners (e.g., states), implements various technical and financial programs to ensure drinking water safety.

State agencies accepting primacy¹ authority from EPA implement drinking water regulations that are no less stringent than federal standards. Federal regulations and standards also apply to underground injections including Aquifer Storage and Recovery wells (see: <https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water>).

STATE WATER RESOURCES CONTROL BOARD RESOLUTION 68-16 ANTI-DEGRADATION POLICY

In 1968, the State Water Resources Control Board (SWRCB) adopted an anti-degradation policy (policy) aimed at maintaining the high quality of waters in California through the issuance of Resolution No. 68-16 (“Statement of Policy with Respect to Maintaining High Quality Waters in California”). They apply to both surface waters and groundwaters (and thus groundwater replenishment projects), protect both existing and potential beneficial uses of surface water and groundwater, and are incorporated into Regional Water Quality Control Board (RWQCB) Water Quality Control Plans (e.g., Basin Plans).

The policy requires that existing high water quality be maintained to the maximum extent possible, but allows lowering of water quality if the change is “consistent with maximum benefit to the people of the state, will not unreasonably affect present and anticipated use of such water (including drinking), and will not result in water quality less than prescribed in policies.” The policy also stipulates that any discharge to existing high quality waters will be required to “meet waste discharge requirements which will result

¹ States accepting primacy are delegated authority by EPA to implement the regulation for which they have accepted primacy. The SDWA and CWA programs are typically delegated to states via primacy agreements.

in the best practicable treatment or control of the discharge to ensure that (a) pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.”

The policy prohibits actions that tend to degrade the quality of surface and groundwater. The RWQCBs oversee this policy (SWRCB, 1968). The anti-degradation policy states that:

- Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water, and will not result in water quality less than that prescribed in the policies.
- Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters must meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

SWRCB has interpreted Resolution No. 68-16 to incorporate the federal anti-degradation policy, which applies if a discharge that began after November 28, 1975 would lower existing surface and groundwater quality. This policy would apply to any project that brings in supplemental sources of water into the Basin because the projects would be required to comply with the state resolution maintaining the existing water quality.

Furthermore, one of the requirements for any recycled water project is that it must be compatible with State Board Resolution 68-16 and the Recycled Water Policy (see below). This can be evaluated on a project-specific localized impacts basis or can be evaluated in terms of the utilization of basin-wide groundwater assimilative capacity. Utilization of more than 10% of basin-wide assimilative capacity for compliance with anti-degradation policy has typically required a Salt and Nutrient Management Plan for the basin or a similar level of evaluation (Brown and Caldwell, 2018).

PORTER-COLOGNE WATER QUALITY CONTROL ACT

The Porter-Cologne Water Quality Control Act (Division 7 of the California Water Code) provides the basis for water quality regulation within California and defines water quality

objectives as the limits or levels of water constituents established for the reasonable protection of beneficial uses. The SWRCB administers water rights, water pollution control, and water quality functions throughout California, while the Central Coast RWQCB (CCRWQCB) conducts planning, permitting, and enforcement activities. The Porter-Cologne Act requires the RWQCB to establish a regional Basin Plan with water quality objectives, while acknowledging that water quality may be changed to some degree without unreasonably affecting beneficial uses. Beneficial uses, together with the corresponding water quality objectives, are defined as standards, per federal regulations. Therefore, the regional basin plans form the regulatory references for meeting state and federal requirements for water quality control. Changes in water quality are allowed if the change is consistent with the maximum beneficial use of the State waters, it does not unreasonably affect the present or anticipated beneficial uses, and it does not result in water quality less than that prescribed in the water quality control plans. The basin plan regulations also apply to groundwater. The Basin Plan for this location is discussed below in the local regulations subsection.

This Act would apply to any project where any supplemental sources of water are brought into the Basin because they would have potential to affect water quality and beneficial uses in the Basin. Thus, it is likely that most supplemental water supply projects would be required to comply with the Basin Plan water quality objectives established by the CCRWQCB to protect the beneficial uses of groundwater. This is discussed in the Local Regulations subsection below.

STATE WATER RESOURCES CONTROL BOARD POLICIES RELATED TO GROUNDWATER

Sources of Drinking Water Policy

The Sources of Drinking Water Policy (adopted as Resolution 88-63) designates the municipal and domestic supply (MUN) beneficial use for all surface waters and groundwater except for those waters: (1) with total dissolved solids exceeding 3,000 mg/L, (2) with contamination that cannot reasonably be treated for domestic use, (3) where there is insufficient water supply, (4) in systems designed for wastewater collection or conveying or holding agricultural drainage, or (5) regulated as a geothermal energy producing source. Resolution 88-63 addresses only designation of water as drinking water source; it does not establish objectives for constituents that threaten source waters designated as MUN.

Recycled Water Policy

The Recycled Water Policy, adopted by the SWRCB in February 2009, and amended in 2013 to include monitoring for CECs (discussed below) for groundwater replenishment

projects. The Recycled Water Policy was a critical step in creating uniformity in how RWQCBs were individually interpreting and implementing the Anti-degradation Policy in Resolution 68-16 for water recycling projects, including groundwater replenishment projects. The critical provisions in the Policy related to groundwater replenishment projects are discussed in the following subsections.

Constituents of Emerging Concern

As defined in the SWRCB Recycled Water Policy, CECs are chemicals in personal care products, pharmaceuticals including antibiotics, antimicrobials, agricultural and household chemicals, hormones, food additives, transformation products and inorganic constituents. These chemicals have been detected in trace amounts in surface water, wastewater, recycled water, and groundwater. The Recycled Water Policy includes monitoring requirements for six CECs for subsurface application groundwater replenishment projects using recycled water, four of which are used as health-based indicators and others serving as performance-based indicators. In addition to the Recycled Water Policy CECs, as part of the SWRCB regulations for groundwater replenishment projects with recycled water, a project sponsor must recommend CECs for monitoring in recycled water and potentially in groundwater in the project's Engineering Report. For recharge projects that use recycled water that has been treated using reverse osmosis (RO) and an advanced oxidation process (AOP), the monitoring requirements in the Recycled Water Policy only apply to recycled water prior to and after RO/AOP treatment (i.e., no groundwater sampling). None of the CECs currently have regulatory limits. The Recycled Water Policy includes monitoring trigger levels (MTLs) for the four health-based CEC indicators and response actions to be taken by groundwater replenishment project sponsors based on monitoring results compared to the MTLs. The MTLs were based on Drinking Water Equivalent Levels. A Drinking Water Equivalent Level represents the amount of a CEC in drinking water that can be ingested daily over a lifetime without appreciable risk (MRWPCA and MPWMD, 2016). The following CECs from the Recycled Water Policy are those with health-based indicators, treatment/performance-based indicators, or both as indicated below in parentheses.

- 17- β -estradiol - steroid hormone (health-based indicator)
- Caffeine – stimulant (health-based and performance-based indicator)
- N-nitrosodimethylamine (NDMA) – disinfection byproduct (health-based and performance-based indicator) [Note: NDMA's current California NL is 0.01 μ g/L]
- Triclosan – antimicrobial (health-based indicator)
- N,N-diethyl-metatoluamide (DEET) – ingredient in personal care products (performance-based indicator)
- Sucralose – food additive (performance-based indicator)

Salt and Nutrient Management Plans

In recognition that some groundwater basins in the state contain salts and nutrients that exceed or threaten to exceed Basin Plan groundwater objectives, and that some Basin Plans do not have adequate implementation measures to achieve compliance, the Recycled Water Policy includes provisions for managing salts and nutrients on a regional or watershed basis through development of Salt and Nutrient Management Plans (SNMP) rather than imposing requirements on individual recycled water projects (which had been the practice prior to adoption of the Recycled Water Policy). Unfavorable groundwater salt and nutrient conditions can be caused by natural soils, discharges of waste, irrigation using surface water, groundwater, or recycled water, and water supply augmentation using surface or recycled water (although treating the recycled water through RO prior to application would typically prevent this from occurring). The Recycled Water Policy recognizes that regulation of recycled water alone will not address these conditions. SNMPs are to be developed for every groundwater basin/sub-basin by May 2014 (May 2016 with a RWQCB-approved extension). SNMPs were not prepared for the Santa Cruz Mid-County Basin because it does not contain salts and nutrients in excess of Basin Plan objectives. If a SNMP is not prepared for a basin underlying a project or a project is using a limited amount of available assimilative capacity (described below), the recycled water policy requires the preparation of a dedicated anti-degradation evaluation.

Antidegradation and Assimilative Capacity

Assimilative capacity is the ability for groundwater to receive contaminants without detrimental effects to human health or other beneficial uses. It is typically derived by comparing background ambient chemical concentrations in groundwater to the concentrations of the applicable Basin Plan groundwater quality objectives. The difference between the ambient concentration and groundwater quality objective is the available assimilative capacity.

The Recycled Water Policy establishes two assimilative capacity thresholds in the absence of an adopted SNMP. A groundwater replenishment project that utilizes less than 10% of the available assimilative capacity in a groundwater basin/sub-basin (or multiple projects utilizing less than 20% of the available assimilative capacity in a groundwater basin/subbasin) are only required to conduct an anti-degradation analysis verifying the use of the assimilative capacity. In the event a project or multiple projects utilize more than the designated fraction of the assimilative capacity (e.g., 10% for a single project or 20% for multiple projects), the project proponent must conduct a RWQCB-deemed acceptable (and more elaborate) anti-degradation analysis.

A RWQCB has the discretionary authority to allocate assimilative capacity to groundwater replenishment projects. There is a presumed assumption that allocations greater than the Recycled Water Policy thresholds would not be granted without concomitant mitigation or an amendment to the Basin Plan groundwater quality objective to create more assimilative capacity for allocation. Groundwater replenishment projects that utilize advanced treated recycled water will use very little to essentially none of the available assimilative capacity because of the high quality of the water.

Regional Water Quality Control Board Groundwater Requirements

The Recycled Water Policy does not limit the authority of a RWQCB to impose more stringent requirements for groundwater replenishment projects to protect designated beneficial uses of groundwater, provided that any proposed limitations for the protection of public health may only be imposed following regular consultation with the California SWRCB Division of Drinking Water (DDW). The Recycled Water Policy also does not limit the authority of a RWQCB to impose additional requirements for a proposed groundwater replenishment project that has a substantial adverse effect on the fate and transport of a contaminant plume (for example those caused by industrial contamination or gas stations), or changes the geochemistry of an aquifer thereby causing the dissolution of naturally occurring constituents, such as arsenic, from the geologic formation into groundwater. These provisions require additional assessment of the impacts of groundwater replenishment projects on areas of contamination in a basin and/or if the quality of the water used for replenishment causes constituents, such as naturally occurring arsenic, to become mobile and impact groundwater.

SWRCB DIVISION OF DRINKING WATER (DDW)

California's drinking water program was originally created in 1915, when the California State Board of Health established the Bureau of Sanitary Engineering. In 1976, two years after the Safe Drinking Water Act was passed, California adopted its own safe drinking water act (contained in the Health and Safety Code) and adopted implementing regulations (contained in Title 22 California Code of Regulation). The state's act had two main goals: (1) to continue the state's drinking water program, and (2) to be the delegated authority (referred to as the "primacy") by the EPA for enforcement of the federal Safe Drinking Water Act. As required by the federal act, California's program must set drinking water standards that are at least as stringent as the EPA's standards. Each public water system also must monitor for a specified list of contaminants, and the findings must be reported to the state.

The DDW regulates public water systems, oversees water recycling projects, permits water treatment devices, supports and promotes water system security, and performs a number of other functions. DDW has adopted enforceable primary and secondary maximum contaminant levels (MCLs). The MCLs are either based on the federal MCLs or as part of DDW's own regulatory process. For example, California has an MCL for perchlorate while there is no federal MCL. The MCLs account for not only chemicals' health risks, but also factors such as their detectability and treatability, as well as costs of treatment. Health and Safety Code Section 116365(a) requires a contaminant's MCL to be established at a level as close to its Public Health Goal (PHG) as is technologically and economically feasible, placing primary emphasis on the protection of public health. The Office of Environmental Health Hazard Assessment (OEHHA) established PHGs. They are concentrations of drinking water contaminants that pose no significant health risk if consumed for a lifetime, based on current risk assessment principles, practices, and methods. OEHHA establishes PHGs pursuant to Health and Safety Code Section 116365(c) for contaminants with MCLs, and for those for which MCLs will be adopted. Public water systems use PHGs to provide information about drinking water contaminants in their annual Consumer Confidence Reports. Certain public water systems must provide a report to their customers about health risks from a contaminant that exceeds its PHG and about the cost of treatment to meet the PHG, and hold a public hearing on the report. Action levels (AL) are included in CCRs for certain constituents where no MCLs have been established, i.e., under the lead and copper rule. If a constituent exceeds its AL, this triggers treatment or other requirements.

There are also a variety of chemicals of health concern whose occurrence is too infrequent in conventional drinking water sources to justify the establishment of national standards, but are addressed using advisory levels. The DDW, with the assistance of OEHHA, has established notification levels (NL) and Response Levels (RL) for that purpose. If a chemical is present in drinking water that is provided to consumers at concentrations greater than the RL (10 to 100 times greater than the NL depending on the toxicological endpoint of the constituent), DDW recommends that the source be taken out of service. If the source is not taken offline and a chemical concentration is greater than its NL in drinking water that is provided to consumers, DDW recommends that the utility inform its customers and consumers about the presence of the chemical, and about health concerns associated with exposure to it.

Final Groundwater Replenishment with Recycled Water Regulations hereafter, referred to as "Groundwater Replenishment Regulations," went into effect June 18, 2014 (SWRCB, 2014). The overarching principles taken into consideration by DDW in developing the Groundwater Replenishment Regulations were:

- Groundwater replenishment projects are replenishing groundwater basins that are used as sources of drinking water.
- Control of pathogenic microorganisms should be based on a low tolerable risk that was defined as an annual risk of infection from pathogen microorganisms in drinking water of one in 10,000 (10⁻⁴). This risk level is the same as that used for the federal Surface Water Treatment Rule for drinking water.
- Compliance with drinking water standards for regulated chemicals.
- Controls for unregulated chemicals.
- No degradation of an existing groundwater basin used as a drinking water source.
- Use of multiple barriers to protect water quality and human health.
- Projects should be designed to identify and respond to a treatment failure. A component of this design acknowledges that groundwater replenishment projects inherently will include storage in a groundwater aquifer and include some natural treatment.

CENTRAL COAST REGIONAL WATER QUALITY CONTROL PLAN (BASIN PLAN)

The CCRWQCB, under the authority of the California Water Code, is responsible for authorizing and regulating activities that may discharge wastes to surface water or groundwater resources.

This authority includes adoption of Basin Plans (Section 13240) with beneficial uses and water quality objectives (both narrative and numeric) to reasonably protect those uses (Section 13050). The Basin Plan also establishes guidelines for water used for irrigation. The Basin Plan for the Central Coast was originally adopted in 1971 and was last amended in 2011.

Groundwater beneficial uses for the Basin are listed as agricultural water supply (AGR), municipal and domestic water (MUN). The Basin Plan has:

- For MUN beneficial uses – groundwater criteria for bacteria and DDW primary and secondary MCLs.
- For AGR beneficial uses – objectives to protect soil productivity, irrigation, and livestock watering and guidelines to interpret a general narrative objective to prevent adverse effects on the beneficial use.

Permit limits for groundwater replenishment projects are set to ensure that groundwater does not contain concentrations of chemicals in amounts that adversely affect beneficial uses or degrade water quality. For some specific groundwater sub-basins, the Basin Plan

establishes specific mineral water quality objectives for total dissolved solids, chloride, sulfate, boron, sodium, and nitrogen.

WATER WELL STANDARDS

Under California Water Code Section 231, enacted in 1949, California Department of Water Resources (DWR) is responsible for developing standards for the protection of well water quality. Authority for enforcing the standards as they apply to the construction, destruction, and modification of water wells rests with the Santa Cruz County Environmental Health Services, which also implements additional local requirements. The California Water Code requires contractors that construct or destruct water wells to have a C-57 Water Well Contractor's License, follow DWR well standards, and file a completion report with DWR (Water Code Sections 13750.5 et seq.).

WELL COMPLETION REPORTS

DWR is responsible for maintaining a file of well completion reports (DWR Form 188), which must be submitted whenever a driller works on a water well. Well completion reports must be filed with DWR within 60 days from the date of the work and must also be filed with the County. Well completion reports may be used by public agencies conducting groundwater studies, and may also be made available to the public as long as the owner's name is not made public (Water Code Sections 13751 and 13752).

GROUNDWATER RIGHTS

In California, water rights involve the right to use water, not the right to own water. While the Water Code implies the existence of groundwater rights, their doctrinal bases and characteristics are essentially the product of the decisions of the courts. There are three types of groundwater rights:

Overlying Rights. All property owners above a common aquifer possess a mutual right to the reasonable and beneficial use of a groundwater resource on land overlying the aquifer from which the water is taken. Overlying rights are correlative (related to each other) and overlying users of a common water source must share the resource on a pro rata basis in times of shortage. A property overlying use takes precedence over all non-overlying uses.

Appropriative Rights. Non-overlying uses and public uses, such as municipal uses, are called appropriative uses. Among groundwater appropriators, the "first in time, first in right" priority system applies. Appropriative users are entitled to use the surplus water available after the overlying user's rights are satisfied.

Prescriptive Rights. Prescriptive rights are gained by trespass or unauthorized taking that can yield a title because it was allowed to continue longer than the five year statute of limitations. Claim of a prescriptive water right to non-surplus water by an appropriator must be supported by many specific conditions, including a showing that the pumpage occurred in an open manner, was continuous and uninterrupted for five years, and was under a claim of right.

From a water law standpoint, rights of public agencies to store water via in-lieu recharge and to recapture water in the Santa Cruz Mid-County Basin can be summarized by the following general rules:

- The agencies have the right to recapture water that has been added to the groundwater supply as a result of in-lieu recharge;
- The agencies have the right to prevent other groundwater producers from extracting the replenished supply, although this could require litigation, and in some cases, adjudication of all rights to the groundwater basin may be necessary to determine rights to the total supply; and
- The underground storage and recovery of the groundwater basin cannot substantially interfere with the basin’s native or natural groundwater supply.

Material Injury. Groundwater case law has generally adopted the threshold that “...material injury... turns on the existence of an appreciable diminution in the quantity or quality of water...” (District, 2010) A reasonable definition of “appreciable” would render a nearby well incapable of meeting its:

1. Historically measured maximum daily production level;
2. Historically measured dry-season production levels; or
3. Historically measured annual production levels under drought conditions.

Local Regulations

California Government Code Section 53091 (d) and (e) provides that facilities for the production, generation, storage, treatment, or transmission of water supplies are exempt from local (i.e. city and county) building and zoning ordinances. However, they would not be exempt from the requirements of Local Coastal Programs.

COASTAL ZONE MANAGEMENT ACT FEDERAL CONSISTENCY REVIEW

The federal consistency requirement set forth in Section 307 of the Coastal Zone Management Act (CZMA) requires that activities approved or funded by the federal government (e.g., the federally-funded California Clean Water State Revolving Fund Program) that affect any land or water use or natural resource of a state's coastal zone, must be consistent with the enforceable policies of the state's federally approved coastal management program.

California's federally approved coastal management program consists of the California Coastal Act, the McAtter-Petris Act, and the Suisun Marsh Protection Act. The California Coastal Commission implements the California Coastal Act and the federal consistency provisions of the CZMA for activities affecting coastal resources outside of San Francisco Bay. Subparts D and F of the federal consistency regulations govern consistency review for activities involving a federal permit and federal funding, respectively. These sections generally require the applicant to provide the subject state agency (e.g., the Coastal Commission) with a brief assessment of potential coastal resources impact and project conformity with the enforceable policies of the management program.

The Coastal Commission considers an application for a coastal development permit to satisfy the Subpart D and F conformity assessment requirements. Typically, the Coastal Commission will provide its response (concurrence, conditional concurrence, or objection) in its staff report for the coastal development permit. In cases where the coastal development permit is issued by a local government with a certified local coastal program (LCP), the Coastal Commission will typically provide its response in a letter, following the permit issuance and the completion of any appeals process.

California Coastal Act

The California Coastal Act (Public Resources Code Section 30000 et seq.) provides for the long-term management of lands within California's coastal zone boundary. The Coastal Act includes specific policies for management of natural resources and public access within the coastal zone. Of primary relevance to groundwater and water quality are Coastal Act policies concerning protection of the biological productivity and quality of coastal waters. For example, Article 4 of the Act details policies related to the marine environment, such as biological productivity and water quality. Specifically, and relevant to groundwater hydrology and water quality, the Act requires the quality of coastal waters, streams, wetlands, estuaries appropriate to maintain optimum populations of marine organisms and for the protection of human health, to be maintained and, where feasible, restored through, among other means, preventing depletion of groundwater supplies (Cal. Pub. Res. Code §§ 30231).

SANTA CRUZ COUNTY ENVIRONMENTAL HEALTH SERVICES

At the local level, the Santa Cruz County Environmental Health Services enforces the well drilling and reporting requirements of the California Water Code (Sections 13750.5 et seq.) through enforcement of Title 7, Chapter 7.70, Water Wells, of the Santa Cruz County Code. The Santa Cruz County Environmental Health Services well program provides permitting for the construction, destruction, and repair/modification of all wells, including geothermal heat exchange wells, cathodic protection wells, test wells, and monitoring wells.

Summary of Key Points

1. There are strong federal and state statutes and regulations governing water quality that will apply to implementation of management actions and/or projects that become part of the GSP;
2. Federal and state anti-degradation policies are particularly important in considering how projects and/or management actions might be used to support basin sustainability; and
3. Federal and state policy and regulations are not static but are continuously evolving based on new information and experience.