



SUMMARY REPORT

Agenda Date: 8/9/2022

To: Board of Supervisors

Department or Agency Name(s): Permit Sonoma

Staff Name and Phone Number: Nathan Quarles, (707) 565-1146

Vote Requirement: Majority

Supervisory District(s): Countywide

Title:

8:45 AM - Amendment to the Sonoma County Code Chapter 25B (Well Ordinance) to add provisions for evaluation of impacts to Public Trust Resources and Well Metering, and to make related and technical corrections; and set a fee for discretionary well permit applications

Recommended Action:

Adopt a resolution (1) reading the title of, (2) waiving further reading of, (3) introducing for adoption an ordinance to amend Chapter 25B of the Sonoma County Code to address evaluation of impacts to public trust resources for proposed new water wells, to add, delete, or modify definitions, to add a well metering requirement, to make other miscellaneous and technical corrections, to set an at-cost fee for discretionary well permit applications, and (4) to determine that the ordinance amendment is exempt from the California Environmental Quality Act.

Executive Summary:

To comply with a 2018 California Court of Appeals decision, which requires counties to consider impacts to public trust resources when permitting groundwater wells, staff has prepared the present proposed ordinance for the Board's consideration. The proposed ordinance provides a framework to guide the County's consideration of impacts to public trust resources when permitting new water supply wells that could harm a navigable waterway. It also provides for a metering requirement for certain new wells and makes other related and technical changes.

"Public trust resources" are waterways the government is obligated to hold in trust, pursuant to the Public Trust Doctrine, for the benefit of the public for purposes of commerce, navigation, recreation, fishing, and preservation of wildlife habitat and natural resources.

The "Public Trust Doctrine" is a common law legal doctrine, reflected in Article X, Section 4 of the California Constitution that continues to develop and evolve through published judicial decisions. The 2018 decision by the California Court of Appeals for the Third Circuit in *Environmental Law Foundation v. State Water Resources Control Board (ELF)* found that public trust responsibility of the state and counties extends to consideration of impacts to public trust resources when making groundwater decisions that could harm a navigable waterway. Prior to the *ELF* decision, there was no case law requiring that a county consider the public trust when permitting wells that may impact a navigable waterway.

In response to such case law, staff has developed proposed ordinance amendments to guide the County's exercise of its public trust responsibility to consider impacts to public trust resources when issuing groundwater well permits that could cause harm to public trust resources in navigable surface waters.

The current well ordinance adopted on July 28, 2015, and codified at Chapter 25B of the County Code, regulates well construction, destruction, water treatment, and setbacks, but does not explicitly address consideration of impacts to public trust resources. The proposed amendments to the well ordinance include a new section 25B-4(d) titled "Public Trust Resource Limitation" to guide the County's consideration of impacts to public trust resources prior to issuance of a permit for a new water supply well.

As proposed, well permit applications will be required to include additional supporting information and studies (e.g. water use estimates, construction details, hydrogeologic reports, etc.) considered necessary to complete the evaluation of impacts to public trust resources. Where a permit application requires a public trust determination, that determination is discretionary. Permit applications not requiring a public trust determination will remain subject to ministerial standards.

The proposed ordinance ensures that the issuance of a new water well permit will not substantially impair a public trust resource after the imposition of feasible mitigation measures. Any interested person may appeal to the Board of Supervisors the determination of the Permit and Resource Management Department, which is the "enforcing agency," under the ordinance for new water supply wells, concerning whether the proposed well would or would not substantially impair a public trust resource. Additionally, regardless of an interested party appeal, or concurrently with an appeal, the Department may elevate a permit application to the Board of Supervisors where the health, safety and welfare needs of the community, including the need for drinking water, may warrant approval of the permit in accordance with overriding considerations on balance with public trust considerations.

The proposed amended ordinance provides an exemption from the public trust limitation for replacement water wells that are limited to 2.0-acre feet or less per year and that serve a parcel that is solely used for domestic purposes and for injection wells.

The proposed amended ordinance would require water meters for new water wells that are subject to the public trust limitation, except for water wells that are limited to 2.0-acre feet or less per year and that serve a parcel that is solely used for domestic purposes.

The proposed ordinance amendments also provide for requests for expedited review of well permit applications that are necessary due to emergency circumstances, while eliminating the provision for emergency well drilling without review and approval by the County before drilling occurs.

Discussion:

Public Trust Doctrine and Legal Background

The Public Trust Doctrine is a legal doctrine, reflected in Article X, Section 4 of the California Constitution, that mandates that the government holds certain natural resources 'in trust' for the benefit of current and future generations. Resources held in trust by the State, for public trust purposes, include tidelands, submerged land and land underlying inland navigable waters. Public trust purposes or uses include commerce, recreation, fishing, wildlife habitat, and preservation of trust lands in their natural state. The obligation to consider and

protect the public trust uses extends to counties and other subdivisions of the State.

In 1983, the California Supreme Court in *National Audubon Society v. Superior Court* held that the Public Trust Doctrine “protects navigable waters from harm caused by diversion of no navigable tributaries”. In 2018, *Environmental Law Foundation (ELF) v. State Water Resources Control Bd.*, to the California Court of Appeals considered well permitting in the Scott River watershed in Siskiyou County, and found that the Public Trust Doctrine applies to permitting of groundwater wells if extraction of groundwater adversely impacts a navigable waterway.

Note, groundwater is not a public trust resource. However, extraction of groundwater that is interconnected with a stream or river may result in reduced streamflow and impact public trust resources of a navigable water. Under the *ELF* decision, impacts to public trust resources must be considered and mitigated, if feasible, when a county issues permits for wells that may reduce flows and adversely impact public trust resources of navigable waters.

Lawsuit

California Coastkeeper Alliance filed a lawsuit against the County of Sonoma on July 13, 2021 seeking the County’s compliance with the Public Trust Doctrine when issuing well permits. The litigation has not concluded.

Navigable Waters

For application of the Public Trust Doctrine in California, “navigable waters” are those “capable of being navigated by oar or motor-propelled small craft”, consistent with the California public right of navigation test. Within Sonoma County, the main stem of the Russian River from Jenner to the Sonoma/Mendocino County line and waterways identified as navigable by the U.S. Army Corp of Engineers survey “Navigable Waterways as of 2 August 1971” are considered navigable and subject to review under and Public Trust Doctrine. The above list of waterways is not exhaustive, and additional waterways may be determined to be navigable by California or federal agencies, or the courts.

Current Well Ordinance

The current well ordinance, adopted on July 28, 2015 (Ordinance No. 6121), with minor changes to definitions approved on December 15, 2020 (Ordinance No. 6331), covers well permitting procedures, construction standards and setbacks, destruction, and water treatment, but does not explicitly require consideration of impacts to public trust resources. Currently all well permits applications are ministerial, meaning they are subject to objective codified standards, which if met, result it in permit issuance, which cannot be conditioned.

Proposed Amendments to Well Ordinance

The proposed amended well ordinance includes a new section 25B-4(d) titled “Public Trust Resource Limitation” that details the public trust review process and requires consideration of and written findings regarding impacts to public trust resources prior to issuance of a permit for a new water supply well located within a watershed that contains a navigable water. The public trust determination requires a decision-maker to review evidence and exercise judgment as to whether standards are meet. This determination is

discretionary. Discretionary permits may be approved subject to conditions. Discretionary well permits must satisfy the public trust determination and all other standards applicable to ministerial well permits, such as construction standards.

To avoid or prevent adverse impacts to public trust resources, such as a substantial impairment to the flow of navigable waters, when permitting new water supply wells, the proposed amended well ordinance specifies that a permit for a new water supply well shall not be issued if the well will have an adverse impact to public trust resources after the imposition of feasible mitigation measures.

Under the proposed ordinance amendments, any interested person may appeal to the Board of Supervisors the determination of the Permit and Resource Management Department, which is the “enforcing agency,” under the ordinance for new water supply wells, concerning whether the proposed well would or would not substantially impair a public trust resource. Additionally, regardless of an interested party appeal, or concurrently with an appeal, the Department may elevate a permit application to the Board of Supervisors where the health, safety and welfare needs of the community, including the need for drinking water, may warrant approval of the permit in accordance with overriding considerations on balance with public trust considerations.

To support the public trust resource evaluation of new water supply wells, well permit applications will be required to submit additional supporting information. Additional information required will be dependent on the location, existing and proposed use of the well, and existing available information. Some small domestic wells may require little additional information such as proximity to the public trust resource, while other higher production wells will require what could amount to substantial supporting studies. Well permit applications for low-volume domestic replacement wells are exempted from the public trust resource evaluation.

Supporting information may include a water supply and use assessment, hydrogeologic report, detailed description of mitigating measures, and other information. Permit Sonoma is authorized to develop administrative procedures to guide the processing and evaluation of applications. The Department also expects to publish materials to assist applicants preparing to seek new well water well permits.

More specifically, the proposed amendments would do the following:

Section 25B-3: Adds definitions for “navigable waters,” “new water supply well,” “public trust resources,” and “special flood hazard area”. Revises definition of “replacement well”. Deletes definition for “area of special flood hazard”.

Section 25B-4: Amendments to this section would add a public trust limitation to permitting for new water supply wells. This section requires that the Department make a finding of no adverse impact to a public trust resource before approving a permit or conditionally approving a permit for new water supply well. This section creates an appeal process and process for the Department to seek an overriding considerations determination from the Board of Supervisors due to health, safety and welfare needs of the community. This section also creates limited exceptions to discretionary review for certain replacement wells that extract 2.0-acre feet or less per year that serve a parcel that is solely used for domestic purposes and for injection wells.

Section 25B-5: Amendments to this section would make minor technical corrections to remove the expiration

date of applications subject to the public trust limitation determination and to provide for an at-cost fee model for such applications. This section is modified to eliminate the provision for emergency well drilling without review and approval by the County before drilling occurs, while adding a provision for requesting expedited permit processing where well drilling is necessary due to emergency circumstances to protect human life, health, safety, and property. Section 25B-5 clarifies the difference between, and standards applicable to, discretionary and ministerial well permits. Well permits for geotechnical borings and well types that are not for water supply, and certain limited replacement wells, will not require public trust review and will continue to be processed in a ministerial fashion. Finally, this section revises requirements for notifying Permit Sonoma of the date and time for sanitary seal placements facilitate and align with inspection workflow.

Section 25B-6: Amendments to this section would add a metering requirement for all new water wells that are subject to the public trust limitation and permitted after January 1, 2023, except for wells that extract 2.0 acre feet or less per year that serve a parcel that is solely used for domestic purposes. Quarterly data collection is proposed with an annual reporting requirement. This section also adds a 90-day timeline for well destruction when a replacement well has been completed and makes technical correction to code references. In response to past recommendations from the Regional Water Quality Control Board, and to better align with current practices, this section is modified to address the circumstances when an exception to minimum setbacks from known contaminated sites is permitted.

Section 25B-9: The amendment to this section makes a technical correction, clarifying that well completion reports must be submitted to in compliance with California Water Code Section 13751.

Fees

An at-cost fee is proposed to be added to Permit Sonoma's fee schedule as part of this item for the processing of discretionary well permit applications authorized under the amended ordinance. Permit Sonoma's current fee schedule, adopted under Ordinance No. 6372 on April 05, 2022, provides for flat plan check fees of ministerial well permits in the amount of \$625 for Class I water wells, \$750 for Class II water wells, and \$375 for well reconstruction. The cost of staff time to process discretionary well permits under an amended Well Ordinance is anticipated to exceed the amount of the existing fee, due to the complexity of the public trust analysis, which is in addition to work to determining compliance with all other well requirements, including construction standards. Because the Department does not yet have data supporting a flat fee for discretionary well permits, it recommends the Board establish an at-cost fee, based on existing hourly rates, to discretionary well permits as part of its adoption of the ordinance. The Department proposes that the minimum deposit for the public trust review fee would be equivalent to 8 hours of staff time of an Engineer or Professional Geologist in the amount of \$1,392. The current fees for ministerial well permits will continue to apply to all wells, which are subject to ministerial approval.

In conjunction with the proposed metering requirement, the Department expects to return to the Board prior to January 2023 to request that it establish fees in connection with staff review and processing of submitted well meter reports.

CEQA

Adoption of the proposed ordinance to Chapter 25B and at-cost fee are exempt pursuant to the categorical exemptions provided at California Environmental Quality Act (CEQA) Guideline §15307 and 15308 for Actions by Regulatory Agencies for Protection of Natural Resources and the Environment because the amendments

are regulatory in nature and are designed to assure the maintenance, restoration, or enhancement or protection of natural resources and the environment and at §15061(b)(3) because the amendments and associated fee create and fund an application review process designed to protect public trust resources, where no exception to applicability of the exemptions under §15300.2, and because it can be seen with certainty that there is no possibility that this ordinance or application fee may have a significant effect on the environment. The County's approval of the ordinance and fee will not authorize any construction activities, but instead impose requirements, consistent with existing law, to consider impacts to public trust resources via discretionary permit applications, subject to an at-cost fee, and to facilitate data collection through metering, and to make other related changes, none of which result in any direct physical change to the environment on their own, and which are designed to be protective of public trust resources and the environment. Discretionary applications for new water supply wells under the amended ordinance must comply with CEQA, unless exempt. Ministerial applications remain exempt from CEQA.

Recommendation

Staff recommends the Board adopt the ordinance amendments to Chapter 25B and approve an at-cost fee applicable to processing discretionary well permits to facilitate compliance with the County's public trust responsibility; and provide direction to staff regarding returning with a fee in connection with staff review and processing of well meter reports.

Strategic Plan:

N/A

Prior Board Actions:

04/05/2022: Board adopted Ordinance No. 6372

12/15/2020: Board adopted Ordinance No. 6331

07/28/2015: Board adopted Ordinance No. 6121

02/28/1978: Board adopted Ordinance No. 2326

FISCAL SUMMARY**Narrative Explanation of Fiscal Impacts:**

Not applicable at this time. If amended ordinance is adopted staff will present staffing and budgetary adjustments to implement the amended permitting process. Adjustments will include, if approved, at cost fee revenue estimates to offset updated permitting review costs.

Narrative Explanation of Staffing Impacts (If Required):

N/A

Attachments:

Attachment A: Board Resolution

Attachment B: Proposed Changes to Chapter 25B (Red line)

Attachment C: Ordinance with Ex. A Changes to Chapter 25B (Clean version)

Attachment D: Draft CEQA Exemption

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Attachment E: Staff PowerPoint

Related Items “On File” with the Clerk of the Board:

N/A