



FISH CREEK

Water Quality Legal Analysis

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FORWARD

In the fall of 2016, Friend of Fish Creek asked the University of Wyoming Haub School of Environment and Natural Resources to prepare a memorandum detailing the legal and regulatory background of water quality law in Wyoming. This document includes a background section on water quality law at the federal, state and local levels, and provides answers to the following questions beginning on pg. 21:

- Is groundwater covered under the Clean Water Act?
- Is a septic tank considered a point source?
- Who is responsible for enforcing septic laws in Teton County? What can be done if those laws are not being enforced?
- How are sewer districts created in Teton County? How are sewer districts disbanded? Could existing sewer districts in Teton County be disbanded and reestablished as one county sewer district to ensure consistency?
- Can local regulators require individuals to connect to a sewer system?
- Can local regulators require best technology such as above ground septic systems for those homes and businesses in the most sensitive areas of the Fish Creek Watershed that are not attached to a sewer line?
- Can Teton County or the WDEQ require the two existing injection facilities to convert to a different sewage disposal method, or require the facilities connect to the Teton County waste plant?
- Can local regulations prohibit future construction of injection facilities?
- Can new local regulations be passed that require septic system inspections, pumping certificates, or other water quality protections?
- Can a new local regulation be passed that require golf courses to use best technology management processes and landscape design features to minimize the impact of the chemicals they use?

- Can Teton County ban residential use of chemical fertilizers, pesticides and fungicides?
- Can Teton County enforce a setback from Fish Creek for lawn mowing?
- Can Teton County ban dumping of un-composted sludge (from adjacent farm lands in particular) into the Fish Creek drainage system?
- Can Teton County require manure management systems?

This report concludes with a summary of two case studies offered to highlight solutions that were implemented to address water quality problems similar to those currently experienced on Fish Creek. The first case study summarizes the Clarks Fork River Voluntary Nutrient Program and the second summarizes the Massachusetts Department of Environmental Protection's revised septic system regulations (Title 5). The case studies begin on page 34.



Fish Creek is a 15-mile long tributary of the Snake River located in Teton County, Wyoming, near the town of Wilson.¹ Fish Creek is a scenic, mountain-front stream utilized for irrigation, fishing and recreation, and adds value to the properties through which the creek flows.²

Despite its scenic setting, increases of nutrients and biovolume of algae and aquatic plants have led to concerns by community members and local government officials over nutrient impairment of Fish Creek.³ Specifically, the biovolume of algae aquatic plants in Fish Creek is greater than biovolumes typically observed in streams of similar size in Wyoming.⁴ This increase in biovolume has been linked to higher than normal nutrient concentrations of nitrogen and phosphorus.⁵ The biovolume of algae and aquatic plants is inversely correlated to nutrient concentrations; the more nutrients in a watershed the larger the growth in aquatic plants.⁶

Between 2004 and 2016, the United States Geological Survey, in cooperation with the Teton Conservation District, conducted a series of scientific investigations attempting to characterize the water quality and biological communities of Fish Creek and to better understand sources of nutrients and their relative contributions to the Fish Creek Watershed.⁷

1 Cheryl A. Eddy-Miller et al, United States Geological Survey, Estimated Nitrogen and Phosphorus Inputs to the Fish Creek Watershed, Teton County, Wyoming 2009-2015, Scientific Investigations Report 2016-5160, 2 (2016); Flitner Strategies, Fish Creek: A Situation Assessment (August 13, 2014).

2 *Id.* at 1.

3 Eddy-Miller, *supra* note 1 at 2.

4 *Id.*

5 *Id.*

6 *Id.*

7 Jerrod D. Wheeler & Cheryl A. Eddy-Miller, United States Geological Survey, Seepage Investigation on Selected Reaches of Fish Creek, Teton County Wyoming, 2004, Scientific Investigations Report 2005-5133 (2005); Cheryl A. Eddy-Miller et al, United States Geological Survey, Characterization of Interactions Between Surface Water and Near-Stream Groundwater Along Fish Creek, Teton County, Wyoming, by Using Heat as a Tracer, Scientific Investigations Report 2009-5160 (2009); Cheryl E. Eddy-Miller et al, United States Geological Survey, Characterization of Water Quality and Biological Communities, Fish Creek, Teton County, Wyoming, 2007-2011, Scientific Investigations Report 2013-5117 (2013); Cheryl A. Eddy-Miller et al, United States Geological Survey, Estimated Nitrogen and Phosphorus Inputs to the Fish Creek Watershed, Teton County, Wyoming 2009-2015, Scientific Investigations Report 2016-5160, (2016).

A recently released USGS/Teton Conservation District report identified the following anthropogenic sources of nitrogen and phosphorus inputs into the Fish Creek Watershed: (1) atmospheric deposition; (2) cattle waste; (3) fertilizers applied to lawns, trees and golf courses; (4) wastewater effluent from septic systems and sewage treatment plants; (5) surface-water diversions entering the watershed; and (6) explosives used for avalanche control.⁸

Nutrient pollution of rivers, streams, lakes and estuaries is one of the top water quality issues in the United States and poses a significant threat to aquatic ecosystems.⁹ Nutrient pollution has been one of the “toughest challenges in contemporary environmental regulation, because most nutrient pollution is caused by nonpoint sources”.¹⁰ Nonpoint source pollution is difficult to regulate because the power to control nonpoint discharges lies beyond the authority of the federal Clean Water Act and rests with the states.¹¹ However, states commonly avoid regulation and rely upon voluntary measures or best practices backed by economic incentives for compliance.¹²

8 *Id.*

9 Zdravka Tzankova, *The Difficult Problem of Nonpoint Nutrient Pollution: Could the Endangered Species Act Offer Some Relief?*, 36 Wm. & Mary Env'tl. L. & Pol'y Rev. 709 (2013).

10 *Id.*

11 *Id.* at 711.

12 *Id.* at 712.



The United States has two federal laws that deal with water quality. The first and most relevant federal law is the Clean Water Act (CWA), which protects the water quality of all navigable waters in the United States.¹³ The second is the Safe Drinking Water Act (SDWA), which protects any water associated with a public water system.¹⁴

Although the United States Environmental Protection Agency (EPA) has congressional authority to enforce and administer the CWA, the CWA allows states that meet certain requirements to implement the CWA locally.¹⁵ Wyoming has been granted authority to implement the CWA, and the state agency charged with that responsibility is the Wyoming Department of Environmental Quality (WDEQ).¹⁶ Wyoming has not sought authority to locally administer the SDWA at this time.

THE CLEAN WATER ACT

The CWA prohibits the discharge of pollutants from a point source into navigable waters unless the polluter obtains a permit.¹⁷ Broken down into elements, under the CWA one cannot (1) discharge (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit.¹⁸

The CWA defines discharge as the addition of any pollutant into a navigable water from a point source.¹⁹ Intentionality is not a factor considered when determining if the CWA has been violated.²⁰ The CWA defines a pollutant as “dredged spoil, solid waste,

13 The Clean Water Act, 33 U.S.C. § 1311.

14 The Safe Drinking Water Act, 42 U.S.C. § 300h.

15 The Clean Water Act, 33 U.S.C. § 1251.

16 Wyo. Stat. Ann. § 35-11-106.

17 The Clean Water Act, 33 U.S.C. § 1311(a), 1362(12)(a).

18 *Sierra Club v. El Paso Goldmines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005).

19 *Id.* at 1146.

20 *Id.* at 1145 (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir.1979)).

incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”²¹

The CWA defines navigable waters as “waters of the United States.”²² Unfortunately, the CWA does not define “waters of the United States.” Obscuring matters even more, the EPA’s regulatory definition of “waters of the United States,” revised during the Obama administration, is in flux due to ongoing litigation concerning the EPA’s purported regulatory overreach.²³

To further complicate matters, President Trump issued an executive order on February 28, 2017 directing the EPA and United States Army Corps of Engineers (Corps) to review and “rescind or revise” the Obama administration “waters of the United States” definition.²⁴ President Trump’s executive order also directed the EPA and Corps to promulgate a new rule consistent with the opinion of Justice Antonin Scalia in the Supreme Court case *Rapanos v. United States*.²⁵ In *Rapanos*, Justice Scalia determined that waters of the United States are limited to “only relatively permanent, standing or flowing bodies of water,” but did not include “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”²⁶

Although there exists uncertainty surrounding the definition of “waters of the United States,” there are two long-standing definitions of navigable water previously acknowledged by the Supreme Court that will likely remain applicable in a new rule promulgated by the Trump administration. The first definition is the traditional view of navigable waters recognized as those waters which are “used, or susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”²⁷ The second Supreme Court definition of navigable water includes “tributaries that flow directly into a traditionally navigable water.”²⁸ Applying these two long standing definitions to Fish Creek, we can surmise that Fish Creek is indeed a navigable water of the United States because it is a tributary that flows directly into a traditionally navigable water, in this case the Snake River.²⁹

The CWA defines a point source as “any discernible, confined and discrete conveyance... from which pollutants are or may be discharged.”³⁰ Conveyances that are obvious point sources are discharges from pipes, ditches, discrete fissures, and pollution from boats or other floating crafts.³¹ Discharges from agricultural storm water (runoff) and return flows are exempted, and not regulated under the CWA as a point source.³²

Although it is generally not permissible to discharge pollutants into a water of the United States from a point source, Section 402 of the CWA does allow discharge of pollutants with a permit.³³ The EPA’s permitting program for the discharge of a pollutant is called the National Pollutant Discharge Elimination System (NPDES).³⁴

Nonpoint source discharges are addressed in Section 303 of the CWA. Section 303 requires states to submit a list of impaired waters to the EPA every two years.³⁵ Impaired waters are those waters where current pollution control technologies alone cannot meet the water quality standards set for that waterbody (as explained in the water classification portion in the state water law

21 The Clean Water Act, 33 U.S.C § 1362(6).

22 *Id.* 33 U.S.C. § 1362(7).

23 *See In re EPA*, 803 F.3d 804 (6th Cir. 2016)

24 Exec. Order No. 13778, 82 Fed. Reg. 12497 (Mar. 3, 2017).

25 547 US 715, 734 (2006).

26 *Id.*

27 *PPL Montana v. Montana*, 132 S. Ct. 1215, 1219 (2012).

28 *Rapanos v. U.S.*, 547 U.S. 715, 739, 780 (2006).

29 Eddy-Miller, *supra* note 1 at 2.

30 The Clean Water Act, 33 U.S.C. § 1362(14).

31 *Id.*

32 *Id.*

33 *Id.* 33 U.S.C. § 1311(a).

34 *Id.* 33 U.S.C. § 1342.

35 *Id.* 33 U.S.C. § 1313(d).

section).³⁶ Along with submitting the list of impaired bodies of water, the CWA requires state regulating agency to prepare a Total Maximum Daily Load (TMDL) assessment of the water body to ensure that the water body maintains its designated use.³⁷ The TMDL creates a numerical limit on the amount of pollutants a point source may discharge into a body of water based on the pollutants already in the body of water generated from nonpoint sources. For example, if an impaired river tests high for phosphorus, a TMDL could be created to restrict phosphorous to a numerical limit of 200 parts per million for the water system. If the nonpoint sources on the river contribute 50 parts per million of phosphorous, the WDEQ may only issue a NPDES permit to a point source polluter for a maximum of 150 parts per million.

The CWA allows states to gain primacy in administering the water quality standards in the state, so long as the state does not lower the standards set forth in the CWA.³⁸ To gain primacy in administering the CWA, the Wyoming State Legislature passed the Wyoming Environmental Quality Act (WEQA) in 1973 to protect all waters within Wyoming.³⁹ To accomplish the goals set forth in the WEQA, the legislature gave the WDEQ the authority to promulgate rules and regulations regarding Wyoming's water quality.⁴⁰ Under its authority to implement the CWA in Wyoming, the WDEQ has jurisdiction over all surface water in the state, regardless of the navigability of the waters.⁴¹

THE SAFE DRINKING WATER ACT

The Safe Drinking Water Act (SDWA) covers groundwater that supplies, or can be reasonably expected to supply, water for a public water system.⁴² The Act defines a "public water system" as a water system that has at least fifteen service connections, or which regularly serves at least twenty-five individuals.⁴³ The EPA administers the SDWA.⁴⁴ Although the SDWA authorizes state primacy, and the EPA traditionally provides states with the authority to locally implement and enforce the SDWA, Wyoming is the only state that has not requested primacy.⁴⁵ The State of Wyoming has not explained why it has yet to request primacy; however, it is likely that the decision is based on the expense associated with enforcing the SDWA coupled with Wyoming's low population.

Although Wyoming does not have primacy, administration of the SDWA in Wyoming is divided between the state and the EPA Region 8.⁴⁶ Under the SDWA Wyoming is responsible for: planning and specification review; issuing construction/well drilling permits; water rights; operator certification; capacity development; source water and wellhead protection; operation of state laboratories; food and beverage inspections; financing drinking water projects; and general public health.⁴⁷ The EPA is responsible for: monitoring/reporting of water testing, sanitary surveys, technical assistance to water operators, laboratory certification, compliance determinations, formal enforcement, and homeland security.⁴⁸

The EPA established the National Primary Drinking Water Regulations to implement standards for water that is used or could be used in public water systems.⁴⁹ Under the regulations, operators of public water systems are required to submit annual reports

36 *Id.*

37 *Id.*

38 The Clean Water Act, 33 U.S.C. § 1313(a).

39 Wyo. Stat. Ann. § 35-11-302.

40 *Id.*

41 Wyo. Admin. Code § ENV WQ Ch. 1 s 2.

42 The Safe Drinking Water Act, 42 U.S.C. § 300h (2012).

43 *Id.* § 300f.

44 *Id.* § 300h.

45 EPA Region 8 Drinking Water Program, *Administration of the Drinking Water Program in Wyoming*, The Environmental Protection Agency (Aug. 24, 2016) <https://www.epa.gov/region8-waterops/about-us>.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

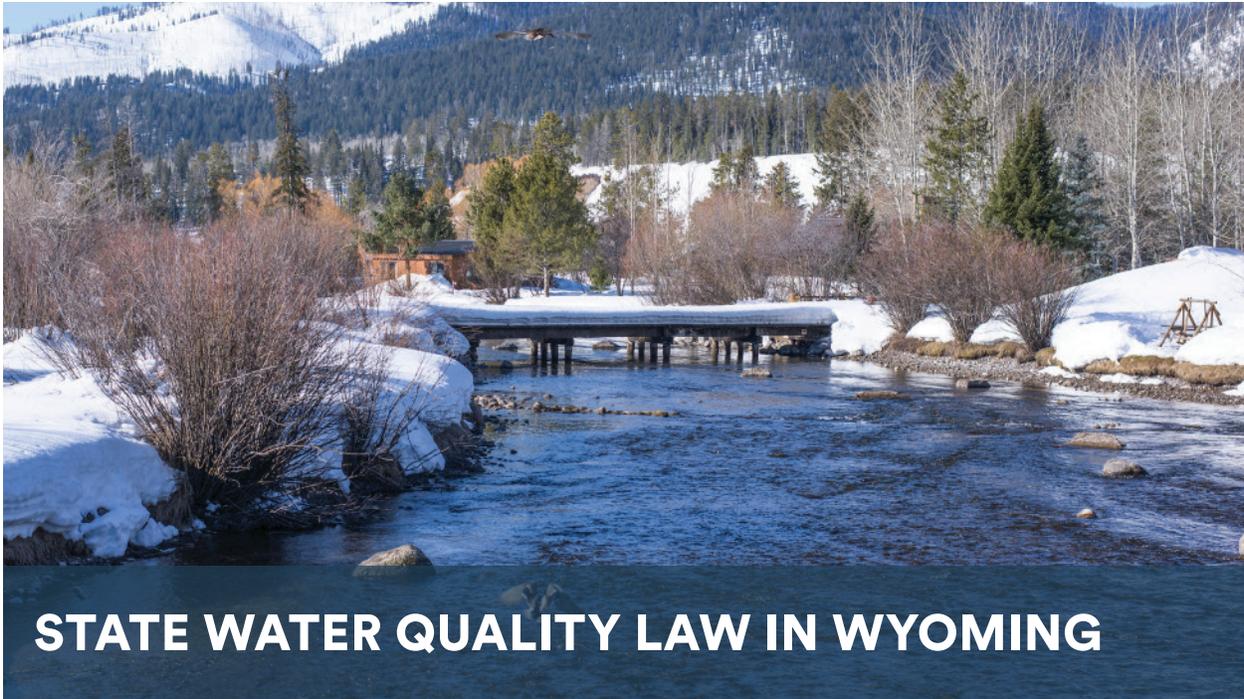
to the DEQ.⁵⁰ Violations occur when public water system operators fail to monitor for the required contaminants or when the level of a contaminant detected in a sample exceeds the Maximum Contaminant Level.⁵¹ If a violation occurs, additional oversight by the EPA or an administrative order requiring correction of the deficiency may be imposed on the public water system.⁵² If the public water system continues to violate the administrative order, fines may be assessed to the water system operator.⁵³

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*



STATE WATER QUALITY LAW IN WYOMING

Wyoming state law plays a key role in water quality protection in Wyoming. The WEQA establishes Wyoming's statutory authority covering water quality.⁵⁴ The WEQA fulfills two roles. First, the WEQA provides Wyoming with the necessary environmental enforcement authority to be granted primacy to administer the CWA locally in the state.⁵⁵ Second, it serves as Wyoming's primary environmental regulatory act allowing Wyoming to enforce its own environmental regulations.⁵⁶

As a stand alone statute, the WEQA prohibits all persons, except when authorized by a permit, from (1) causing, threatening or allowing a discharge of any pollution or wastes into the waters of the state; (2) altering the physical, chemical, radiological, biological or bacteriological properties of any waters of the state; (3) constructing, installing, modifying or operating any sewerage system, treatment works, disposal system or other facility; (4) increasing the quantity or strength of any discharge; and (5) constructing, installing, modifying or operating any public water supply or constructing any subdivision water supply.⁵⁷ Although the WEQA does not distinguish between point source and nonpoint source discharges, the WDEQ only monitors pollutants from point sources.⁵⁸ WDEQ generally regulates nonpoint sources through voluntary programs.⁵⁹

The WEQA defines waters of the state as "all surface and groundwater within the state of Wyoming."⁶⁰

54 Wyo. Stat. Ann. § 35-11-103(c)(vi), 302.

55 33 U.S.C. § 1342(b); 40 C.F.R. 123.

56 *Id.*

57 *Id.* § 35-11-301.

58 Wyo. Admin. Code § ENV WQ Ch. 1 s 7; *see also*, Wyoming Department of Environmental Quality, *Nonpoint Source* (last accessed Jan. 8, 2016) <http://deq.wyoming.gov/wqd/non-point-source/>.

59 *Id.*

60 Wyo. Stat. Ann. § 35-11-103(c)(vi).

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY REGULATIONS

To accomplish the goals of the WEQA, the Wyoming State Legislature granted the WDEQ the authority to set rules and regulations regarding Wyoming’s water quality.⁶¹ Under its authority to implement the CWA in Wyoming, the WDEQ has jurisdiction over all water in the state, regardless of the navigability of the water.⁶² The WDEQ Water Quality Regulations were promulgated to define and enforce water quality standards for both surface and groundwater in the state.⁶³

SURFACE WATER QUALITY

Chapter 1 of the Water Quality Regulations addresses surface water quality in Wyoming.⁶⁴ The regulations divide the waters of the state into different classes based on the types of uses designated for a particular body of water.⁶⁵ Table 1 identifies the water classes and the types of uses associated with each class. The WDEQ designates every body of surface water in the state on the Wyoming Surface Water Classification List.⁶⁶ The WDEQ has promulgated allowable use regulations that ensure water quality in each classification is maintained or improved.

To maintain water quality the WDEQ’s regulations prohibit discharge of pollutants from new point sources, other than dams, into a surface water body in Wyoming and further prohibit existing point sources, other than dams, from increasing the quantity of pollution discharged into any Class 1 Waters.⁶⁸ Exceptions are only given for existing and new construction and stormwater runoff via permits.⁶⁹ Further, Class 1 Waters are afforded the greatest regulatory protection.⁷⁰ That regulatory protection includes more stringent pollution allowances, and stricter E. coli and turbidity regulations.⁷¹ One such protection is that Class 1 Waters must meet the overall standards for discharges set out in the Water Quality Criteria Regulation.⁷² The criterion is divided into two different categories priority pollutants that apply to all waters of the state, and non-priority pollutants that apply only to

Table 1. Wyoming Surface Water Classes and Use Designations

Water Class	Drinking Water	Game Fish	Non-Game Fish	Fish Consumption	Other Aquatic Life	Recreation	Wildlife	Agriculture	Industry	Scenic Value
1*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2AB	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2A	Yes	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
2B	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2C	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2D	No	When Present	When Present	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3A	No	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
3B	No	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
3C	No	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
3D	No	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
4A	No	No	No	No	No	Yes	Yes	Yes	Yes	Yes
4B	No	No	No	No	No	Yes	Yes	Yes	Yes	Yes
4C	No	No	No	No	No	Yes	Yes	Yes	Yes	Yes

61 *Id.*

62 Wyo. Admin. Code § ENV WQ Ch. 1 s 2.

63 Wyo. Admin. Code § ENV WQ Ch. 1, 8.

64 Wyo. Admin. Cod. § ENV WQ Ch. 1.

65 Wyo. Admin. Cod. § ENV WQ Ch. 1 s 3.

66 Wyoming Department of Environmental Quality, *Wyoming Surface Water Classification List* (July 26, 2013) http://sgirt.webfactional.com/filesearch/content/Water%20Quality%20Division/Programs/Watershed%20Protection/Sub/Surface%20Water%20Quality%20Standards/Guidance%20Documents/2013-0726_wqd-wpp-surface-water-standards_Wyoming-Surface-Water-Classification-List.pdf.

67 *Id.* at iv.

68 Wyo. Admin. Code § ENV WQ Ch. 1 s 7(a).

69 Wyo. Admin. Code § Ch. 1 s 7(b).

70 Wyo. Admin. Code § ENV WQ Ch. 1 s 7.

71 Wyo. Admin. Code §§ ENV WQ Ch. 1 App. B, s 23; §, s 27.

72 Wyo. Admin. Code § ENV WQ Ch. 1 App. B.

Class 1, 2AB, 2B, and 2C Waters.⁷³ The criterion also specifically lays out the amounts of each pollutant permissible in a body of water, depending on the designation.⁷⁴

The WDEQ categorizes every water body in the state as recreation water, and further divides the bodies into either a primary or secondary recreation water.⁷⁵ For all surface waters used for recreation, the WDEQ designates the maximum allowable E. coli level.⁷⁶ For primary recreation waters, the maximum is 126 organisms per 100 million during any consecutive 60-day period.⁷⁷ For secondary recreation waters, the requirement is 630 organisms per 100 million.⁷⁸

If a violation of the WEQA is suspected, the WDEQ must conduct a prompt investigation of the violation.⁷⁹ After the investigation is conducted, the accused party has the right to correct the violation.⁸⁰ If the accused party fails to correct the violation, the WDEQ sends a written notice, notifying the party of the violation and requesting immediate remedial action within a deadline.⁸¹ If the accused party fails to remedy the violation before the deadline, the party can be fined \$10,000 for every violation, each day, until the violation is remedied.⁸² The WDEQ can also seek an injunction against the accused party.⁸³

Fish Creek is listed as a Class 1 River and is thus afforded the greatest regulatory protection by the EPA and WDEQ.⁸⁴ Fish Creek is also considered a primary recreation water, which restricts the maximum E. coli allowable to 126 organisms per 100 million during any consecutive 60-day period.⁸⁵

TURBIDITY

Because Fish Creek is a cold-water fishery, human-caused turbidity (water murkiness) is also regulated by the WDEQ. In all cold-water fisheries and/or drinking water supplies (Classes 1, 2AB, 2A and 2B), the discharge of particulate substances cannot be present in quantities that result in a turbidity increase of more than ten nephelometric turbidity units (NTUs).⁸⁶ A person can temporarily increase turbidity if they obtain a 404 Permit with the Army Corps of Engineers, a 401 Permit with the WDEQ⁸⁷, and a Grading and Erosion Control Permit from the Teton County Planning and Development Department Building Division.⁸⁸

When a 404 Permit is requested through the Corps, the permittee must notify the WDEQ within five days before any instream work begins to obtain a 401 Permit.⁸⁹ Through section 401 of the Clean Water Act, the State of Wyoming is in charge of issuing

73 *Id.*

74 *Id.*

75 Wyoming Department of Environmental Quality, *Final Determination Regarding the Categorical Re-Designation of Waters in the State Identified in the September 2016 "Categorical Use Attainability Analysis for Recreation" From Primary Contact Recreation to Secondary Contact Recreation* (Sept. 1, 2016) http://deq.wyoming.gov/media/attachments/Water%20Quality/Surface%20Water%20Quality%20Standards/UAAAs/02_2016-0901_Final_Admin_Determination_Recreation_UAA_Signed.pdf.

76 Wyo. Admin. Code § ENV WQ Ch. 1 s. 27.

77 *Id.*

78 *Id.*

79 Wyo. Stat. Ann. § 35-11-701(a).

80 *Id.* § 35-11-701(c).

81 *Id.* § 35-11-701(c)(i).

82 *Id.* § 35-11-901(a).

83 *Id.*

84 Wyoming Department of Environmental Quality, *supra* note 66 at iv; Wyo. Admin. Code § ENV WQ Ch. 1 s 7.

85 *Id.*

86 Wyo. Admin. Code § ENV WQ Ch. 1 s 23.

87 Wyoming Department of Environmental Quality, *Turbidity* (last viewed Mar. 8, 2017) <http://deq.wyoming.gov/wqd/cwa-section-401-turbidity-wetland/resources/turbidity/>.

88 Wyo. Stat. Ann. § 18-5-201; *permit available at* http://www.tetonwyo.org/engineer/GEC_Application%202015.pdf.

89 Wyoming Department of Environmental Quality, *Application Instructions for Temporary Turbidity Increase*, (last viewed March 8, 2017) http://deq.wyoming.gov/media/attachments/Water%20Quality/CWA%20Section%20401%20-%20Turbidity%20-%20Wetland/Turbidity/Instructions-for-Application-for-Increased-Turbidity_2016-1213.pdf.

permits for discharging into waters of the United States.⁹⁰ Ultimately, the conditions under Wyoming's 401 Permit are then adopted into the Corp's 404 Permit.⁹¹ When turbidity is caused by construction, the associated storm water discharge is handled through general construction permits issued by the WDEQ.⁹² Under the general construction permits, the permittee must create a Storm Water Pollution Prevention Plan (SWPPP) that will eliminate or reduce pollutants discharged by the project.⁹³ General construction permits apply to all construction projects one acre or greater, or projects less than one acre that are part of a larger common plan greater than one acre.⁹⁴ Violating the conditions of the general construction permit could result in a fine of up to \$10,000 per day of violation.⁹⁵

A person affecting the turbidity of Fish Creek must also apply and receive a Grading and Erosion Control Permit from the Teton County Engineering Department.⁹⁶ These permits are submitted to the Teton County Planning and Development Department Building Division for technical review and then finally approved by the Teton County Engineering Department.⁹⁷ During the technical review, applications are evaluated to ensure compliance with the Teton County Land Development Regulations, particularly the Natural Resource Buffers and Waterbody and Wetland Buffers (discussed in detail below).⁹⁸ During the technical review, local Wyoming Game and Fish biologists are also provided an opportunity to submit their recommendations.⁹⁹

WATER QUALITY CRITERIA REGULATION

Another regulation affecting Fish Creek is the Water Quality Criteria Regulation, which requires that the creek meet the overall standards for discharges for waters of the state.¹⁰⁰ The Water Quality Criteria Regulations also specify the maximum amount of each pollutant permissible in a body of water, depending on the designation.¹⁰¹

Currently, Fish Creek is within the existing State of Wyoming water quality criteria limits.¹⁰² However, the State of Wyoming's Water Quality Criteria Regulations do not currently include numeric nutrient criteria.¹⁰³ The WDEQ is in the process of creating numeric nutrient criteria.¹⁰⁴

The State of Montana does have numeric nutrient criteria.¹⁰⁵ Under Montana's numeric nutrient criteria, chlorophyll-a, an

90 Wyoming Department of Environmental Quality, *401 Certification*, (last viewed March 21, 2017) <http://deq.wyoming.gov/wqd/401-certification/>.

91 *Id.*

92 Wyoming Department of Environmental Quality, *Construction General Permits*, (last viewed March 21, 2017) <http://deq.wyoming.gov/wqd/storm-water-permitting/resources/construction-general-permits/>.

93 Wyoming Department of Environmental Quality, *General Permit to Discharge Storm Water Associated with Small Construction Activity Under the Wyoming Pollutant Discharge Elimination System (WYPDES)*, (July 8, 2013) http://sgirt.webfactional.com/filesearch/content/Water%20Quality%20Division/Programs/WYPDES/sub/Discharge%20Permitting/Storm%20Water%20Permitting-Construction%20General%20Permits/WQD-WYPDES-Stormwater_Small-construction-general-permit%20_2013-06.pdf.

94 Wyoming Department of Environmental Quality 401 Certification, *supra* note 90.

95 Wyoming Department of Environmental Quality, *General Permit to Discharge Storm Water Associated with Large Construction Activity Under the Wyoming Pollutant Discharge Elimination System (WYPDES)*, 28 (April 22, 2016) http://deq.wyoming.gov/media/attachments/Water%20Quality/Storm%20Water%20Permitting%20/Construction%20General%20Permits/2016_Large-Construction-General-Permit.pdf.

96 Telephone Interview with James Rosen, Associate Planner, Teton County Planning and Development (March 24, 2017); *permit available at* http://www.tetonwoyo.org/engineer/GEC_Application%202015.pdf.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* § ENV WQ.Ch. 1 App. B.

101 *Id.*

102 Telephone interview with Dan Leemon, Executive Director, Friends of Fish Creek (March 22, 2017).

103 *Id.*

104 *Id.*

105 Mont. Admin. R. § 17.30.631.

indicator of nutrient pollution in a stream, is limited to summer mean of 100 mg/square meter and a maximum of 150 mg/square meter.¹⁰⁶ Chlorophyll-a concentrations from Fish Creek have been recorded in the range of, or exceeding 100 to 200 milligrams per square meter, well above Montana's numeric nutrient criteria and is suggested as an indicator of nuisance algal conditions by the EPA.¹⁰⁷

GROUNDWATER QUALITY

The WDEQ also has the authority to regulate groundwater and is responsible for protecting and creating standards for all groundwater in the state, so long as it does not interfere with the EPA's protection of water connected to public water systems governed by the SDWA.¹⁰⁸

The WDEQ designates each body of groundwater by its existing uses.¹⁰⁹ If pollution causes the groundwater to no longer sustain its designated use, WDEQ is authorized to require the polluting party to cease the activity.¹¹⁰ The existing uses are domestic water, water for fish and aquatic life, water for agriculture, water for livestock, and, water for industry.¹¹¹ Thus, if groundwater is appropriated via state water rights, that use is protected through the WDEQ regulations.¹¹² If the groundwater is unappropriated water, the regulations break down the water into seven classes.¹¹³ Class 1 is water used for domestic use.¹¹⁴ Class 2 is water used for agriculture.¹¹⁵ Class 3 is water that can be used for livestock.¹¹⁶ Class Special is water that is suitable for fish and aquatic life.¹¹⁷ For these first four classifications the water quality parameters are located in Table 1 in Section 5 Groundwater Quality Rules.¹¹⁸ Class 4 water is used for industry and the standards implemented are issued on a by-industry basis.¹¹⁹ Class 5 is water used for hydraulic fracturing.¹²⁰ Class 6 is water that is not suitable for any use.¹²¹

106 *Id.*

107 Telephone interview with Dan Leemon *supra* note 102.

108 Wyo. Admin. Code § ENV WQ Ch. 8 s 3(c); Wyo. Stat. Ann. § 35-11-102; Wyo. Stat. Ann. § 35-11-103(c)(i).

109 *Id.* § ENV WQ Ch. 8 s 4.

110 *Id.* § ENV WQ Ch. 8 s 4(c).

111 *Id.* § ENV WQ Ch. 8 s 4(c).

112 *Id.* § ENV WQ Ch. 8 s 4.

113 *Id.*

114 *Id.* § ENV WQ Ch. 8 s 4(d)(i).

115 *Id.* § ENV WQ Ch. 8 s 4(d)(ii).

116 *Id.* § ENV WQ Ch. 8 s 4(d)(iii).

117 *Id.* § ENV WQ Ch. 8 s 4(d)(iv).

118 *Id.* § ENV WQ Ch. 8 s 5.

119 *Id.* § ENV WQ Ch. 8 s 4(d)(vii).

120 *Id.* § ENV WQ Ch. 8 s 4(d)(viii).

121 *Id.* § ENV WQ Ch. 8 s (4)(d)(ix).



STATE FISH AND WILDLIFE LAW IN WYOMING

In addition to the WDEQ's authority to designate streams for water quality, the Wyoming Game and Fish Department (WGFD) has the authority to designate streams based upon the quality of the fishery.¹²² WGFD designates a stream or river fishery depending on the sport fish pounds per mile.¹²³ The Wyoming Game and Fish Commission uses these designations when implementing its mitigation policy which serves as a guideline for when the department gives recommendations on development projects, new land use planning activities, and permitting decisions by local, state, and federal authorities.¹²⁴

Fish Creek is designated a Red Ribbon Stream.¹²⁵ Under the Commission's mitigation policy, Red Ribbon Streams are considered high mitigation priority streams.¹²⁶ Whenever a high mitigation stream is impacted the Commission directs the WGFD to recommend mitigation measures that address the long-term loss of habitat function or species distribution or abundance.¹²⁷ Locally in Teton County, the Wyoming Game and Fish Department is often consulted in the permitting process for several permits, including turbidity waivers and general construction permits.¹²⁸ Although the recommendations have no enforcement power, they are often used as expertise guidance for private and local government in the area.¹²⁹

122 Tom Annear, et al, *Wyoming Game and Fish Department, Modification of The Wyoming Game and Fish Department's System for Classifying Stream Fisheries* 8 (2006).

123 *Id.*

124 Wyoming Game and Fish Commission, *Mitigation* 177 (Nov. 17, 2008) https://wgfd.wyo.gov/WGFD/media/content/PDF/Fishing/Stream%20Class/WGFC_MITIGATION_POLICY.pdf.

125 Wyoming Game and Fish Commission, *Blue and Red Streams List* (last visited Jan. 8, 2016) https://wgfd.wyo.gov/WGFD/media/content/PDF/Fishing/Stream%20Class/WYSTREAM_BLUEREDRIBBON_LIST.pdf.

126 *Id.*

127 *Id.* at 178.

128 Telephone interview with Anna Senecal, Aquatic Habitat Biologist, Wyoming Game and Fish Department (March 22, 2017).

129 *Id.*



WYOMING LOCAL GOVERNMENT WATER QUALITY LAWS/REGULATIONS

Similar to the state's jurisdiction to administer federal water quality programs like the CWA, Wyoming has granted authority to local governments to develop sewer districts, manage small wastewater facilities, and establish land development regulations.¹³⁰

SEWER DISTRICTS

Sewer districts are organized to acquire and manage sewer projects for the purpose of providing sanitary sewers, treatment facilities, disposal plants or other disposal works, and appurtenant facilities.¹³¹ The State of Wyoming has vested the authority to establish sewer districts to the boards of county commissioners, and granted the commissioners with the exclusive jurisdiction to oversee any and all proceedings concerning the districts, such as bonding or changing district boundaries.¹³²

Sewer districts are also overseen by the Wyoming Department of Health.¹³³ This is because a sewer district is considered a sanitary and improvement district, which is a civil or political subdivision of the state organized to secure, preserve, and promote public health.¹³⁴ While county commissioners have jurisdiction over the districts and have the power to authorize their creation, the Wyoming Department of Health serves as a consulting partner, approving the sewer district's plans.

To establish a sewer district, a petition must be approved through the board of county commissioners.¹³⁵ Once established, sewer districts are granted perpetual existence and retain the power to have and use a corporate seal, to sue and be sued.¹³⁶ A sewer district's authority includes preparing plans for a system of sewers, disposal and treatment plants and works, and all other systems that will provide an effective and advantageous means for adequate sanitary disposal and treatment of the sewage thereof.¹³⁷ Sewer

130 Wyo. Stat. Ann. § 41-10-103(a); Wyo. Stat. § 35-11-304(a); Wyo. Stat. § 18-5-201.

131 Wyo. Stat. Ann. § 41-10-101(a)(iii).

132 Wyo. Stat. Ann. § 41-10-103(a)-(b).

133 Wyo. Stat. Ann. § 35-3-106.

134 *In re West Highway Sanitary & Improvement Dist.*, 317 P.2d 495 (Wyo. 1957).

135 Wyo. Stat. Ann. § 41-10-103(b).

136 Wyo. Stat. Ann. § 41-10-113(a)(i)-(iii).

137 Wyo. Stat. Ann. § 41-10-113(a)(iv).

districts should keep in mind existing and future needs of other cities, towns, districts or other persons, which may be affected with any proposed development.¹³⁸

Districts cannot acquire or improve any sewage system without first obtaining the approval of the Wyoming Department of Health.¹³⁹ Once approval by the Wyoming Department of Health is received, districts may establish, own, construct, improve, lease, operate, and maintain sewage treatment and disposal plants and systems.¹⁴⁰ Sewer districts can continue to consult the Wyoming Department of Health about any system, proposed or developed, as to the best method of disposing sewage.¹⁴¹

To carry out its necessary objectives, sewer districts have the power and authority to levy and collect general ad valorem taxes on and against all taxable property within a district.¹⁴² A sewer district is allowed to expand its jurisdiction through the method prescribed in the Special District Elections Act of 1994.¹⁴³ Districts may also exercise the power of eminent domain in the same manner as a city to condemn private property for public use.¹⁴⁴ Under this authority, sewer districts have the power to take any property necessary to exercise their authority to prepare a system of sewers, whether the land is within or outside the sewer district.¹⁴⁵

Sewer districts also have the authority to compel inhabited property owners to connect to their sewer system.¹⁴⁶ However, the sewer district can only compel property owners to connect for health and sanitation purposes.¹⁴⁷ Additionally, the sewer line must be located within 400 feet of the dwelling place.¹⁴⁸ If these obligations are met and the property owner fails to connect to the sewer system within 60 days, the sewer district may establish the connection from the house to the sewer line at the owner's expense.¹⁴⁹

SMALL WASTEWATER FACILITIES

The WDEQ Water Quality Division serves as the small wastewater permitting authority for many counties in Wyoming.¹⁵⁰ However, through a delegation agreement, the WDEQ must delegate authority to local governmental agencies to enforce and administer provisions of the WEQA within their jurisdiction.¹⁵¹ These provisions include constructing, installing, modifying or operating any sewerage system, treatment works, disposal system, or other facility capable of causing or contributing to pollution.¹⁵² The WDEQ has delegated this authority to Teton County along with the power to develop necessary rules, regulations, standards, and permit systems, and to review and approve construction plans, conduct inspections, and issue permits.¹⁵³

In 2010, the Teton County Board of County Commissioners adopted the Small Wastewater Facility Resolution (SWFR) to govern the permitting of the construction, installation, modification and operation of small wastewater facilities within the county.¹⁵⁴ Small wastewater facilities are septic systems intended for domestic wastes of 2,000 gallons of sewage a day or less.¹⁵⁵

138 Wyo. Stat. Ann. § 41-10-113(a)(xv).

139 *Id.*

140 Wyo. Stat. Ann. § 41-10-113(a)(v).

141 Wyo. Stat. Ann. § 41-10-113(a)(xv).

142 Wyo. Stat. Ann. § 41-10-114.

143 Wyo. Stat. Ann. § 41-10-120(a).

144 Wyo. Stat. Ann. § 41-10-113(xix); Wyo. Stat. § 35-3-110.

145 *Id.*

146 Wyo. Stat. Ann. § 41-10-113(a)(xxi).

147 *Id.*

148 *Id.*

149 *Id.*

150 Wyoming Department of Environmental Quality, *Small Wastewater Permitting Authority* (last accessed Jan. 12, 2017) <http://deq.wyoming.gov/wqd/permitting-2/resources/small-wastewater-permitting-authority/> (WDEQ permits Campbell (commercial systems only), Carbon, Crook, Niobrara, Platte, and Weston Counties).

151 Wyo. Stat. § 35-11-304(a).

152 Wyo. Stat. § 35-11-301(a)(iii).

153 Wyo. Stat. § 35-11-304(a).

154 Teton County Small Wastewater Regulations, (Updated Jan. 3, 2017) <http://www.tetonwyo.org/plan/docs/ComprehensivePlan/Resolutions/SWFRResolution.PDF>.

155 Wyo. Stat. Ann. §35-11-103(c)(ix) (any facility that is bigger than 2,000 gallons per day does not meet the definition of a "small wastewater

The SWFR applies to anyone developing septic systems within Teton County and was developed to prevent, reduce, and eliminate pollution, and enhance the waters of the State of Wyoming.¹⁵⁶ Through its implementation, Teton County protects the health, safety, and welfare of the environment and its inhabitants by ensuring that the design and construction of small wastewater systems meet the requirements of the WEQA.¹⁵⁷ Teton County's septic permitting authority is the Teton County Building Division and is overseen by the county sanitarian.¹⁵⁸ The board of county commissioners appoints the sanitarian to supervise Teton County's septic rules.¹⁵⁹

The Teton County Land Development Regulations (LDRs) provide further guidelines to determine when the use of a local septic system is appropriate for new construction.¹⁶⁰

TETON COUNTY LAND DEVELOPMENT REGULATIONS

The Wyoming State Legislature granted broad authority to county commissioners to develop land-zoning plans, and these plans form the basis of local government zoning laws.¹⁶¹ Under this authority, Teton County has developed extensive zoning and subdivision regulations, called LDRs, to promote the health, safety, and general welfare of the present and future inhabitants of the community.¹⁶² The LDRs implement the common values of community character including ecosystem stewardship, growth management, and quality of life.¹⁶³

Depending on an area's zoning, different rules may apply regarding sewage disposal. For land zoned "Rural – County," the LDRs require a connection to a public sanitary sewer if the building is within 500 feet of the sewer system and legal access is obtainable.¹⁶⁴ If there is no public sanitary sewer reasonably available, applicants are required to install sewage disposal facilities or individual septic tanks.¹⁶⁵ The county sanitarian must approve these facilities prior to their construction.¹⁶⁶ Applicants are required to furnish the county sanitarian or the WDEQ a report of percolation, groundwater, and soil tests.¹⁶⁷ Tests are required to show sufficient samples over the absorption field site to ensure the installation of the proposed type of soil absorption system will not create sanitation or pollution problems.¹⁶⁸

The board of county commissioners also governs subdivision regulations and issues subdivision permits.¹⁶⁹ In order for a permit to be granted, the Board must be presented with a study evaluating the sewage system proposed for the subdivision and the adequacy and safety of the system.¹⁷⁰ If individual on-lot sewage systems are being proposed, the study is required to document the safety and adequacy of separation distances, separation of drain field relative to groundwater and impervious soils, suitability of the subdivision soil conditions, suitable topography, proposed population density, protection of groundwater uses, and watershed located on or draining into, under or over, the proposed subdivision.¹⁷¹

facility" and remains under the authority of the WDEQ Water Quality Division for permitting).

156 Teton County Small Wastewater Regulations § 3.

157 *Id.* § 2.

158 *Id.* § 4.

159 Wyo. Stat. Ann. §35-1-306(c).

160 Teton County Small Wastewater Regulations § 7.7.

161 Wyo. Stat. Ann. § 18-5-201; *see also Snake River Venture v. Bd. of Cnty. Comm'rs, Teton Cnty.*, 616 P.2d 744, 752 (Wyo. 1980) (holding the language in the statute is a broad grant of authority).

162 Teton County Land Development Regulations § 1.3.

163 *Id.* § 1.3.2.

164 *Id.* § 7.7.3(A).

165 *Id.*

166 *Id.*

167 *Id.* § 7.7.3(B).

168 *Id.*

169 Wyo. Stat. Ann. § 18-5-301.

170 Wyo. Stat. Ann. § 18-5-306(a)(iv).

171 Wyo. Stat. Ann. § 18-5-306(a)(iv)(C)(I)-(VI).

However, LDRs are only applicable for new development or modifications of existing development. Preexisting developments that do not conform to current LDRs are considered nonconformities.¹⁷² These nonconformities are grandfathered in because they existed prior to the promulgation of the LDRs.¹⁷³ The intent of the LDRs is to allow nonconformities to remain until they are discontinued, but not to encourage their expansion.¹⁷⁴ To this end, the LDRs do not allow for the maintenance, alteration, expansion, or improvement of a nonconforming physical development unless four standards are met.¹⁷⁵ First, nonconformity shall not increase and shall otherwise comply with all other applicable standards in the LDRs.¹⁷⁶ Second, nonconforming physical development may not be maintained, altered, or expanded.¹⁷⁷ Third, nonconforming physical development shall be brought into compliance with all applicable standards of the LDRs upon willful demolition of any structural support for the portion of the physical development.¹⁷⁸ Finally, the maintenance, alteration, replacement, or expansion of an existing nonconforming physical development shall be completed within 18 months after commencement or destruction.¹⁷⁹

Currently, Teton County's LDRs have a placeholder for water quality regulations, but they have not yet been developed.¹⁸⁰ Nonetheless, there are two LDRs that have a water quality nexus: (1) waterbody and wetland buffers, (2) and natural or scenic resources overlays.

WATERBODY AND WETLAND BUFFERS

The Teton County LDR Waterbody and Wetland Buffer areas are in part local governments' response to water quality concerns over runoff from land development.¹⁸¹ Waterbodies are defined by the LDRs as "natural features that convey or contain surface water."¹⁸² The Wetland and Waterbody Buffer protect rivers, streams, and natural lakes or ponds.¹⁸³ To qualify as a stream protected under the LDR, the body of water cannot be identified as an irrigation ditch and must either have an annual flow of at least 3 cubic feet per second, or provide winter habitat for trumpeter swans, or serve as a cutthroat trout spawning area.¹⁸⁴ One purpose of the Waterbody and Wetland Buffers is to protect the community from negative impacts to water resources caused by physical development.¹⁸⁵ The risk from development and use close to waterways is severe in negatively affecting water quality and damaging the natural functions of water resources.¹⁸⁶ The Waterbody and Wetland Buffer establishes rules to protect the most sensitive areas around waterbodies and requires that the setback or buffer "shall remain free from physical development and use, parking, and open storage of vehicles, refuse, or any other material."¹⁸⁷ Rivers require a 150-foot development free setback; streams, as defined by the LDRs, require a 50-150 foot setback depending on the extent of the riparian plant community and wetlands require a 30-foot development free setback.¹⁸⁸ Additionally, the LDRs state that no land use or development can occur along a stream within the riparian plant community.¹⁸⁹

172 *Id.* § 1.9.1(B).

173 Wyo. Stat. Ann. § 18-5-207; *see also Snake River Brewing Co., Inc. v. Town of Jackson*, 39 P.3d 397, 404 (Wyo. 2002).

174 Teton County Land Development Regulations § 1.9.1(A).

175 *Id.* § 1.9.2(B).

176 *Id.* § 1.9.2(B)(1).

177 *Id.* § 1.9.2(B)(2).

178 *Id.* § 1.9.2(B)(3).

179 *Id.* § 1.9.2(B)(4).

180 *Id.* § 5.1.5.

181 *Id.* § 5.1.1(A).

182 *Id.* § 5.1.1(C). Man-made ponds are generally not considered to be water bodies covered in the LDRs unless the man-made pond is created as wetland mitigation. Telephone Interview with James Rosen, *supra* note 96.

183 *Id.* § 5.1.1(C)(1)-(3).

184 *Id.* § 5.1.1(C)(2).

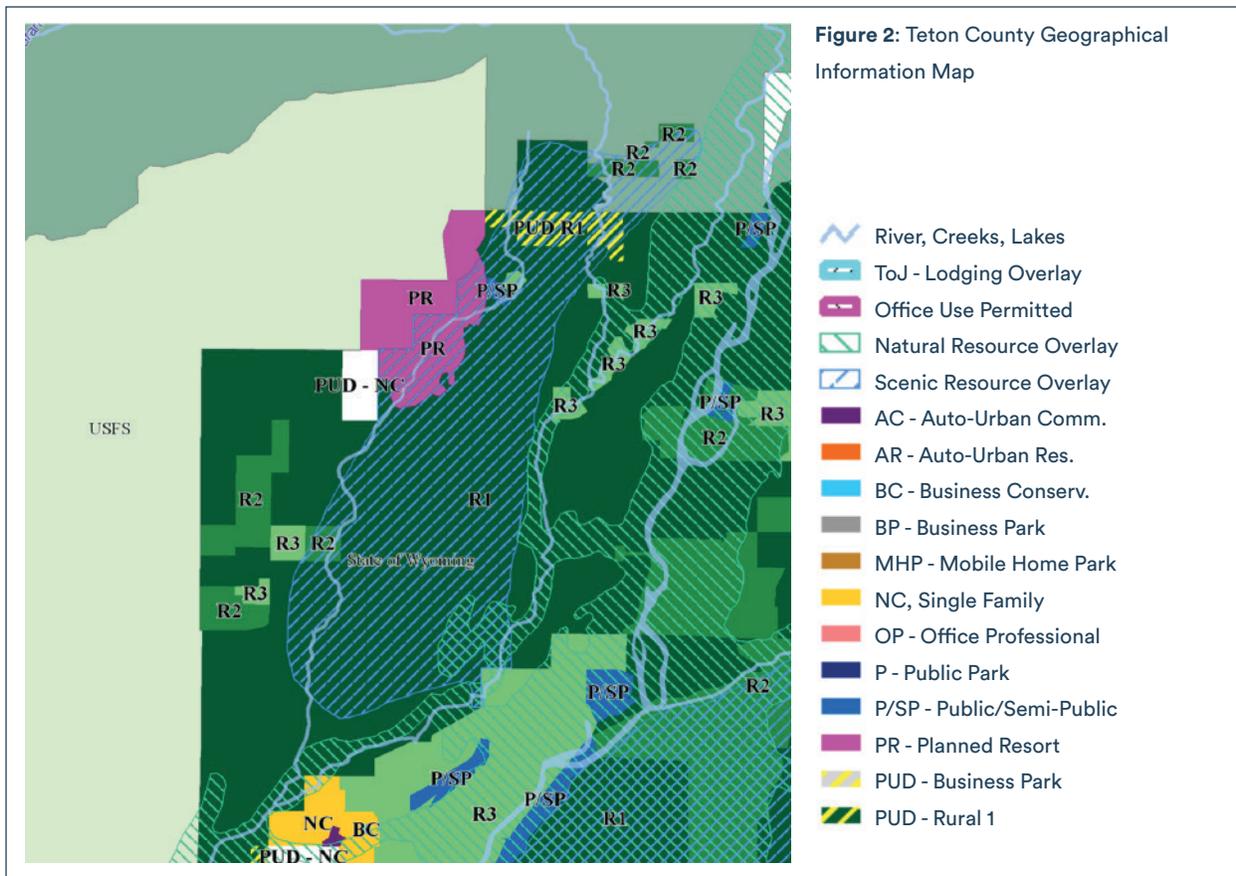
185 *Id.*

186 *Id.* § 5.1.1(D).

187 *Id.* § 5.1.1(D)(2)(f).

188 *Id.* § 5.1.1(D)(2)(b).

189 *Id.*



NATURAL AND SCENIC RESOURCE OVERLAY STANDARDS

The Teton County LDR overlays are established boundaries to guide future development within particular areas.¹⁹⁰ The Teton County LDR Natural and Scenic Overlays are aimed at preserving different resources, they both have an effect on protecting water quality.

The Teton County LDR Scenic Resource Overlay (Figure 2) attempts to maintain the scenic resources of the community.¹⁹¹ Scenic resources generate tourism revenue, which is an essential part of Teton County's economy.¹⁹² The Scenic Resource Overlay includes scenic standards to ensure foregrounds and skylines of scenic views are not destroyed or encumbered.¹⁹³ In some cases the Scenic Resource Overlay requires developments to provide landscape screening, which in addition to maintaining the character of the area, also has an affect on water quality resources as improper landscaping can cause erosion and run-off.¹⁹⁴ The Scenic Resource Overlay requires landowners to submit landscape plans for all physical development except detached single-family units and those with administrative permits.¹⁹⁵

The Teton County Natural Resource Overlay LDR is designed in part to provide "protection to the most important and sensitive

¹⁹⁰ *Id.* § 1.7.1.

¹⁹¹ *Id.* § 5.3.

¹⁹² *Id.* § 5.3.2(B)(1).

¹⁹³ *Id.* § 5.3.2(B)(1)-(2).

¹⁹⁴ *Id.* § 5.3.2.(D)(1).

¹⁹⁵ *Id.*

natural areas throughout the town and county.¹⁹⁶ Those important and sensitive natural areas include critical spawning areas that are essential to the survival of cutthroat trout.¹⁹⁷ Applications to build within the Natural Resource Overlay have additional requirements to lessen the impact of development on wildlife.¹⁹⁸ The Natural Resource Overlay restricts development within 150 feet of identified cutthroat spawning areas, unless the developer can demonstrate that the development will not cause any run-off or disturbance to cutthroat trout.¹⁹⁹ Developers are also required to provide mitigation and habitat enhancement for the land impacted, either on-site or off-site.²⁰⁰ Applications to build require a Habitat Enhancement Plan to demonstrate how mitigation will be achieved.²⁰¹ A Habitat Enhancement Plan must include a maintenance plan to ensure the successful establishment of vegetative cover, a weed control plan to control noxious weeds, a monitoring plan that details the success of project goals through annual monitoring by a qualified landowner representative, and a surety bond to ensure obligations are met.²⁰²

The Natural Resource Overlay currently does not encompass Fish Creek (see Figure 2). However, on March 7, 2017, the Teton County Commissioners approved a work plan to overhaul of the Natural Resource Overlay.²⁰³ The revised Natural Resource Overlay is expected to be completed by spring 2018.²⁰⁴

196 *Id.* § 5.2.1(A).

197 *Id.*

198 *Id.* § 5.2.1(D).

199 *Id.* § 5.2.1(E)(5).

200 *Id.* § 5.2.1(E)(2)(a).

201 *Id.* § 5.2.1(E)(2)(b).

202 *Id.* § 5.2.1(E)(2)(b)(i)-(vii).

203 Mike Koshmrl, *Overlay Redo Could Take up to 12 Months*, Jackson Hole News & Guide, March 7, 2017, http://www.jhnewsandguide.com/news/environmental/overlay-redo-could-take-up-to-months/article_5e2d54cb-5e0d-5901-9b36-cac645ae551e.html (last visited Mar 27, 2017).

204 *Id.*



QUESTIONS AND ANSWERS

Q IS GROUNDWATER COVERED UNDER THE CLEAN WATER ACT?

A Maybe, but only if it is considered a point source. Although scientifically connected to many navigable waters, groundwater has traditionally never been included in the CWA. Of note, the EPA's regulations covering the CWA expressly exclude groundwater from the definition of waters of the United States.²⁰⁵ The only way groundwater could be considered a part of the CWA would be for the EPA to declare groundwater a point source for a pollutant in a navigable water.

One groundwater conveyance that could possibly be considered a point source is hydrologically-connected groundwater to navigable surface water. There is a split in federal legal jurisdictions as to whether the CWA applies in this situation.²⁰⁶ The theory in this situation is that since groundwater is connected to surface water, any conveyance of pollution into surface water that originates from groundwater should be considered a point source under the CWA.²⁰⁷ A federal district court in North Carolina ruled in 2015 that if pollution in groundwater makes its way to a "water of the U.S.," that groundwater can be considered a conduit that conveys the pollution to a water of the U.S.²⁰⁸ Thus, the federal district court in North Carolina concluded that groundwater can be a point source.²⁰⁹

Although a federal district court in North Carolina readily accepted groundwater as a point source, not all courts agree. A federal district court in Pennsylvania ruled that groundwater cannot be a point source, and thus conveyances

²⁰⁵ 80 C.F.R. 37073, 37099.

²⁰⁶ *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F.Supp.3d 428, 445 (M.D.N.C 2015) (ruling that pollution in groundwater that is hydrologically connected to a Water of the United States falls under the Clean Water Act); *compare with, Tri-Realty Company v. Ursinus College*, 124 F.Supp.3d 418, 459 (E.D.Pa. 2015) (ruling that pollution in groundwater that is hydrologically connected to a Water of the United States does not fall under the Clean Water Act).

²⁰⁷ *Yadkin Riverkeeper, Inc.*, 141 F.Supp.3d at 445.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

of pollutants that originate from groundwater are not covered by the CWA.²¹⁰ Wyoming lies within the jurisdiction of the Tenth Circuit Court of Appeals. Unfortunately, the Tenth Circuit has not yet decided whether groundwater that is hydrologically connected to a navigable water can be considered a point source. Because the Tenth Circuit is silent on the issue it is unknown whether groundwater is considered a point source in Wyoming.

Ultimately, if groundwater is considered a point source, any unpermitted discharges of pollutants into Fish Creek that come from groundwater would be a violation of the CWA and the WEQA and would be subject to the \$10,000 daily fine laid out in Section 901 of the WEQA.²¹¹

Q

COULD A SEPTIC TANK BE CONSIDERED A POINT SOURCE?

A

There is a chance that septic systems could be considered a point source. The Fifth Circuit Court of Appeals ruled septic systems could be considered a point source.²¹² In *Lucas* a subdivider began installing septic systems in wetland areas.²¹³ The EPA wrote several cease and desist orders and eventually brought suit stating that the subdivider discharged pollutants into a water of the United States without a NPDES permit.²¹⁴ The defendants argued that septic tanks did not require a NPDES permit because septic tanks are not point sources.²¹⁵ The court ruled that septic tanks that directly discharge into a water of the United States are point sources because septic tanks are containers of waste, which falls under the definition of a point source.²¹⁶ Since the septic tank was a point source to pollution into a water of the United States, the court ruled that a NPDES was required for the discharges.²¹⁷

The court further justified its decision by noting a case (*Ortiz*) in the Tenth Circuit in which a person was found guilty of dumping pollutants from a point source (a storm drain) into a water of the United States.²¹⁸ The defendant originally dumped the pollutants into a toilet, which eventually led the pollutants to empty through a storm drain into the Colorado River.²¹⁹ In both *Ortiz* and *Lucas* the conveyance discharged directly into a water of the United States.²²⁰ Conversely, in the present case, if the septic tanks are only discharging into groundwater and not directly into Fish Creek, *Ortiz* and *Lucas* could be distinguishable from Fish Creek based on a lack of connection between the point source of the pollution and the conveyance from the septic tank.

Once again, if a septic tank is considered a point source, any unpermitted discharges of pollutants into Fish Creek that can be traced back to a septic tank would be a violation of the CWA and the WEQA and would be subject to the \$10,000 daily fine laid out in Section 901 of the WEQA.²²¹

210 *Tri-Realty Company*, 124 F.Supp.3d at 459.

211 Wyo. Stat. Ann. § 35-11-901.

212 *US v. Lucas*, 516 F.3d 316 (5th Cir. 2008).

213 *Id.* at 322.

214 *Id.*

215 *Id.* at 329.

216 *Id.* at 332.

217 *Id.*

218 *Id.* at 333 (citing *US v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005)).

219 *Ortiz*, 427 F.3d at 1281.

220 See *Lucas*, 516 F.3d at 22 (conveyance came directly from septic tank into wetlands considered to be a Water of the United States); *Ortiz*, 427 F.3d at 1281 (conveyance came from toilet directly to storm drain that led directly to the Colorado River).

221 Wyo. Stat. Ann. § 35-11-701(a).

Q

WHO IS RESPONSIBLE FOR ENFORCING SEPTIC LAWS IN TETON COUNTY? WHAT CAN BE DONE IF THOSE LAWS ARE NOT BEING ENFORCED?

A

Teton County's Building Division is responsible for overseeing permitting for construction and modification of small wastewater facilities in Teton County. However after septic systems are built they must continue to comply with the permits that were issued, nuisance laws, and the WEQA.

Wyoming Statute 35-11-301(a)(iii) does not allow a person to “construct, install, modify or operate any sewerage system, treatment works, disposal system or other facility ...” without a permit.²²² The SWFR governs the permitting of the construction, installation, modification and operation of all small wastewater facilities within the county.²²³ All permits are still required to comply with state and federal water quality laws including the CWA and the Teton County LDRs.²²⁴

The county sanitarian evaluates permit applications based upon the outlined design and construction standards and may suspend or revoke a permit *before construction, installation or modification is completed* if the permittee:

- Is not in compliance with the terms of the permit,
- Modified the approved design or construction,
- Submitted false information in the application,
- The site conditions have changed and would result in a violation of applicable regulations,
- Not complying with any requirements in the SWFR, and for
- Any other reason necessary to effectuate applicable statutes, standards or regulations.²²⁵

Once a septic system has been installed, the SWFR remains in effect.²²⁶ The SWFR prohibits discharges from a wastewater system to surface waters or surface of the ground.²²⁷ The SWFR also prohibits any sewage being discharged into any abandoned or unused well, or into any crevice, sinkhole, or similar opening, either natural or artificial.²²⁸ The Teton County Commissioners, through the county and prosecuting attorney are responsible for enforcing all provisions of the resolution.²²⁹ Any person who is in violation of the SWFR may be faced with injunctive action and fined \$100 per day per offense.²³⁰

The Teton County LDRs also prohibit the active or passive discharge of effluent from any cesspool, septic tank, drain field or sewage disposal system upon the surface of the ground.²³¹ A violation of the operational standards for septic systems could be considered a nuisance violation.²³² Under the Teton County LDRs a nuisance constitutes an unreasonable interference with the quality of life, health, safety and welfare of citizens and may be abated or remedied

222 Wyo. Stat. Ann. 35-11-301(a)(iii).

223 Teton County Small Wastewater Regulations § 1.

224 *Id.* § 16.

225 *Id.* § 15.

226 *Id.* § 10.

227 *Id.* § 6(E).

228 *Id.*

229 *Id.* § 33(C).

230 *Id.*

231 *Id.* § 6.4.9(A).

232 Teton County Land Development Regulation § 6.4.9(A).

upon the issuance of a nuisance order.²³³ The board of county commissioners may issue a nuisance order if there is proof based on a preponderance of the evidence standard that a nuisance exists, there is sufficient cause to evict or relocate the nuisance, and the nuisance poses a threat to the health or safety of persons in Teton County.²³⁴ When a nuisance order is issued the board of county commissioners should provide a reasonable period of time for the landowner to correct the violation.²³⁵ The county has the right to enforce the provisions of the LDRs, including the prohibiting nuisances, under any remedy provided by law.²³⁶

Despite the delegation of authority to Teton County to permit small wastewater facilities, the WDEQ is required to periodically review the standards and enforcement programs.²³⁷ If Teton County is not fulfilling its obligations to maintain standards at least as stringently as those promulgated by the Water Quality Division, the WDEQ can revoke or temporarily suspend the delegation.

There remains a question of whether faulty septic systems constitute a violation of the WEQA for groundwater pollution. The WDEQ's prohibition is broad and encompasses anyone who pollutes or alters the physical, chemical, or biological properties of any water of the state without a permit.²³⁸ Waters of the state include all surface water, all groundwater, and all water associated with wetlands.²³⁹ WDEQ may seek penalties of permitted acts if they have increased in quantity or strength.²⁴⁰ This may include additional pollutants stemming from permitted but faulty septic systems.²⁴¹ If the WEQA is violated individuals can be fined up to \$10,000 per day per violation.²⁴²

Q

HOW ARE SEWER DISTRICTS CREATED IN TETON COUNTY? HOW ARE SEWER DISTRICTS DISBANDED? COULD EXISTING SEWER DISTRICTS IN TETON COUNTY BE DISBANDED AND REESTABLISHED AS ONE COUNTY DISTRICT TO ENSURE CONSISTENCY?

A

Sewer districts are service districts within counties of the State of Wyoming.²⁴³ Unlike the decentralized nature of private septic systems, sewer districts are designed to collect and treat sewage from individuals within the district. Districts are formed through a petition process to the Teton County Board of County Commissioners.²⁴⁴ The State of Wyoming vested county commissioners with the jurisdiction, power, and authority to establish sewer districts and exclusive jurisdiction as to any and all proceedings concerning the districts.²⁴⁵ A sewer district may include all or portions of the unincorporated land in a county regardless of whether the tracts are contiguous.²⁴⁶ Multiple sewer districts may exist in a county so long they do not overlap each other.²⁴⁷

233 *Id.* § 8.9.5(A).

234 *Id.* § 8.9.5(C)(1)-(3).

235 *Id.* § 8.9.5(D).

236 *Id.* § 8.9.6.

237 Wyo. Stat. Ann. § 35-11-304(a)(v)

238 Wyo. Stat. Ann. § 35-11-301(a)(i).

239 Wyo. Stat. Ann. § 35-11-103(c)(vi).

240 Wyo. Stat. Ann. § 35-11-101(a)(iv).

241 *Id.*

242 Wyo. Stat. Ann. § 35-11-901(a).

243 *In re West Highway Sanitary & Improvement Dist.*, 317 P.2d at 495.

244 Wyo. Stat. Ann. § 41-10-103(b).

245 Wyo. Stat. Ann. § 41-10-103(a).

246 Wyo. Stat. Ann. § 41-10-102(a),(d).

247 Wyo. Stat. Ann. § 41-10-102(f).

When sewer districts are created they are granted perpetual existence by the Teton County Commissioners.²⁴⁸ The granting of perpetual existence means that the sewer districts cannot be required to disband or merge.²⁴⁹ However, districts may be annexed by a town or city, voluntarily dissolve, or decide to consolidate with another sewer district.²⁵⁰ Annexation occurs when a city decides to take ownership of a sewer district or a portion of it.²⁵¹ The city is required to assume any bonds or obligations of the district at the time of annexation.²⁵²

For a sewer district to voluntarily dissolve it must grant its property to a city or town that has guaranteed it will continue to operate and maintain the property.²⁵³ The district must abut the city or town that consented to receive the sewer district's property and file a certificate noting the conveyance with the Wyoming Secretary of State and the county clerk where the sewer district was established.²⁵⁴

If two or more districts are using the same or joint facilities, the two may consolidate into a single district.²⁵⁵ In order to consolidate, the sewer districts must be free from debt and obligations.²⁵⁶ Also, the districts would initially be required to operate under a joint board until the board is reduced to five members and regular elections can be held.²⁵⁷

In conclusion, it is possible for multiple sewer districts to come under the management of a single entity. The single entity could be either a city or a single sewer district. However, outside of annexation by a city, there is no statutory method to require sewer districts to consolidate.

Q

CAN LOCAL REGULATORS REQUIRE INDIVIDUALS TO CONNECT TO A SEWER SYSTEM?

A

Yes, property owners can be required to connect to a sewer system in some situations. A sewer district has the power to compel owners of inhabited properties within a sewer district to connect their property with the sewer line.²⁵⁸ A sewer district may force individual septic users to attach to their sewer system “for health and sanitary purposes.”²⁵⁹ In order to do this, a service line must be brought within 400 feet of the dwelling.²⁶⁰ If the sewer district has given the property owner 60 days written mailed notice and a connection has not been made, the district may choose to connect the house to the sewer line and may put lien on the property for the services rendered.²⁶¹

While this only applies to properties within a sewer district, boundaries of a sewer district can be enlarged after its creation.²⁶² Under the Special District Elections Act of 1994, so long as the enlargement of the boundaries of the district do not affect, impair, or discharge any contract, obligation, lien or charge, the district's boundaries may be changed.²⁶³

248 Wyo. Stat. Ann. § 41-10-113(a)(i).

249 Wyo. Stat. Ann. § 35-3-113; § 41-10-113(a)(xxiv); § 41-10-113(a)(xxv).

250 *Id.*

251 Wyo. Stat. Ann. § 35-3-113.

252 *Id.*

253 Wyo. Stat. Ann. § 41-10-113(a)(xxiv).

254 *Id.*

255 Wyo. Stat. Ann. § 41-10-113(a)(xxv).

256 *Id.*

257 *Id.*

258 *Id.*

259 Wyo. Stat. Ann. § 41-10-113(a)(xxi).

260 *Id.*

261 *Id.*

262 Wyo. Stat. Ann. § 41-10-120.

263 Wyo. Stat. Ann. § 41-10-120(a).

A petition for enlargement of a district must be signed by at least 15% of the electors, or 100 electors registered in the area proposed to be added, and at least 15 landowners or landowners owning at least 10% of the assessed valuation of the property within the area proposed to be included in the district.²⁶⁴ Sewer districts can also expand their sewer system through their power of eminent domain.²⁶⁵ Once a property is within a district, the district can collect fees and levy taxes on individuals.²⁶⁶ A sewer district could hypothetically expand its boundary to encompass all of the land of a county and require every home to connect to the sewer line.

Another method to require conversion from septic systems to a sewer system is through Teton County LDRs. The LDRs contain septic regulations that require homeowners to connect their dwellings to a sewer line if the line is within 500 feet of the residence.²⁶⁷ However, these LDRs are designed to apply to new construction or development.²⁶⁸ Therefore, requirements in the LDRs do not retroactively apply to septic systems that existed before the LDRs were enacted.²⁶⁹ The LDRs consider these preexisting septic systems nonconformities.²⁷⁰ However, the LDRs do not allow “creating, expanding, replacing, or changing any nonconformity except in compliance with these LDRs.”²⁷¹ So individuals who need to replace, change, or expand their septic systems must do so according to the rules of the LDRs for sewer connections.

In conclusion, individual homeowners may be required to abandon their septic systems and connect to a sewer line, either by the expansion of sewer districts or the implementation of Teton County LDRs.

Q

CAN LOCAL REGULATORS REQUIRE BEST TECHNOLOGY SUCH AS ABOVE GROUND SEPTIC SYSTEMS FOR THOSE HOMES AND BUSINESSES IN THE MOST SENSITIVE AREAS OF THE FISH CREEK WATERSHED THAT ARE NOT ATTACHED TO A SEWER LINE?

A

Yes. Through the use of the SWFRs and the LDRs Teton County could require all new constructions to use the best technology above ground septic systems for homes built in the most sensitive areas of the Fish Creek Watershed. However, the use of best technology cannot be implemented retroactively to homes that have preexisting nonconformities.²⁷² These existing systems are currently protected under the LDRs unless they violate the WEQA or expand the nonconforming use.²⁷³

The Teton County SWFRs impose design and construction standards for all small wastewater systems in the county.²⁷⁴ Plans for small wastewater systems must include a site plan, which includes topography of the site, boundaries of the project, and nearby waterways.²⁷⁵ All plans and specifications for septic systems must conform to the minimum design standards identified in Sections 17 through 31 of the SWFRs.²⁷⁶

The Teton County LDRs also include specific regulations for restricting development along waterways. The Waterbody

264 Wyo. Stat. Ann. § 22-29-105(b)(i)-(ii).

265 Wyo. Stat. Ann. § 41-10-113(a)(xix).

266 Wyo. Stat. Ann. § 41-10-119.

267 Teton County Land Development Regulations § 7.7.3(B).

268 *Id.* § 1.5.2(A).

269 *Id.* § 1.9.1(A).

270 *Id.* § 1.9.1(B).

271 *Id.* § 8.9.2(F)(9).

272 *Id.* § 1.9.1.

273 *Id.* § 1.9.1(f).

274 Teton County Small Wastewater Regulations § 4.

275 *Id.* § 8(C)(1)(c).

276 *Id.* § 8(D).

and Wetland Buffers “shall remain free from physical development and use, parking, and open storage of vehicles, refuse, or any other material.”²⁷⁷ The LDR Waterbody and Wetland Buffers currently provide a portion of the same protections as the Natural Resource Overlay, but this could change as the Natural Resource Overlay is revised.²⁷⁸ The Natural Resource Overlay gives additional building requirements to developers within the Natural Resource Overlay, even requiring a surety bond to ensure compliance.²⁷⁹ Despite its history of cutthroat trout spawning, Fish Creek is not currently considered a part of the Natural Resource Overlay.²⁸⁰

To enforce the LDRs, code compliance officers inspect properties when there is a new development permit or building permit.²⁸¹ However, code compliance officers do not inspect all properties in Teton County on a regular basis.²⁸² A concerned citizen can make a complaint to the code compliance office.²⁸³ After a complaint is received, compliance staff may inspect the property if it is warranted to confirm the violation.²⁸⁴ A Notice of Complaint may be issued to the property owner in question.²⁸⁵ If violations are not remedied, staff can bring an abatement hearing or bring the case to the appropriate court and seek fines.²⁸⁶

Q

CAN TETON COUNTY OR THE WDEQ REQUIRE THE TWO EXISTING INJECTION FACILITIES TO CONVERT TO A DIFFERENT SEWAGE DISPOSAL METHOD, OR REQUIRE THE FACILITIES CONNECT TO THE TETON COUNTY WASTE PLANT?

A

No. As long as injection facilities are adequately following their permits and ensuring additional pollutants are not entering the waters of the state, they will be allowed to continue to operate. There are two injection facilities, Aspen Water and Sewer District and Teton Pines Water and Sewer District, located in Teton County that have been approved by the WDEQ and these facilities remain under the authority and enforcement of the WDEQ.²⁸⁷

Unless authorized by a permit, the WEQA prohibits anyone from causing or allowing the discharge of any pollutants or wastes into a water of the state.²⁸⁸ It is also a violation of the WEQA to increase “the quantity or strength of any [permitted] discharge.”²⁸⁹ The penalties for violations of the WEQA are up to \$10,000 per day per violation.²⁹⁰ The WDEQ may also request a temporary injunction while facilities come into compliance, or issue a permanent injunction.²⁹¹ Additionally, penalties for persons who willfully and knowingly violate any permit or portion of the WEQA may be fined up to \$25,000 per violation and imprisoned.²⁹² If an injection facility is in violation of the WEQA the WDEQ may negotiate a stipulated settlement that involves the payment of a penalty, the implementation of compliance a schedule or

277 Teton County Land Development Regulations § 5.1.1(D)(2)(f).

278 See *supra* note 204, Mike Koshmrl, *Overlay Redo Could Take up to 12 Months*.

279 *Id.* § 5.2.1(E)(2)(b)(vii).

280 Natural Scenic, Agricultural and Tourism Resources Protection, Art. III S. 3250, <http://www.tetonwyo.org/plan/docs/ComprehensivePlan/LDR-ArticleIII-2007Nov20.pdf>.

281 Teton County, *Code Enforcement* (last visited Jan. 9 2017) <http://www.tetonwyo.org/pdcode>.

282 *Id.*

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.*

287 Wyo. Stat. Ann. § 35-11-302.

288 Wyo. Stat. Ann. § 35-11-301(a)(i).

289 Wyo. Stat. Ann. § 35-11-301(a)(iv).

290 Wyo. Stat. Ann. § 35-11-901(a).

291 *Id.*

292 Wyo. Stat. Ann. § 35-11-901(j).

other settlement conditions in lieu of litigation.²⁹³ Hypothetically, settlement conditions could include alteration to the facility design, conversion to a different waste disposal method, or even the requirement to connect to a sewer disposal line.

In 1991, an adjacent neighbor (Knight) objected to the WDEQ's permit approval of the Aspens Water and Sewer District and Teton Pines Water and Sewer District's sewer treatment injection system.²⁹⁴ Knight challenged the WDEQ's approval of the sewage injection system because he was concerned about the system's impact on his downstream well.²⁹⁵ Knight objected to WDEQ's approval before the Environmental Quality Council (EQC) claiming that the permit did not meet the statutory and regulatory requirements by the state.²⁹⁶ The EQC determined the sewer district applicants had met their burden and ordered WDEQ issue the permit.²⁹⁷ Knight then appealed to the District Court of Teton County, which affirmed the EQC's decision.²⁹⁸ The case was brought before the Wyoming Supreme Court but was primarily centered on procedural rules guiding administrative action and the court's review.²⁹⁹ The Wyoming Supreme Court held that a court may only set aside an agency action that is an abuse of discretion, arbitrary, and capricious or otherwise not supported by substantial evidence.³⁰⁰ Finding that neither the WDEQ permit decision nor the EQC's decision violated that standard, the Wyoming Supreme Court affirmed the district court's findings and the injection system was approved.³⁰¹

Q

CAN LOCAL REGULATIONS PROHIBIT FUTURE CONSTRUCTION OF INJECTION FACILITIES?

A

Yes, Teton County can decide to prohibit the construction of future injection facilities through their LDRs.³⁰² The LDRs already prohibit development in sensitive areas in the county.³⁰³ These zoning rules could be broadened to encompass injection facilities throughout the county. The LDRs also have a section on water quality that is currently blank that could be used to restrict future waste management systems.³⁰⁴ Water quality regulations are not currently listed in the LDRs but may be developed in the future.³⁰⁵ Any new facility would be required to adhere to the current LDRs.

293 Wyo. Stat. Ann. § 35-11-901(a)(ii).

294 *Knight v. Envtl. Quality Council*, 805 P.2d 268, 275 (Wyo. 1991).

295 *Id.* at 271.

296 *Id.*

297 *Id.* at 275.

298 *Id.*

299 *Id.*

300 *Id.* at 272-274.

301 *Id.* at 275.

302 Teton County Land Development Regulations § 1.2.

303 *See id.* § 1.7.2.

304 *Id.* § 5.1.5.

305 *Id.*

Q

CAN NEW LOCAL REGULATIONS BE PASSED THAT REQUIRE SEPTIC SYSTEM INSPECTIONS, PUMPING CERTIFICATES, OR OTHER WATER QUALITY PROTECTIONS?

A

Local regulations can be passed to require septic system inspections and pumping certificates. When the administrator of the WDEQ Water Quality Division delegated authority to Teton County to manage the provisions of Wyo. Stat. § 35-11-301(a) the WDEQ did not require that the local government conduct continual inspections.³⁰⁶ However, the local government is allowed to “establish rules, regulations and standards for the issuance of permits... which shall be at least as stringent as those promulgated by the state under § 35-11-302(a)(iii).”³⁰⁷ Therefore the language of the delegation does not restrict Teton County from establishing additional standards beyond the WDEQ’s minimal requirements for small wastewater facilities. The county is allowed to establish rules for the “issuance of permits for construction, installation, modification or *operation* of any” sewage system “capable of causing waste or contributing to pollution.”³⁰⁸ Therefore, Teton County could require documentation to prove proper operation of sewage systems.

Q

CAN NEW LOCAL REGULATIONS BE PASSED THAT REQUIRE GOLF COURSES TO USE BEST TECHNOLOGY MANAGEMENT PROCESSES AND LANDSCAPE DESIGN FEATURES TO MINIMIZE THE IMPACT OF THE CHEMICALS THEY USE?

A

Yes. Wyoming has vested the authority to the local counties to control land-use regulations in their local jurisdictions, local regulations or ordinances may be adopted to require *new* golf courses to use best technology management processes and landscape design features to minimize the impact of chemical use.³⁰⁹ There is also a chance that preexisting golf courses could be required to adopt best technology management processes if the course expands, modifies or terminates its use.

Counties in Wyoming are considered “arms of the state,” thus they only have powers granted to them explicitly from the Wyoming State Statutes or from the Wyoming Constitution.³¹⁰ Further, counties are required to enforce state statutes and laws, but they cannot enact their own ordinances.³¹¹ Despite the limitation on the power of counties, Wyoming has vested the authority to the counties to control land use regulations in their local jurisdictions.³¹² Thus, zoning ordinances can be used to regulate the nature of the land use and also the physical dimensions of the use.³¹³ However, new zoning ordinances can only be enforced against new uses and cannot be enforced against preexisting uses.³¹⁴ A nonconforming use can only continue so long as the use continues to exist.³¹⁵ Once a use is terminated, or the property owners ask to expand their use, the county then has the authority to apply any new land-use regulations as a condition to approve the new use.³¹⁶ There are four ways a use can be terminated: (1) abandonment; (2) discontinuance or non-

306 Wyo. Stat. Ann. § 35-11-304.

307 Wyo. Stat. Ann. § 35-11-304(a)(iii).

308 Wyo. Stat. Ann. § 35-11-302(a)(iii).

309 Wyo. Stat. Ann. § 18-5-201.

310 *Dunnegan v. Laramie County Commissioners*, 852 P.2d 1138, 1142 (Wyo. 1993).

311 *Id.*

312 Wyo. Stat. Ann. § 18-5-201.

313 *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985).

314 Wyo. Stat. Ann. § 18-5-207. *See also Snake River Brewing Co., Inc.*, 39 P.3d at 404.

315 *Snake River Brewing Co.*, 39 P.3d at 404.

316 *Id.*

use for a prescribed period; (3) amortization; and (4) voluntary or involuntary destruction.³¹⁷ In order for a landowner to abandon a use, the landowner must have an intent to abandon, and also must fail to act to protect his right, creating a renunciation of the use.³¹⁸ A discontinuance or non-use of the property for a statutorily designated period of time establishes a presumption of abandonment.³¹⁹

Teton County already has a land-use regulation in place that requires golf courses to submit an operation plan to the land-use commission that must be approved as part of its land-use permit.³²⁰ An operation plan must address:

1. Strategies or mitigation measures to minimize glare from night lighting;
2. How agronomic, maintenance and other management practices associated with the use will avoid impact to natural resources;
3. Integrated pest management and best practices for nutrient application and control;
4. Hours of operation; and
5. A monitoring program for periodic review of compliance by federal, state or local agencies, as applicable.³²¹

Teton County could be more specific in what it requires golf courses to include in their operation plans. A good example of a municipality adopting best practices for golf courses is Austin, Texas. The City of Austin uses a template called “Golf Course Design and Management Plan for Water Quality Management.”³²² Using the template, the City of Austin creates a specific plan for each golf course proposed.³²³ The plan includes buffer zone specifications, and plans for irrigation management, nutrient management, integrated pest management, and monitoring.³²⁴ Although the Austin template is not adopted through ordinance, the city uses it whenever it considers approval of a golf course.³²⁵

Perhaps the most effective way to improve golf course practices for existing operations would be to encourage the golf courses to do so voluntarily. One measure in particular that could yield great benefits for both parties is to incentivize golf courses to voluntarily adopt an integrated pest management system.³²⁶ Integrated pest management has proven very effective for several golf courses and has reduced the amount of pesticides used by resorts that use them.³²⁷ One outstanding case comes from Applewood Golf Course in Golden, Colorado. This golf course adopted integrated pest management and was able to completely eliminate the use of pesticides.³²⁸ The course was built by the Coors Brewing Company in 1961.³²⁹ By 1988 Coors did not want to risk contaminating the aquifer with runoff from the golf course, so it ordered the golf course to eliminate its chemical use.³³⁰ The course adopted an integrated pest management program and has eliminated the use of chemical pesticides on the course.³³¹ The program is a best practice that golf courses use to ween off the use of pesticides and to ensure that those applying the pesticides are well trained in

317 *Id.*

318 *Id.*

319 *Id.*

320 Teton County Land Development Regulations § 6.1.3(C).

321 *Id.*

322 City of Bloomington, *Best Management Practices for Golf Courses* (last accessed Jan. 6, 2017) <https://bloomington.in.gov/best-management-practices-for-golf-courses#Westover>.

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

328 Ron Whitten, *Special Report: Golf's Green Teams – Precious Few Golf Courses Just Say No to Chemicals*, *Golf Digest* (Oct. 20, 2008) <http://www.golfdigest.com/story/environment>.

329 *Id.*

330 *Id.*

331 *Id.*

minimizing their use.³³² The City of Bloomington, Indiana has outlined integrated pest management on their land-use planning webpage.³³³

In conclusion, although Teton County has the authority to create land-use regulations that could achieve the goals sought, those measures could only be applied to new golf courses, or those golf courses that have terminated, expanded, or modified their use.³³⁴ Further, Teton County already has a regulation in place that requires golf courses to adopt measures to protect the environment.³³⁵

Q

CAN TETON COUNTY BAN RESIDENTIAL USE OF CHEMICAL FERTILIZERS, PESTICIDES AND FUNGICIDES?

A

Yes and no. Teton County cannot further regulate pesticides in Teton County. It is possible that Teton County could limit or ban the use of fertilizers.

The State of Wyoming, through Wyoming Statute § 35-7-374, explicitly preempts any local ordinance regarding “pesticides storage, sale, distribution, notification of use, or use” that is more stringent than the restrictions contained in the Wyoming Environmental Pesticide Control Act or the Wyoming Department of Agriculture’s rules promulgated from the statute.³³⁶ However, the statute and regulations deal more with labeling and storage of pesticides than restricting the use of pesticides, and thus there appears to be no regulatory limit to pesticide use.³³⁷ Although there is a preemption for pesticides, there is not a preemption for chemical fertilizers.³³⁸ Thus, Teton County cannot limit pesticides and fungicides, but it does have the authority to implement land-use regulations that would curtail the use of fertilizers in the county. Although Teton County would have the authority to limit the use of fertilizers, this authority is once again limited to any new or changed uses in the county.³³⁹

Q

CAN TETON COUNTY ENFORCE A SETBACK FROM FISH CREEK FOR LAWN MOWING?

A

Yes. The answer to this question is very similar to the answer to whether regulations can be adopted to regulate golf course activity. The answer is that a setback could be created for lawns next to Fish Creek, but the setback could only be enforceable against those creating new uses along the river or non-conforming uses that have been terminated, expanded, or modified.³⁴⁰

332 *Id.*

333 *Id.*

334 *Snake River Brewing Co.*, 39 P.3d at 404.

335 Teton County Land Development Regulations § 6.1.3(C).

336 Wyo. Stat. Ann. § 35-7-374.

337 *Id.*

338 *Id.*

339 *Snake River Brewing Co.*, 39 P.3d at 404.

340 *See supra* notes 263-272 and accompanying text.

Q

CAN TETON COUNTY OR THE WDEQ BAN DUMPING OF UN-COMPOSTED SLUDGE (FROM ADJACENT FARM LANDS IN PARTICULAR) INTO THE FISH CREEK DRAINAGE SYSTEM?

A

Yes. Both entities can ban the dumping of uncomposted sludge into Fish Creek. However, Teton County is once again limited to regulating new or changed uses to the property, therefore, for Teton County, the answer to this question is very similar to the answer to whether regulations can be adopted to regulate golf course activity. The answer is that Teton County can ban the dumping of uncomposted sludge, however, the ban could only be enforceable against those creating new uses along the river or non-conforming uses that have been terminated, expanded, or modified.³⁴¹ In fact, dumping sludge into Fish Creek without a permit is a violation of the CWA and the WEQA.³⁴²

The CWA prohibits discharges of pollutants from a point source into navigable waters unless a permit is obtained.³⁴³ Sludge falls under the definition of pollutant under the CWA.³⁴⁴ The question then becomes whether the person is dumping the sludge from a point source. The CWA defines a point source as, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”³⁴⁵

However, the CWA specifically exempts agricultural stormwater discharges and return flows from irrigated agriculture from being point sources.³⁴⁶ Since the CWA specifically excludes stormwater discharges and irrigated agriculture return flows from being a point source, it is unlikely that the CWA could be used to prohibit sludge that enters the water from runoff in agriculture, unless the farmland used a listed point source from which to dump the sludge.³⁴⁷

One way there could be a point source on agricultural land would be if the operation were considered a Concentrated Animal Feeding Operation (CAFO).³⁴⁸ A CAFO is an Animal Feeding Operation (AFO) that has a statutorily designated number of animals on the operation.³⁴⁹ An AFO is generally a livestock operation in which the animals are in a confined area and feed is brought to the animals in lieu of pasture grazing.³⁵⁰

In Wyoming, CAFOs are further broken down into three different categories, Large CAFOs, Medium CAFOs, and Small CAFOs.³⁵¹ Large CAFOs are operations that hold 1,000 or more cattle.³⁵² Medium CAFOs are operations that hold between 300 and 999 cattle and where “pollutants are discharged into surface waters of the state through a man-made ditch, flushing system, or other similar man-made device; or pollutants are discharged directly into surface waters of the state which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.”³⁵³ Small CAFOs are those operations that the director of the

341 See *supra* notes 263-272 and accompanying text).

342 The Clean Water Act, 33 U.S.C. § 1311(a), 1362(12)(a) (2012); Wyo. Stat. Ann. § 35-11-301.

343 The Clean Water Act, 33 U.S.C. § 1311(a).

344 *Id.* 33 U.S.C. § 1362(6).

345 *Id.* 33 U.S.C. § 1362(14).

346 *Id.*

347 *Id.*

348 *Id.*

349 40 C.F.R. §122.23.

350 Mary Jane Angelo & James F. Choate, *Agriculture and the Clean Water Act*, MARY JANE ANGELO, JASON J. CZARNEZKI, AND WILLIAM S. EUBANKS, III, FOOD, AGRICULTURE AND ENVIRONMENTAL LAW, 16 (ELI Press, 2013) https://law.ku.edu/sites/law.ku.edu/files/docs/law_review/symposium/angelo-materials.pdf.

351 Wyo. Admin. Code § ENV WQ.Ch. 2 App. G.

352 *Id.* § ENV WQ.Ch. 2 App. G. (b)(v).

353 *Id.* § ENV WQ.Ch. 2 App. G. (b)(vii).

WDEQ determines is a significant contributor of pollution to the surface waters of the state.³⁵⁴ When determining whether a Small CAFO is a significant contributor of pollution, the director must consider (1) the size and amount of waste reaching the surface water; (2) the location of the AFO relative to the surface water in the area; (3) the means of conveyance of the waste into the surface water, and (4) the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of waste into surface water.³⁵⁵

In conclusion, it is rare for agricultural land to be controlled by the CWA because the CWA explicitly exempts agricultural runoff. Although it is rare, it is possible. If an agricultural project is a CAFO it must have a discharge permit issued by WDEQ.³⁵⁶ If there is a CAFO in the area, discharge permitting could regulate those agricultural discharges into Fish Creek.

Q

CAN TETON COUNTY REQUIRE MANURE MANAGEMENT SYSTEMS?

A

Yes, Teton County can require a manure management system for new agricultural developments. Under Wyoming Statute § 18-5-201, Wyoming has vested the authority to the counties to control land-use regulations in their local jurisdictions.³⁵⁷ Zoning ordinances can be used to regulate the nature of the land use and the physical dimensions of the use.³⁵⁸ Such uses can include a conditional use in which the county requires the development to meet certain specifications in order to grant the permit.³⁵⁹ However, new zoning ordinances can only be enforced against new uses and cannot be enforced against preexisting uses.³⁶⁰ A nonconforming use can only continue so long as the use continues to exist.³⁶¹

Other parties that could be required to adopt a manure management system are CAFOs. CAFOs are considered a point source and require a permit from the WDEQ to operate.³⁶² The WDEQ could condition the permit to require the CAFO to adopt a manure management system to ensure that the CAFO never increases its discharges.³⁶³

Although there is minimal regulation that can be implemented against existing nonpoint source developments, the State of Wyoming has a grant program called a 319 Grant that allows organizations to gain state funding to reduce nonpoint source contamination.³⁶⁴ The program is available for any project that demonstrates a real potential to increase water quality by reducing nonpoint source discharges.³⁶⁵

In conclusion, Teton County can require new agriculture operations to adopt manure management systems as a condition of their permit. The county cannot force existing uses to adopt manure management systems. The WDEQ can require CAFOs to adopt a manure management system as a condition of the CAFO's point source permit.

In 1998, a consensus based committee in Missoula, Montana, focused on the goal of restoring beneficial uses and eliminating

354 *Id.* § ENV WQ Ch. 2 App. G. (c).

355 *Id.*

356 *Id.* § ENV WQ Ch. 2 App. G. (d).

357 Wyo. Stat. Ann. § 18-5-201.

358 *Cheyenne Airport Bd.*, 707 P.2d at 726.

359 Wyo. Stat. Ann. § 18-5-201.

360 Wyo. Stat. Ann. § 18-5-207; *see also Snake River Brewing Co., Inc.*, 39 P.3d at 404.

361 *Snake River Brewing Co.*, 39 P.3d at 404.

362 Wyo. Admin. Code § ENV WQ Ch. 2 App. G.

363 *Id.* § ENV WQ Ch. 1 s 7(a).

364 Wyoming Department of Environmental Quality, *Grant Resources* (Jan. 7, 2017) <http://deq.wyoming.gov/wqd/non-point-source/resources/grant-resources/>.

365 Department of Environmental Quality, *Request for Proposals for Federal Fiscal Year 2017 Section 319 Funds Pre-Review Proposal Submittal Deadline (Optional): Monday, August 1, 2016 Final Proposal Submittal Deadline: Friday, September 16, 2016*, 2 (Jun. 15, 2016) http://deq.wyoming.gov/media/attachments/Water%20Quality/Nonpoint%20Source/Grant%20Resources%20FY17_319RFP_MEMO.pdf.



nuisance algae growth in the Clarks Fork River.³⁶⁶ This group successfully developed and implemented the Clarks Fork River Voluntary Nutrient Reduction Program (VNRP).³⁶⁷ To gain public support for the approval of the VNRP the committee worked with the Montana Department of Environmental Quality (Montana DEQ) to facilitate public meetings and incorporated public comments into the document.³⁶⁸

The VNRP is a voluntary program that provides the four major point source dischargers into the Clarks Fork River (three municipal wastewater treatment facilities and a paper mill) with an opportunity to develop and implement their own plan to reduce nutrient discharges and improve in-stream quality of the Clarks Fork River.³⁶⁹ This voluntary program is offered in place of a Montana DEQ-administered mandatory program of permit based effluent reductions.³⁷⁰

In addition to the voluntary efforts of the four major point source emitters, additional commitments were made by local government entities to develop a strategy to address septic effluent/groundwater-to-surface water issues also affecting nutrient levels in the Clarks Fork River.³⁷¹ The City of Missoula, the Missoula City/County Health Department and Missoula County agreed to the following action items to address the septic effluent issues for the Missoula Valley, both inside and outside the sewer service areas:

- Review state and local regulations with the goal of removing disincentives and/or offering incentives for connecting new and existing septic systems to public sewage collection and treatment facilities that will remove nutrients;
- Maintaining existing local regulations and modifying state subdivision regulations as appropriate to encourage

366 Tri-State Implementation Council, *Clarks Fork Voluntary Nutrient Reduction Program*, (August 1998). <http://clarkfork.org/wp-content/uploads/2016/03/VNRP-Agreement.pdf>.

367 *Id.*

368 *Id.* at 32.

369 *Id.* at 1.

370 *Id.*

371 *Id.* at 3-6.

clustering and smaller lots in new subdivisions and provide for the economically feasible, orderly and timely connection of new subdivisions in the area onto public sewer;

- Encouraging development of alternatives to municipal wastewater disposal to reduce nutrients from new development (e.g. land application, wetlands, and nutrient removal septic systems);
- Connecting 50% of the existing 6,780 septic systems in the Missoula urban area; and
- Continuing to connect existing septic systems in the Missoula area to public sewage treatment and collection facilities at a rate approximately equivalent to the number of new septic permits issued in the Missoula Valley Water Quality District.³⁷²

In the VNRP the committee acknowledged that septic systems are likely point sources under the CWA, but went on to note that they do not intend septic systems to be required to seek a NPDES permit.³⁷³ Instead, the committee acknowledged septic systems as a point source to provide a sound basis for mandatory county and/or health department septic regulations to deal with septic contributions to surface water.³⁷⁴

To address septic densities outside of areas serviced by wastewater treatment facilities the VNRP noted that local government entities will:

- Estimate the discharge of septic nutrient effluent and track new septic permits and new public sewer connections;
- Develop a maximum permissible allocations of septic nutrient discharge to surface water, institute adequate requirements and policies to implement the allocation;
- Explore options to address discrepancies in surface and groundwater standards, and develop a program to address small community land application and rapid infiltration systems.;
- Provide for the extension of sewer plans to high density unsewered areas as quickly as feasible;
- Provide for the orderly and timely connection of new subdivisions into public sewer;
- Give credit to wastewater treatment facilities for meeting nutrient reductions as additional hook-ups are made; and
- Encourage planning for alternatives to municipal wastewater disposal to reduce nutrients form new development (such as land application, wetlands, and nutrient removal septic systems).³⁷⁵

An analysis of the success of the VNRP conducted in 2011 by University of Montana, the Montana Department of Environmental Quality, and Kansas State University researchers indicated that the Clarks Fork nutrient reduction efforts produced improvements at some sites, and have at least “held the line” elsewhere despite a 20% increase in population in Missoula over the decade of the VNRP.³⁷⁶ The researchers noted that the VNRP was successful in reducing point source loads and the number of septic systems (3,000 septic systems reduced); however, they also noted that algae levels have only decreased slightly or remained static suggesting tighter nutrient standards should be implemented.³⁷⁷

372 *Id.* at 5.

373 *Id.* at 24.

374 *Id.*

375 *Id.* at 24-25.

376 Vicki Watson; Mike Suplee; and Walter Dodds, *10 Years of Nutrient Reductions on the Clarks Fork River, Conference Paper 9th ESA Annual Convention* (2011) http://www.montanaawra.org/wp/ppts/2012/session7/Watson_Vicki_Clark_Fork_River.pdf.

377 *Id.*



CASE STUDY: MASSACHUSETTS REVISED TITLE 5 SEPTIC SYSTEM REGULATIONS

In 1995, after becoming aware that 44 percent of Massachusetts’s main rivers, and 60 percent of its assessed coastal waters failed to meet water quality standards for fishing and swimming, despite significant process on point source, the Massachusetts Department of Environmental Protection (MDEP) turned their attention to nonpoint sources.³⁷⁸

The MDEP confirmed that the major generators of nonpoint source contamination included storm water runoff and failing to substandard septic systems.³⁷⁹ These failing septic systems were a major source of pathogens and excess nutrients in the waters of Massachusetts. In 1995 the MDEP estimated that 27% of households (650,000 homeowners) in Massachusetts were served by onsite sewage disposal systems, either septic systems or cesspools.³⁸⁰ The MDEP regulates the siting, design, installation, and operation of onsite disposal systems under Title 5 of the Massachusetts State Environmental Code.³⁸¹

In the spring and summer of 1995, the MDEP oversaw a major regulatory revision to Title 5. The purpose of the revision was to “regulate subsurface septic systems to protect groundwater and surface water from the adverse affects of on-site septic system effluent.”³⁸² Prior to regulatory revision, septic system owners in Massachusetts were required to “properly maintain” on-site disposal systems, but there were no additional requirements to ensure inspections were taking place.³⁸³

The first version of the revised Title 5 regulations went into effect on March 31, 1995.³⁸⁴ The regulations were met with an overwhelming public outcry, spurred by rumors that required septic system repairs were exceeding the value of residences.³⁸⁵ Concern over the regulation led to a threat by the state legislature to impose a moratorium on the enforcement of the

378 Allison Hamm, *The Massachusetts Experience With NonPoint Sources: Regulators Beware!*, 10-WTR Nat. Resources & Env’t 47 1996 at 47.

379 *Id.*

380 *Id.*

381 *Id.*

382 Richard Reilly, *Flushing Money Down the Drain: Environmental Regulatory Takings and Title 5 of the Massachusetts State Environmental Code*, 32 Suffolk U. L. Rev. 663, 664 (1999).

383 Hamm, *supra* note 380 at 47.

384 *Id.*

385 *Id.*

regulations.³⁸⁶ The MDEP acknowledged that its initial proposed regulation revision was “disastrous” because the agency failed to form a broad advisory group and failed to garner sufficient public support.³⁸⁷

In response to the public concern and criticism, the MDEP undertook an emergency revision to the regulations and released its revised Title 5 regulations on August 2, 1995.³⁸⁸ During the emergency revision process the MDEP sought greater public input from builders, realtors, health boards, and environmentalists.³⁸⁹ As a result the regulations were better received.³⁹⁰

The revised Title 5 regulations strictly govern the siting, construction, upgrade, and maintenance of on-site sewage disposal systems and appropriate means for the transport and disposal of sewage under threat of civil and criminal penalties.³⁹¹ Subpart B: “Siting of Systems,” contains stringent siting requirements for new septic systems including setbacks from surface water supplies, restrictions on construction in velocity zones or in a regulatory floodway, and restrictions on new construction in nitrogen sensitive areas.³⁹²

With regard to existing sewage systems, Subpart D: “Inspection and Maintenance of Systems,” requires that “any person owning a home or operating a facility on which an on site subsurface sewage treatment and disposal system is installed shall be responsible for the inspection and maintenance of, and any necessary upgrades to, the system.”³⁹³ To comply with this regulation, a homeowner with an on-site sewage disposal system must retain a licensed inspector to inspect their systems at the time of transfer of the property to a new owner, at a point of change of use or expansion, or if specifically required by the MDEP or the a local Board of Health.³⁹⁴ Those homeowners whose systems fail an inspection must ensure their systems meet the Title 5 code requirements by either upgrading or replacing their septic systems at their own expense within two years of the discovery.³⁹⁵ Property transfers, as part of estate planning and involuntary transfers (such as those through bankruptcy proceedings), must also comply with Title 5 regulations.³⁹⁶

The Title 5 inspection and maintenance regulations also include a provision instructing the MDEP to produce and distribute educational materials to the general public describing the importance of proper maintenance and operation of septic systems and the impact of such systems on public health and the environment.³⁹⁷

The Massachusetts Title 5 case study seems to be particularly applicable to the Fish Creek situation given the primary concern with nonpoint source groundwater contamination from septic systems. Because of its relevance we have provided additional readings on Title 5 to the Executive Director of Friends of Fish Creek. The criteria for inspection may be of particular interest and can be found at in the Title 5 regulations at 15.302.

386 *Id.*

387 *Id.*

388 *Id.*

389 *Id.*

390 *Id.*

391 Reilly, *supra* note 384 at 665.

392 310 Mass. Code Regs. 15.211, 15.213, 15.214 (2016).

393 310 Mass. Code Regs. 15.300(4) (2016).

394 310 Mass. Code Regs. 15.301 (2016).

395 *Id.*

396 *Id.*

397 310 Mass. Code Regs. 15.300(3) (2016).



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