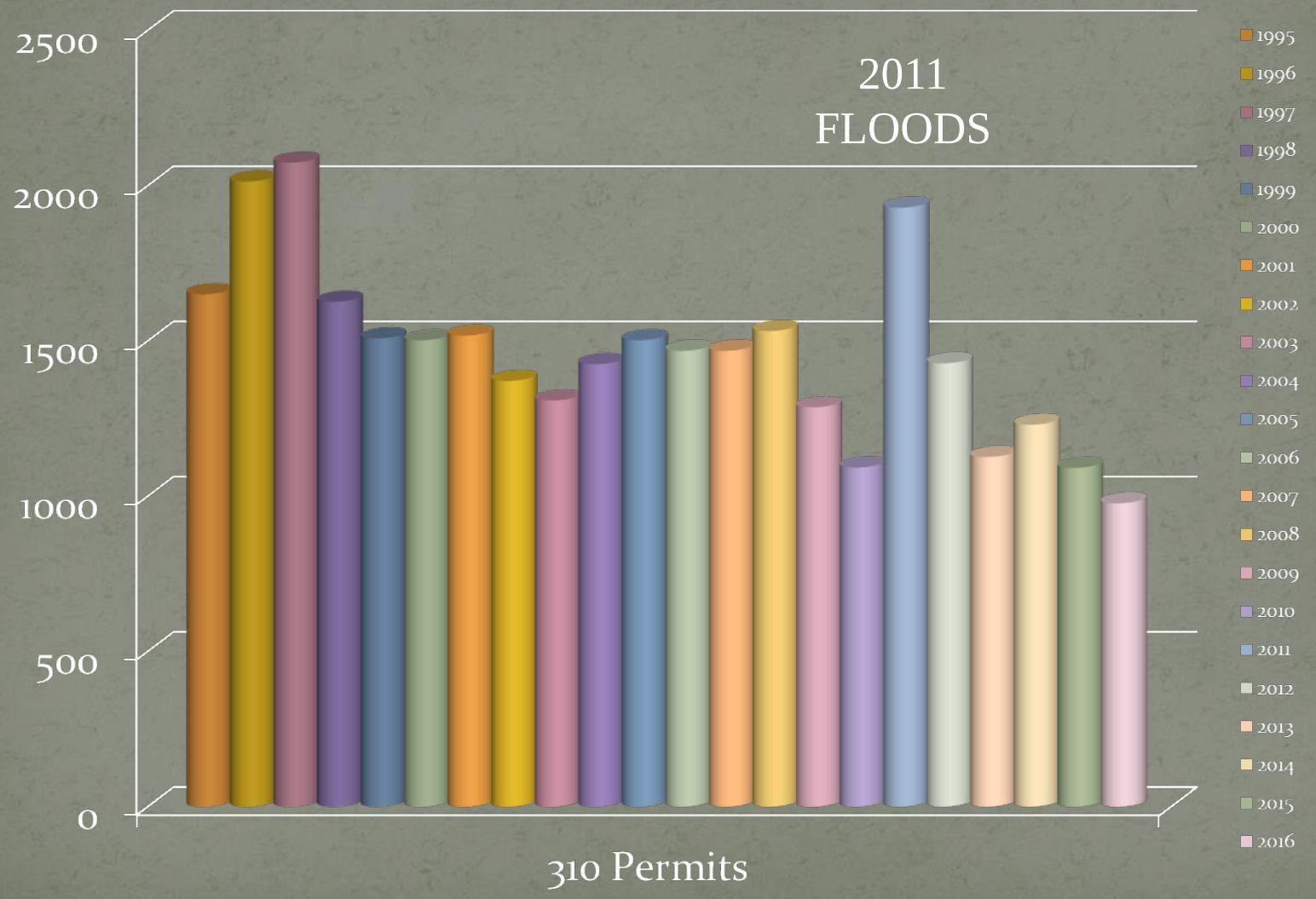
STREAM PERMITTING

310 BASICS

ADMINISTERED BY THE CONSERVATION DISTRICTS OF MONTANA

310'S APPLICATIONS IN MONTANA 1995-2016



History of the 310 Law

- A little over 50 years ago, Montana policy makers embarked on a process that would eventually overhaul regulation related to the state's waters and streams. Beginning with the Montana Stream Protection Act in 1963, the Montana Legislature subsequently passed major acts related to water quality, water use, and streambed protection.

- While the Stream Protection Act created regulations for government actions (especially highway projects) in and around streams, the 1975 Natural Streambed and Land Preservation Act was passed to govern private party stream and river projects. The *Natural Streambed and Land Preservation Act* of 1975 was passed "to provide for a policy of preserving the natural or existing shape, form and course of streams to activities of private persons or organizations; and in so doing to keep soil erosion and sedimentation to a minimum."

History of the 310 Law – (Cont.)

- The act tasked the state's 58 conservation districts with an important permitting process – the 310 permit, named after the bill number for the act, Senate Bill 310. A 310 permit is necessary for any activity that alters or modifies the bed or banks of a perennially flowing stream. A conservation district's board of supervisors must scrutinize a project for potential erosion and sedimentation issues, while also protecting the use of water by irrigators or other agricultural users.

- While many other agencies are involved in decisions when a project impacts a stream – for example, the FWP issues SPA 124 permits for projects modifying the natural existing shape and form of any stream or its banks to protect fisheries, and the DEQ issues stormwater discharge permits for projects that discharge storm water into surface waters – conservation district's major regulatory authority is issuing hundreds of 310 permits annually across the state.

What laws or rules are used to regulate stream activity?

- Administrative Rules of Montana.
- Local Rules- Conservation District, City, County.
- Federal, State, and Local Laws for Projects in a Floodplain.

310 Basics

- Purpose of the law:

  . . . That natural rivers and streams and lands immediately adjacent to them are to be protected and preserved to be available in their natural or existing state . . . Keeping soil erosion to a minimum except as may be necessary and appropriate after consideration of all factors . . .

310 BASICS

- Further . . .

  The policy recognizes the needs of irrigation and agricultural uses and the need to protect the use of water for any beneficial purpose guaranteed by the constitution . .

310 Law Applicability

Law applies to:

- Perennial-flowing streams - Definition of Perennial

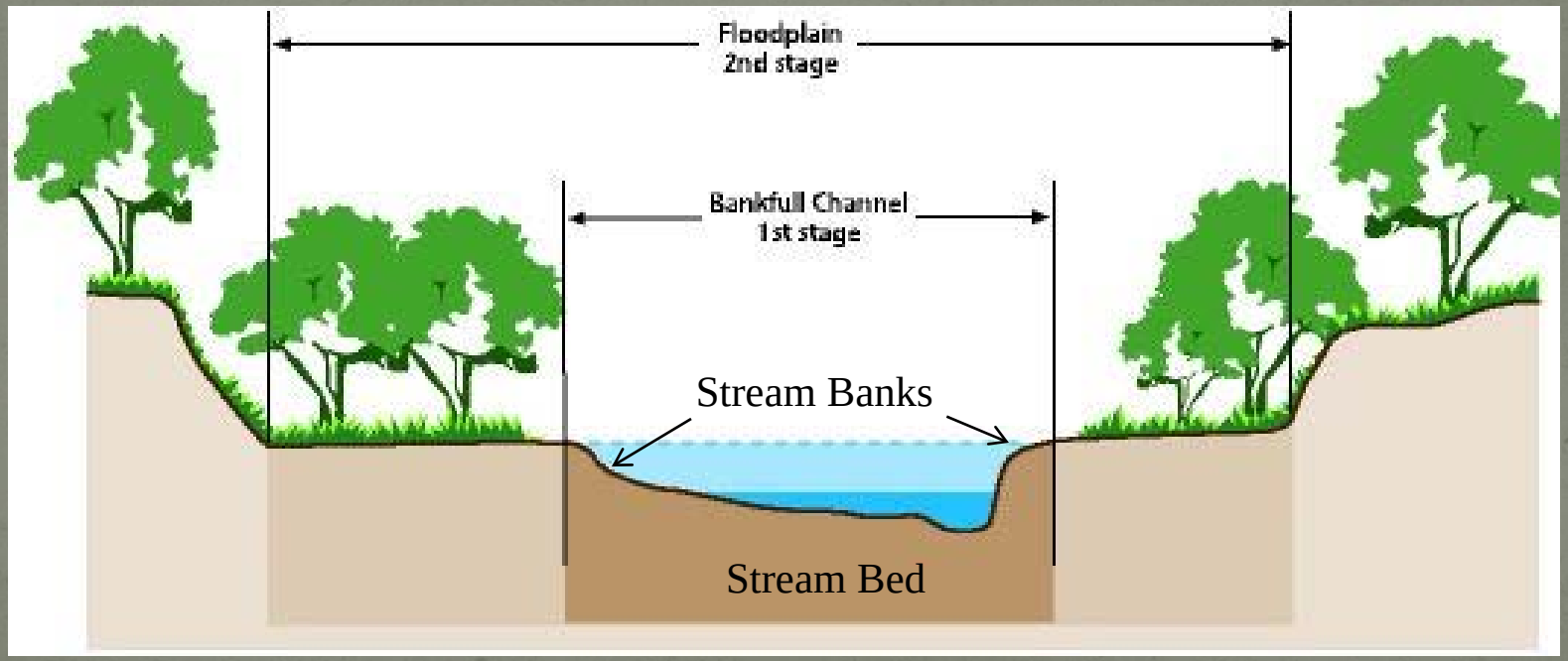
Determining if a stream should be considered perennial or not can be complicated. Most Conservation Districts use these definitions:

- “Natural perennial-flowing stream”- means a stream, which in the absence of diversion, impoundment, appropriation, or extreme drought, flows continuously at all seasons of the year and during dry as well as wet years.

- Also: "Stream" means any natural perennial-flowing stream, or river, its bed and immediate banks, and its channels, and includes the entire stream from its mouth to its source even if portions go dry periodically. The term does not include a stream or river that has been designated by district rule as not having significant aquatic and riparian attributes in need of protection or preservation under 75-7- 102, MCA.

310 Law Applicability (cont.)

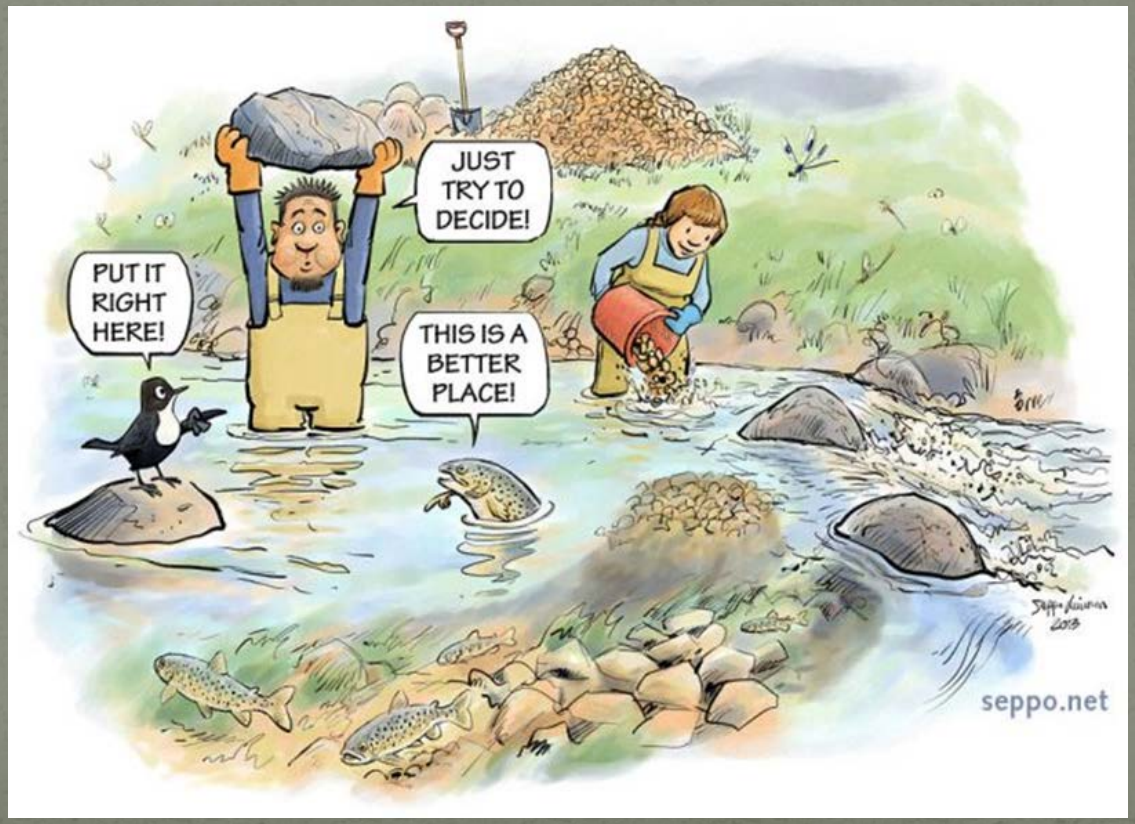
- Stream Bed.
- Immediate Banks.
- Bank Full - Above high water mark to a point where a project doesn't physically alter a stream or its banks.



310 Law Applicability (cont.)

- Who does the law apply to?

Any private, nongovernmental individual or entity that proposes to work (Do a Project) in or near a perennial flowing stream on public or private land.



Definition of "Project":

- "Any activity that results in a change in the state of a natural perennial-flowing stream or river, its bed, or its immediate banks."

- This can also mean a project located on a dry drainage (intermittent or ephemeral stream) that in the event of a storm event, could cause sediment or erosion in or on a perennial stream.

310 Project Examples:

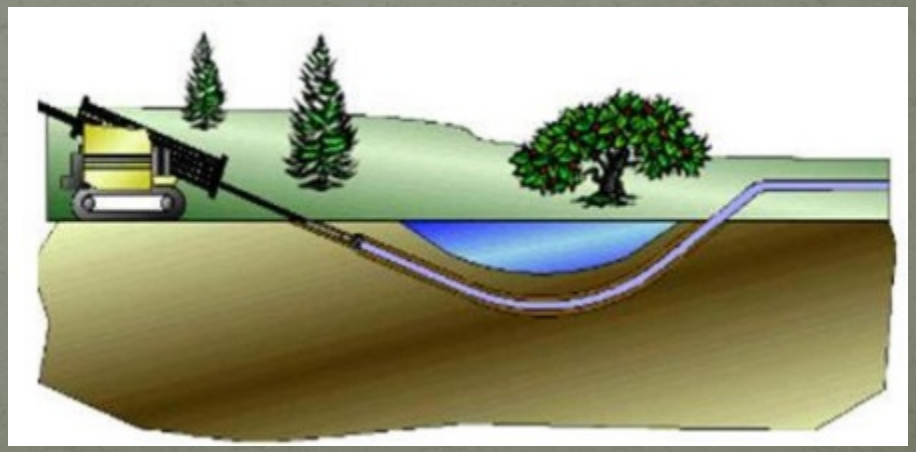
- Bank Stabilization
- Stream Restoration
- Flood Protection

BEFORE

AFTER

310 Project Examples (Cont.)

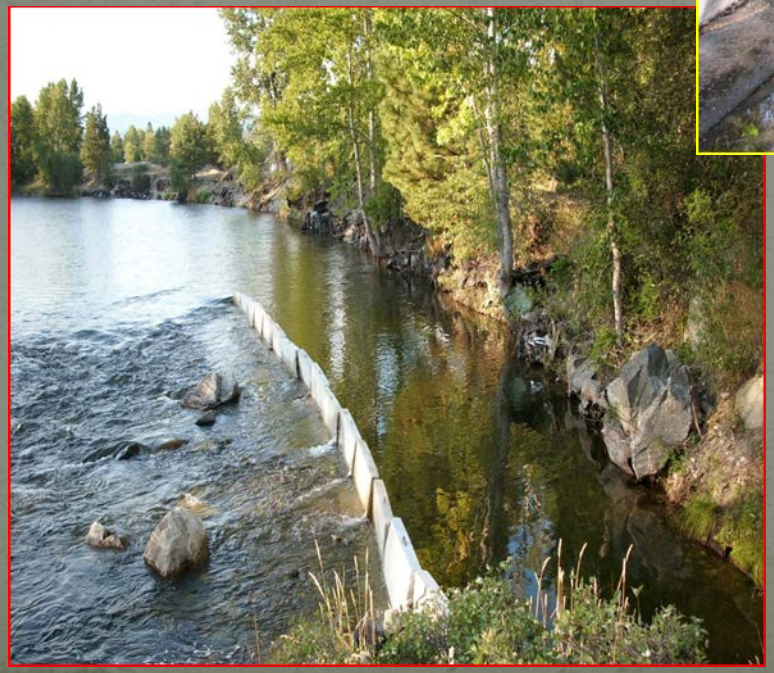
- Bridges
- Culverts
- Utilities



310 Project Examples (Cont.)

Irrigation:

- Headgates
- Diversions
- Maintenance



Annual Maintenance Permits Are Available and are good for 10 years.

310 Project Examples (Cont.)

- New Fords or Heavy Use of An Existing Ford Crossing

310 Project Examples (Cont.)

- In-Stream Ponds (pools) – Generally not allowed.

- Sediment traps.
- Tubifex worms (host whirling disease parasite).
- Solar collectors. Raise Stream Temp.
- Require periodic maintenance -Pools need to be self maintaining with hydraulic scouring.

Jurisdiction and is it Perennial?

- Perennial? – How do you determine if a waterway is perennial?

- We know from the two "big" cases we have on this question that when deciding whether a stream meets the definition of "natural perennial-flowing stream," our conservation districts are to interpret their jurisdiction very broadly to include the stream if at all possible.

- Bitterroot River Protective Ass'n. v. Bitterroot Conservation Dist., 346 Mont. 508, 198 P.3d 219 (2008) (BRPA II) , and City of Livingston v. Park Conservation Dist.; 371 Mont. 303, 307 P.3d 317 (2013). BRPA II and City of Livingston, the issue was whether side channels of the Bitterroot (Mitchell Slough) and Yellowstone Rivers were “natural”.

Jurisdiction and is it perennial?

- In BRPA II, the BCD determined that Mitchell Slough was not a "natural" stream and that as a result the BCD lacked jurisdiction. District court in Ravalli County affirmed that determination. Montana Supreme Court reversed both the Bitterroot Conservation District and the district court, finding not only had they had erred, but that they had ***abused their discretion*** by not applying the Act to protect the stream.

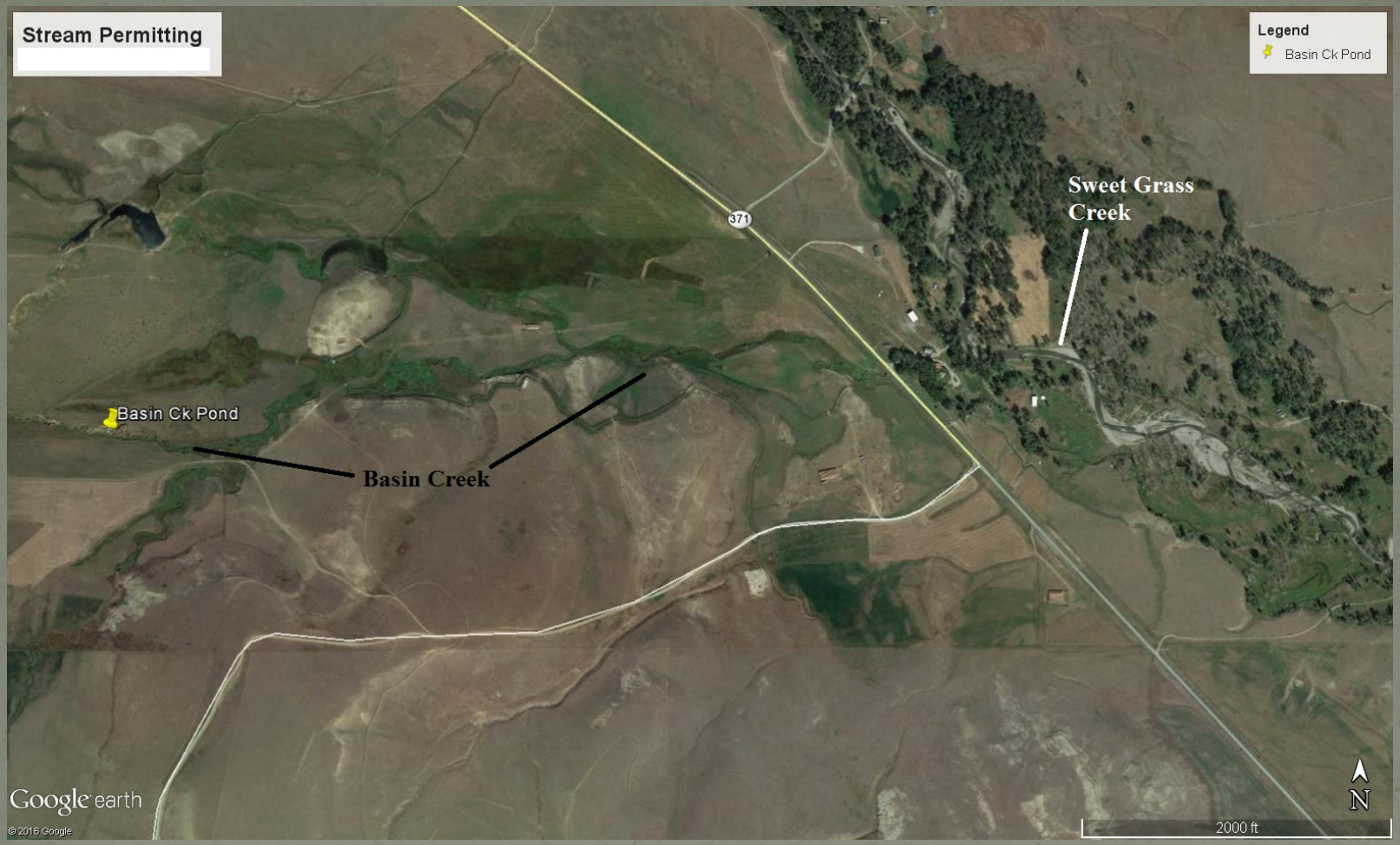
- The Court made it clear that the purpose of the Streambed Act (and the function of our conservation districts in enforcing it) is to protect Montana's streams, and the only way to provide that protection is to interpret the law and regulations expansively to support jurisdiction and not leave the stream unprotected and vulnerable to unregulated degradation.

JURISDICTION AND IS IT PERENNIAL?

- Ephemeral (stormwater) stream' means a feature that carries only stormwater in direct response to precipitation with water flowing only during and shortly after large precipitation events. An ephemeral stream may or may not have a well-defined channel, the aquatic bed is always above the water table, and stormwater runoff is the primary source of water. An ephemeral stream typically lacks the biological, hydrological, and physical characteristics commonly associated with the continuous or intermittent conveyance of water.
- 'Intermittent stream' means a well-defined channel that contains water for only part of the year, typically during winter and spring when the aquatic bed is below the water table. The flow may be heavily supplemented by stormwater runoff. An intermittent stream often lacks the biological and hydrological characteristics commonly associated with the conveyance of water.

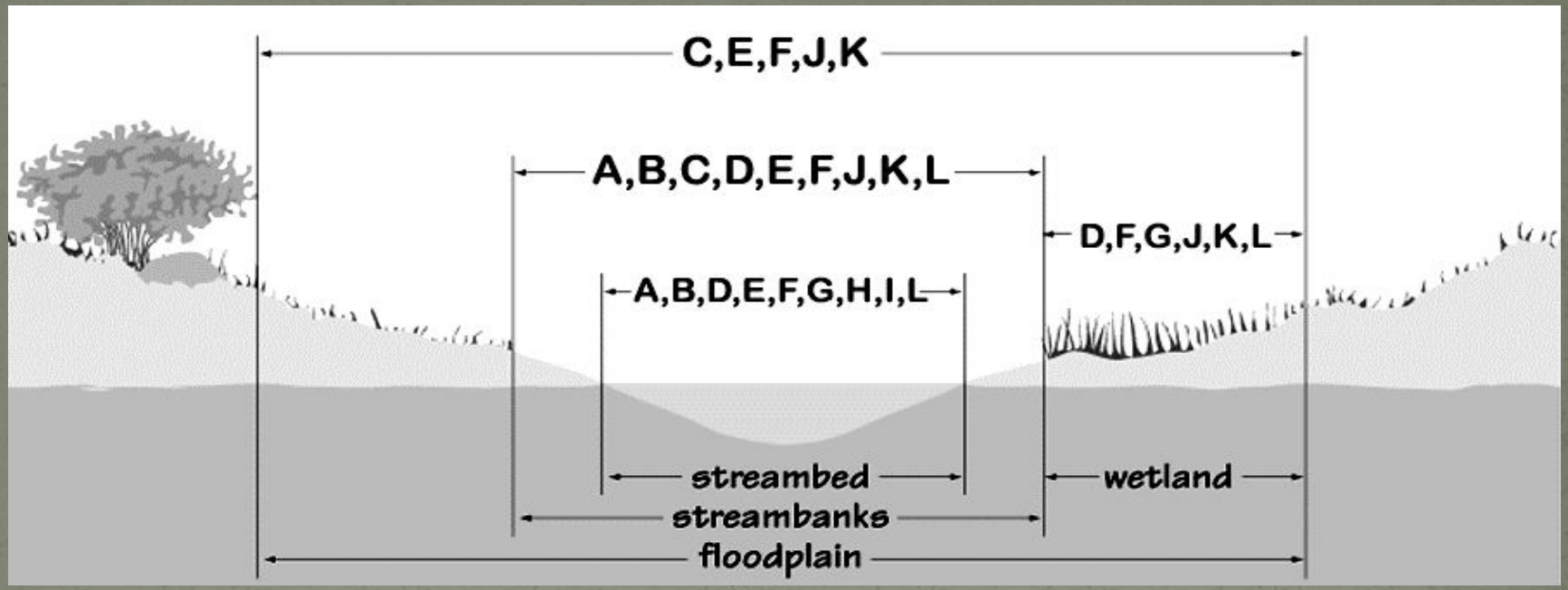
- These 2 definitions are from the North Carolina Division of Water Quality
- So to summarize these definitions… an Ephemeral Stream only flows water during storm events. An Intermittent stream has flow both from storm events as well as from groundwater.

JURISDICTION AND IS IT PERENNIAL?



Basin Creek is a perennial stream in its upper reaches which has sections that go dry periodically downstream. Since the project is just upstream from to its confluence with Sweet Grass Creek (which is a perennial stream), the CD took jurisdiction over Basin Creek due to the potential impact of projects completed on Basin Creek which could have detrimental effects on Sweet Grass Creek as well as downstream landowners.

What Permit Do I Need?



A. Montana Natural Streambed and Land Preservation Act (310) - Conservation District – Any private, nongovernmental individual or entity.

B. Montana Stream Protection Act (SPA 124 Permit) – MT FWP – Any agency or subdivision of state, county, or city government.

C. City or County Floodplain Development Permit. – DNRC and Conservation Floodplain Management Section

D. Federal Clean Water Act (404 Permit) - To restore and maintain the chemical, physical, and biological integrity of the nation's waters. - USACOE

E. Federal Rivers and Harbors Act (Section 10 Permit) - USACOE

F. Short-Term Water Quality Standard for Turbidity (318 Authorization) – MTDEQ Water Protection Bureau

G. Montana Land-Use License or Easement on Navigable Waters – DNRC Land Office or Real Estate Management Bureau

H. Montana Water Use Act (Water Right Permit and Change Authorization) – DNRC and Conservation Water Rights Bureau

I. Montana Water Use Act (Water Reservations) – Conservation District or DNRC Water Reservations

J. Stormwater Discharge General Permits - MTDEQ Water Protection Bureau

K. Streamside Management Zone Law - Department of Natural Resources and Conservation Forestry Division or Local DNRC Land Office

Application

- Use Joint Application (310 Form 270) – Also has sections for SPA 124, Floodplain Permit, 404 Permit, Section 10 Permit, 318 Authorization/401 Certification, and Navigable Rivers Land Use.
- Available from the local Conservation District or on the DNRC website under Licenses and Permits/Stream Permitting.
- Joint Application instructions are also available.

Application (cont.)

What makes a good application?

- Complete Applicant Information, Physical Address, Mailing Address, Phone Numbers and/or Email.
- Complete Project Site Information, Location, and Water Body Name.
- Complete Project Information Including Plans, Drawings and/or Design, Purpose, Materials, and Equipment.
- Detailed maps and diagrams are very helpful.
- Adjacent Landowner information.
- CD does not design Projects for the applicant. Funding is available for technical review to the CD.

310 Application Process

- CD Receives Application for a Project.
- Initially Reviews and Accepts or Denies.
- Denied if it is obviously not a project or if the application is incomplete.
- Time Frame Starts When Application Accepted.
- Notify FWP of Inspection within 10 working days.

  - FWP has 5 working days to say if they want an inspection.

  - Though their participation is required by Law, it is advisory only.

310 Application Process (Cont.)

- Typical 310 Application Timeline – 60 days from date of acceptance of application. Can be shorter or longer.

1. Receive the Application in July.
2. Inspection/Decision August.
3. Issue Decision September.

310 Application Process (Cont.)

- Typical 310 Application Timeline for Application submitted in early July.

  July 3– Application Received

  July 5 - Public Notice/Agenda

  July 12 Monthly CD Meeting – Review Application and make determination:

  1. It is Not A Project.
  2. Set up or Waive Inspection. Notify FWP within 10 working days for Inspection.

310 Application Process (Cont.)

JULY 2017						
SUN	MON	TUES	WED	THURS	FRI	SAT
						1
2	3 App. Rec'd	4	5 Public Notice	6	7	8
9	10	11	12 CD Meeting- Review App.	13	14	15
16	17	18	19	20	21	22
23	24	25	26 Notify FWP	27	28	29
30	31					

310 Application Process (Cont.)

- Typical 310 Application Timeline August

August 2nd - Inspection Based on Team Member Availability.

August 9 - Board Reviews Team Report at Board Meeting.

1. Not A Project
2. Accept
3. Modify
4. Deny

310 Application Process (Cont.)

August 2017						
SUN	MON	TUES	WED	THURS	FRI	SAT
		1	2 Team Inspection	3	4	5
6	7	8	9 CD Meeting-Review Team Report	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30 Applicant may start project	31		

310 Application Process (Cont.)

- August 30 – CD Issues Permit.*
- Applicant Returns Signed Copy - Set Date.
- Note: Applicant cannot start work before this date.*
- Applicant is given one year to complete their project. (In some cases extensions are needed.)
- An applicant is required to submit written notification and photos to the Conservation District when they have completed their project. Project Completion Form.

* There is a 15 day waiting period once the permit is issued which may be waived by the Board.

310 Application Process (Cont.)

- The Conservation District may request a follow-up inspection to verify the project was done in accordance to what was permitted.
- Written documentation of the follow up inspection should be attached to the original application and kept on file.
- The District may request a Completion Form once the project is completed.
- Documentation of everything is very important!

Team Inspection Process

Law requires supervisors to determine:

- The purpose of the project.
- If the project is reasonable - Law sets forth criteria to determine reasonableness.
- Effects on soil erosion, sedimentation.
- Are their alternatives that are reasonably practical that would reduce disturbance and accomplish the same result?
- Will the project create harmful flooding or erosion up or down stream?
- Will it effect adjacent landowners?
- Effects of stream channel alteration.
- Effects on streamflow, turbidity, or water quality caused by materials used or ground cover removed.
- Effects on fish and aquatic habitat.

Note: CD's can not design an applicants project, but can make suggestions and modifications.

Team Inspection Process (cont.)

Team Inspection Process (Cont.)

Team inspection:

- Consists of CD Supervisors, FWP, and Applicant or Landowner.
- Review all information presented on application.
- Complete and submit Team member reports.

Team Inspection Process (Cont.)

- Within 30 days, team members submit a report in writing to the supervisors.
- Supervisors decide to approve, modify, or deny team's recommendations.
- Notify applicant within 60 days of acceptance of application.
- 15-day waiting period after supervisors decision (permit).
  - The CD (if all members agree) may waive waiting period.
- A team member or applicant may ask for arbitration if they disagree with board's decision.

Violations

Cutoff of Meander on Perennial River.

Violations

310 and Floodplain Violation

Violations

Lidar is a useful tool for detailed surface information

EMERGENCIES

- What is an emergency?
- As defined in 310 law, emergency means:
  - Unforeseen event or combination of circumstances that calls for immediate action to safeguard life, including human or animal, or property, including growing crops, without giving time for the deliberate exercise of judgment or discretion under the act.

Emergencies (cont.)

- Must notify supervisors within 15 days

  - Submit Form 275 (Notice of Emergency) Available from CD or DNRC website.

- If no action required, then nothing further.
- If project needs to be fixed or modified.
  - Applicant must fill out a Joint Application to mitigate. Possibly other permits as well.
  - Normal 310 process starts.

Emergencies (cont.)

EMERGENCIES (CONT.)

EMERGENCIES (CONT.)

Emergencies (cont.)

Emergencies (cont.)

OTHER

- CD Meetings are open to the Public

- Help is available from your local CD or DNRC Office
  - Advise, informal
  - Technical assistance
  - Funding Source Assistance

Any Questions?