



## II. BACKGROUND

Foster's applied for approval to install a wastewater system in June 2003 to support five cabins and two trailers.<sup>1</sup> The proposed wastewater system included a 1000-gallon septic tank (First Septic Tank") and a soil absorption system ("SAS").<sup>2</sup> The septic tank would be located more than 100 feet from a nearby unnamed stream ("Stream") that flows into the Kenai River. The SAS, however, would be located approximately 80 feet from the Stream, requiring a setback waiver.<sup>3</sup> The Division requested additional information for its review.<sup>4</sup> Foster's, however, did not respond until January 2005 when it informed the Division that it had already installed the wastewater system in June 2003, without the Division's approval, and that both the First Septic Tank and the SAS were less than 100 feet from the Stream.<sup>5</sup> The Division informed Foster's that it had violated state regulations by installing its wastewater system without prior approval, but proceeded with a review process for a setback waiver and other necessary approvals.<sup>6</sup> The Division eventually waived the setback for the SAS to 85 feet, where it had already been installed.<sup>7</sup> The Division did not address the location of the First Septic Tank or determine whether it was located 100 feet or more from the Stream.<sup>8</sup> In this same decision, the Division approved construction for a second, 1250-gallon septic tank ("Second Septic Tank"). By regulation, that approval was good for two years.<sup>9</sup> No setback waiver was requested or granted for the Second Septic Tank.

Fourteen years later, on April 29, 2019, Appellant Jim Richardson contacted DEC to report that Foster's was modifying its wastewater system.<sup>10</sup> The Division called Foster's owner, who stated that Foster's was laying service lines to tie into the sewer main.<sup>11</sup> The Division informed Foster's that it needed approval *prior* to installing any components of its wastewater system.<sup>12</sup> Foster's later admitted, in a documentation of construction form, that it had installed the Second Septic tank in in April 2019.<sup>13</sup> Foster's does not appear to have disclosed this fact to

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<sup>1</sup> DEC000095.  
<sup>2</sup> DEC000095-96.  
<sup>3</sup> DEC000096; 18 AAC 72.020(b).  
<sup>4</sup> DEC000092.  
<sup>5</sup> DEC000084-85.  
<sup>6</sup> DEC000080.  
<sup>7</sup> DEC000068.  
<sup>8</sup> DEC000068-69.  
<sup>9</sup> 18 AAC 72.225(d).  
<sup>10</sup> DEC000138.  
<sup>11</sup> DEC000139.  
<sup>12</sup> *Id.*  
<sup>13</sup> DEC00048.

the Division during the April 29 call.<sup>14</sup> Nor did Foster's have a setback waiver or current, valid construction approval from the Division at the time.<sup>15</sup>

Foster's did not request approval to construct the Second Septic Tank until May 10, 2019. Foster's additionally requested approval to replace the First Septic Tank with a larger capacity tank.<sup>16</sup> Foster's did not request a setback waiver for either tank.<sup>17</sup>

It was not until September 15, 2021 that Foster's sought a setback waiver, but it was only for the Second Septic Tank, for 55 feet.<sup>18</sup> In support of that request, Foster's engineer pointed out that the Division had already granted a waiver for the SAS and stated that the 1250-gallon tank was over-sized for the expected use and would have a high liquid level alarm.<sup>19</sup> The engineer also speculated that the Stream bed soils "are believed to offer some infiltration" and that, based on observations, the Stream flows intermittently.<sup>20</sup>

Still with no waiver for either septic tank, Foster's proceeded to replace the First Septic Tank with a 1250-gallon tank on October 20, 2021.<sup>21</sup> In an exchange of comments on Foster's pending application in November 2021, the Division pointed out that Foster's also needed a waiver for the First Septic Tank.<sup>22</sup> Foster's made that request for 90 feet.<sup>23</sup>

In a November 19, 2021 decision, the Division granted setback waivers to 75 feet for the First Septic Tank replacement and 55 feet for the Second Septic Tank. The Division provided the following reasons for granting these waivers:

1. The entire septic system had been documented after-the-fact.
2. The 16-year-old 1000 gallon septic tank was replaced with a new 1250 gallon tank.
3. The existing 1250 gallon STEP tank will have a redundant pump installed (on backorder).<sup>24</sup>
4. The surface water is upgradient of the septic system components.
5. The drainage with the surface water only flows intermittently.<sup>25</sup>

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<sup>14</sup> DEC000139.

<sup>15</sup> See DEC000139.

<sup>16</sup> DEC000126-27.

<sup>17</sup> DEC000127. Foster's did include a different waiver request related to sewer lines. *Id.*

<sup>18</sup> DEC000043.

<sup>19</sup> DEC000044.

<sup>20</sup> DEC000043-44.

<sup>21</sup> DEC000003; DEC000221.

<sup>22</sup> DEC000752.

<sup>23</sup> *Id.*

<sup>24</sup> This reference is to the Second Septic Tank.

<sup>25</sup> DEC000001-2

Neighboring landowners Ron Rogalsky, MJ Loveland, Jim Richardson, and Barbara Baker appealed, requesting a hearing on briefs. This request was granted and the Division and Appellants filed timely briefs. Foster's timely served the involved parties, but filed its brief with OAH a day late. The Commissioner nonetheless accepted it. An oral argument was held on June 30, 2022.

### III. DISCUSSION

As a default, domestic wastewater systems may not be installed within 100 feet of the annual mean high water level of a lake, river, stream, spring, or slough.<sup>26</sup> The Division of Water will waive this requirement if it finds that a lesser setback "does not threaten public health or the environment and protects surface water, groundwater, and existing or potential drinking water sources" based on an engineer's report.<sup>27</sup> Thus the Division's task is not to assess the potential threat from Foster's wastewater system itself, but whether locating the septic tanks 25 and 45 feet closer to the Stream than the default setback poses a threat to public health or if the proposed distance still provided sufficient protections.

There are two overarching issues of concern here. The first is Foster's repeated failure to obtain setback waivers prior to installing components of its wastewater system. Applicants are required to obtain a number of Division approvals *before* beginning construction, including setback waivers.<sup>28</sup> The Division advised Foster's on numerous occasions that it was violating regulations by failing to obtain the necessary waivers and other approvals first, yet Foster's has twice now requested waivers after installation. When it comes to regulatory compliance, asking for forgiveness instead of permission is neither wise nor acceptable. Foster's is strongly advised to comply with all DEC statutes and regulations in the future. That said, this is not an enforcement action. This matter deals with the discrete issue of whether the Division should have granted waivers for the two septic tanks. The setback and waiver regulations do not cite a party's history of non-compliance as a basis for granting or denying a waiver and therefore the Commissioner does not hold Foster's noncompliance against it here.

Nor does the Commissioner consider Foster's non-compliance to be a reason for granting a waiver, as the Division stated in its decision. To the contrary, the Commissioner finds the repeated violations and lack of enforcement here both quite disturbing. The waiver process would

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<sup>26</sup> 18 AAC 72.020(b).

<sup>27</sup> 18 AAC 72.020(e)(f); 18 AAC 72.060(b).

<sup>28</sup> 18 AAC 72.010(a).

be meaningless if applicants routinely seek waivers after the fact and the Division is in any way influenced by the fact that a septic tank has already been installed. It may well be inconvenient and costly for Foster's to dig up and remove its septic tanks if the waivers are denied, but that is the risk Foster's took when it installed them before obtaining waivers. That is not a risk the Division should be encouraging applicants to take, even implicitly by inaction. Going forward, the Commissioner urges the Division to consider and utilize any mechanisms it has available to enforce the regulations and require waivers prior to installation.

The second overarching issue here is the level of detail, or lack thereof, in the Division's decision. In general, when an agency is required to issue a decision, it should explain the basis for that decision.<sup>29</sup> Not every decision need be voluminous or highly detailed. But enough detail is needed for the applicant and the public to understand the agency's reasoning. In its brief, the Division's counsel analyzed the record and set forth determinations based on the record. Unfortunately, most of that analysis and many of these determinations are nowhere to be found in the Division's decision itself. For example, the Division's brief states that "the Division reasonably concluded the septic tanks are not likely to leak." But the Division's decision does not include this finding. Nor does there appear to be any such conclusion in the record. The Division's decision did provide a list of reasons for granting the waivers. But the Division did not explain the significance of these reasons or how they relate to the waiver regulations, leaving Foster's and the public to guess at its reasoning. This lack of detail leads to ambiguity and confusion. A prime example is the Division's first stated reason for granting the waivers — that Foster's had documented its system after the fact. At oral argument, the Division claimed that it mentioned the after-the-fact nature of Foster's request merely to state a fact, not as a reason to grant the waivers. But the decision itself expressly states "this waiver is approved for the following reasons" and then lists that Foster's "entire septic system has been documented after-the-fact." Without further explanation, this language expressly states that the Division granted the waive in part because Foster's sought it after the fact.<sup>30</sup> Similarly, the Division's fifth reason states that the Stream "only flows intermittently" without explaining how that relates to the potential threat to public health or the environment or protection of water. In its briefing, the

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<sup>29</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("an agency must cogently explain why it has exercised its discretion in a given manner"); *Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. & Pub. Facilities*, 685 P.2d 715, 718 (Alaska 1984) ("if a statute requires reasoned decisions, and the legislature has not expressly or by implication limited judicial authority to decide how to review administrative action, courts may and should require agencies to explain their decisions").

<sup>30</sup> DEC000001-2

Division sited many attributes of the stream and how that relates to the likelihood and degree of risk from a septic tank leak. None of that explanation is in the Division's decision itself. This lack of detail appears to have led Appellants to focus much of their appeal on whether the Stream is indeed a stream — a fact that is not in dispute.

It is readily apparent from the record that the Division gave due consideration to the waiver requests here. But that decision itself does not fully reflect the effort the Division put into its review. For future decisions, the Commissioner advises the Division to be mindful of explaining itself with sufficient detail that applicants and the public can understand the basis for its determinations and how it relates to the pertinent statutes or regulations. To address the matter at hand, the Commissioner has considered the record in its entirety, in addition to the Division's decision.

The record as a whole supports the waivers. The tanks themselves are designed to avoid or minimize contamination. One of Foster's engineer submittals points out that the tanks are watertight to prevent both groundwater entering the tanks and wastewater leaking out.<sup>31</sup> Another engineer submittal notes that the Second Septic Tank has an audible and visible high liquid level alarm.<sup>32</sup> In response to questions from the Division, Foster's engineer explained that once the alarm is triggered, the tank has another 140 gallons of capacity.<sup>33</sup> This alarm should help ensure an overly high volume is identified and remediated before an overflow occurs, or at a minimum before significant overflow reaches the Stream. The Division further conditioned the waiver on Foster's installing a redundant pump on the Second Septic Tank and on Foster's maintaining its entire wastewater system without leaks.<sup>34</sup> Both conditions should help ensure Foster's wastewater system continues to operate safely as designed. The waiver's condition that a leak will terminate the waivers further protects the Stream and the environment by establishing that Foster's will have to move its wastewater system back the full 100 feet if there is even the smallest leak. No septic tank can be 100 percent foolproof. But as a whole, these tanks' design elements and the conditions the Division has placed on their operation minimize the threat and provide protections to the Stream and the environment.<sup>35</sup>

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<sup>31</sup> DEC000019.

<sup>32</sup> DEC000044.

<sup>33</sup> DEC000012.

<sup>34</sup> DEC000002.

<sup>35</sup> 18 AAC 72.020(e)(f); 18 AAC 72.060(b).

The nature and location of the Stream further supports a waiver. The Division and Foster's have both referred to the Stream at various times as a drainage ditch and the Division stated in its decision that it flows intermittently. Appellants took this to mean that there was some question whether the Stream was a stream for purposes of a setback waiver or that it was somehow less worthy of protection. But the fact that the Division required these waivers means that it considered the Stream to be a stream. Intermittent flow does not bring that into question. Indeed, Foster's own engineer noted that the Stream flows year-round, but that it had been observed to be dry on occasion which may be due to infiltration.<sup>36</sup> This infiltration does not make the Stream any less valuable or worthy of protection. But it does mean that contamination that reaches the Stream may not move quickly or far, thus decreasing the potential magnitude of harm from an overflow or leak.

The record further indicates that the risk of an overflow or leaking reaching the Stream is minimal. Appellants argued that the Stream is downslope from the tanks. Foster's engineers acknowledged that the surface slopes down to the north, where the Stream is located, but noted that the degree of slope is less than five percent. The risk of wastewater overflow flowing down that slope to the Stream before it can be detected and ameliorated is thus less than if there was a steep slope. In the subsurface, the Division's engineer explained that based on basic principles of groundwater flow and the location of the property in relation to the Kenai River, a leak from Foster's septic tanks would likely flow deeper into the subsurface and then to the south and the west, away from the Stream.<sup>37</sup> Appellants strongly disagreed with this conclusion, but did not identify a specific error in the engineer's analysis or provide contrary facts or a contrary engineer's opinion. The evidence here supports a conclusion that subsurface leak would most likely flow away from the Stream and that a surface overflow might flow downslope toward the Stream, but would do so more slowly because the slope is minimal, providing time to remediate an overflow before it reaches the Stream or reaches it in significant volumes.

Again, these risks are not nil. But any natural resource decision is a matter of balancing reasonable use with risk. The record here demonstrates the risks of Foster's septic tanks contaminating the Stream are minimal in both likelihood and gravity. Appellants argued that even a small risk weighs against granting the waivers because small impacts become big impacts

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<sup>36</sup> DEC000012.

<sup>37</sup> Tonya Bear Declaration ¶¶ 8, 13. This conclusion means that leaking wastewater would flow in the direction of the Kenai River, but Foster's tanks are more than 100 feet from the River, so no waiver is required in relation to that waterbody.

when multiplied, killing the Kenai River by a thousand cuts. Appellants are correct that even small-scale risks are worthy of serious consideration. In other contexts, the Alaska Supreme Court has held that the State has a constitutional duty to consider the cumulative impact of discrete activities on the state's resources.<sup>38</sup> This is not, however, a situation with cumulative impacts. If Foster's wastewater system operates according to design, it will have no impact at all on the Stream or the Kenai River. Thus, this is not one of a thousand cuts; Foster's system is a knife and the Division's task is to consider where that knife can be safely stored. The Division carefully considered those risks and the protections Foster's system provides and concluded that these waivers do not threaten public health or the environment and protect surface and groundwater. Based on the record, the Commissioner reaches the same conclusion.

#### IV. CONCLUSION

The record as a whole demonstrates that waivers for these septic tanks do not threaten public health or the environment and protect surface, ground, and drinking water. Accordingly, the Division's decision, including the conditions the Division placed on these waivers, is affirmed.

Dated: August 2, 2022

*Signed*

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Jason W. Brune  
Commissioner

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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<sup>38</sup> *Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL)*, 311 P.3d 625, 634 (Alaska 2013).