MEMORANDUM

TO: Richard Snelgrove, Salt Lake County Councilmember

FROM: Mitchell F. Park, Legal Counsel

DATE: September 9, 2020

SUBJECT: County Authority and Responsibility for Water Quality Issues in the Canyons

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Background:

You have asked me to review Salt Lake County's regulatory stewardship over local wetlands and watercourses. Particularly, you have expressed concerns regarding condition of certain abandoned mine sites in Big and Little Cottonwood Canyons, as well as the potential resulting discharge of toxic pollutants into the drinking water sources.

Questions Presented:

- Is Salt Lake County the "Local Watershed Coordinator" as defined by law?
- What are Salt Lake County's general obligations to identify and report to the public significant pollution sources in its watershed?
- Does Salt Lake County have a specific obligation to remediate abandoned mine sites that may potentially be leaching heavy metals into the watershed?
- Is Salt Lake County fulfilling its obligation to our watershed?

Brief Answer

Salt Lake County Government does have regulatory responsibility for and certain jurisdictional authority over the condition of watersheds in the county's canyons. Salt Lake County exercises this authority in the form of long-term planning and by undertaking pollution control efforts. Salt Lake County exercises this authority in conjunction with federal, state, and local partners. Salt Lake County could use its authority to further study and consider additional regulatory actions related to potential water pollution generated by historic mining sites.

Discussion

Salt Lake County's Role as "Local Watershed Coordinator"

Salt Lake County has certain responsibility for water quality planning and coordination efforts in the county's[1] canyons and watersheds as delegated by federal and state law. Section 208 of the federal Clean Water Act grants states the authority to identify local water quality planning areas and to designate a local authority to oversee water quality planning in those

[1] For this memorandum, the term "County" refers to the Salt Lake County government, while the term "county" refers to the geographical area within the Salt Lake County government's jurisdictional boundary.

areas.[2] The State of Utah initially delegated this responsibility to Salt Lake County government in 1978, granting the County planning and enforcement authority for water quality activities occurring within the Jordan River Watershed area. Salt Lake County has exercised this planning and enforcement authority in various forms since 1978.[3] In 2006, the Council allocated budgetary funds for the development of an updated area-wide Water Quality Stewardship Plan, which plan enhanced the County's existing watershed planning to better reflect emerging policy issues within the Jordan River watershed area. The updated plan was published in 2009.[4]

Salt Lake County further revised these planning efforts in 2015, when it updated the 2009 plan by completing the 2015 Integrated Watershed Plan, which plan was subsequently ratified by a resolution of the Council on October 11, 2016, and approved by the Utah Department of Environmental Quality and Region 8 of the Environmental Protection Agency.[5] The next scheduled update of Salt Lake County's Integrated Watershed Plan is scheduled to occur on or before 2025, and will consider the following policy topics among others: population and land-use analysis; changes in water quality regulations and standards; water quality and stream function data; and watershed water quality planning elements including pollutant loading reduction, and point- and nonpoint-source discharges.[6]

Salt Lake County's General Water Pollution Control Responsibilities

Salt Lake County has several on-going responsibilities with respect to water quality in the county's watershed. First, as described above, the County has water quality planning and coordination responsibilities under section 208 of the Clean Water Act. These responsibilities include the development of long-term water quality plans for the county, the coordination of stakeholders to ensure that those plans are implemented, and the fulfillment of specific water quality functions through various County departments.

Second, the County has jurisdiction for the purpose of maintaining water quality or managing water resources in the unincorporated county – which crucially includes significant watershed areas within the canyons. The County has land use jurisdiction within its boundaries and is also responsible for permitting and managing stormwater discharges to receiving waters. These functions are exercised by the County's Department of Public Works – Flood Control, and are further detailed in Salt Lake County Ordinance.[7]

Third, the Salt Lake County Health Department has authority to enforce water quality discharges occurring in the county because of spills and illicit discharges. The Health

[2] 33 U.S.C. § 1251 et seq.
[3] A full overview of the legal authority for and regulatory history of Salt Lake County's water quality planning efforts was outlined by the Salt Lake County District Attorney's Office in a November 2007 memorandum, a copy of which is appended to this document. See also, Chapter 6.0, "Implementation" of Salt Lake County's 2009 Water Quality Stewardship Plan.
[4] A copy of the 2009 Water Quality Stewardship Plan is available at https://slco.org/watershed/watershed-planning/2009-watershed-plan/
[5] A copy of the 2015 Integrated Watershed Plan is available at https://slco.org/watershed/watershed-planning/2015-integrated-watershed-plan/
[6] *Id*. at pp. 174-75.
[7] Salt Lake County Code of Ordinances, Chapters 17.04, 17.22.

Department also exercises regulatory authority over certain of the county's watersheds[8]. The Health Department regulates "the use and occupancy of watersheds within Salt Lake County in a manner that will protect and promote the public health, safety, and welfare; prevent damage to property; prevent the spread of disease; prevent the creation of nuisances; prevent air and water pollution; and promote conditions that contribute to the preservation and protection of drinking water quality."

Taken together, these respective responsibilities suggest that the County does have a obligation to identify and report significant pollution sources in the county's watershed: initially as it coordinates general water quality planning, and then again as it regulates more specific water quality violations. However, it is important to note that federal, state, local, and private stakeholders often have a more direct responsibility for reporting and controlling water pollution sources in the county's watersheds. As the Salt Lake County District Attorney has previously advised, "although the County has [Water Quality Management] planning responsibility, the legal authority for requiring compliance . . . is vested with other public and private entities."[9] This includes the responsibility of state and federal agencies such as the Environmental Protection Agency and the Utah Division of Water Quality to conduct regulatory activities covered under the Clean Water Act and Safe Drinking Water Act, including the regulation of discharges and establishment of scientific water quality standards.[10]

Water Quality Issues Related to Abandoned Mining Sites in Salt Lake County Watersheds

Salt Lake County's canyons contain an unknown but significant number of abandoned hard rock mining sites. Some of these abandoned mining sites are in watercourses that feed directly into the county's watersheds. These sites have become the focus of recent attention from policymakers and the news media, prompting concerns that heavy metals and other pollutants might leach from the sites, negatively impacting drinking water sources, aquatic life, and the natural environment.[11]

Salt Lake County's Integrated Watershed Plan addresses municipal and industrial wastewater discharges, commonly referred to as "point-source" discharges. The plan prohibits new-point discharges in certain waterbodies designated as "high-quality waters" by Utah Administrative Code, including the upper sub-watersheds that have headwaters in the Wasatch Mountains.[12] The Plan also provides that "diffuse sources [of pollution] must be controlled to the

[8] Salt Lake County Health Department Regulation No. 14, "Watershed Regulation," available at https://slco.org/globalassets/1-site-files/health/regs/watershed.pdf. This authority is shared with Salt Lake City's Department of Public Utilities, which has extraterritorial jurisdiction for drinking water source headwaters and watershed protection in areas of the Wasatch Mountains within Salt Lake County.
[9] See *supra* note 3 at p. 6.
[10] For a more complete list of federal, state, and local stakeholders that have jurisdiction over county watersheds, see *supra* note 5 at p. 32-33
[11] Amy Joi O'Donoghue, "Are abandoned mines affecting our drinking water or could they soon?," *Deseret News*, August 23, 2020, available at https://www.deseret.com/utah/2020/8/23/21365132/are-abandoned-mines-affecting-our-drinking-water-or-could-they-soon
[12]See *supra* note 5 at p. 29.

extent feasible through implementation of best management practices or regulatory programs."[13] The Plan establishes overall water quality monitoring standards that conform with federal and state regulations, but does not directly discuss historic mining impacts except to note that the lower and upper Little Cottonwood Creek has the lowest pH of all monitored watersheds in the county "likely due to historic mining legacy."[14]

As explained in the previous section, Salt Lake County does not have primary legal responsibility for enforcing water quality compliance violations. Primary enforcement activity instead rests with state and federal regulators that have more direct authority under the Clean Water Act and other laws. Additionally, un-remediated legacy sources of potential pollution – such as abandoned mines – often present a tricky regulatory problem because of the lack of a responsible private property owner liable to regulatory authority. The Environmental Protection Agency is currently evaluating some of the county's abandoned rock mines located in and near the county's watersheds as potential Superfund sites and has set aside $3 million for possible remediation efforts.[15] Such potential federal action might help regulators better understand the environmental impact of legacy mining operations on the county's water quality, and also provide resources for any necessary remediation.

Salt Lake County Policy Responses

The question of Salt Lake County's ultimate obligation to its watersheds is fundamentally a question of policy and resources. The County does have specific legal role within the larger multijurisdictional effort to maintain and protect the watersheds, and County leaders have historically devoted substantial planning and enforcement resources for such purposes. A broader consideration of the costs and benefits of undertaking new or expanded water quality and remediation efforts at the County level would be the subject of a rich policy analysis. For legal purposes, it is sufficient to note that the County – working both on its own and in conjunction with other stakeholders – has important regulatory authority over water quality issues.

Salt Lake County policymakers, including the Council, could take certain steps to better understand the specific situation concerning abandoned mines in the county's watersheds. One potential policy option might be for Salt Lake County Public Works and/or Health Department personnel to conduct a review of abandoned mines within the county's watersheds, including an analysis of water quality impacts. Any insights obtained from this effort could be used to amend the County's watershed plans or to recommend appropriate enforcement and remediation activities consistent with federal and state law. The Council could also conduct legislative hearings and invite subject matter experts to provide briefings related to such water quality issues. Finally, County leaders could request additional information from federal, state, and local regulators, as well as any applicable landowners, about these and other relevant issues.

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[13] *Id*.

[14] *Id*. at p. 65.

[15] Amy Joi O'Donoghue, "EPA, Utah settle Gold King Mine spill lawsuit" *Deseret News*, August 5, 2020, available at https://www.deseret.com/utah/2020/8/5/21355512/epa-utah-settle-gold-king-mine-spill-lawsuit-reyes-wastewater-pollution