



DELIVERED BY FAX

September 16, 2015

Kevin Frederick, Administrator  
Water Quality Division  
Department of Environmental Quality  
122 West 25th Street,  
Herschler Building 4-W  
Cheyenne, WY 82002

Re: DEQ/WQD's Categorical Use Attainability Analysis for Recreation and Final Determination Regarding the Categorical Redesignation of Streams in The State from Primary Contact Recreation to Secondary Contact Recreation (August 20, 2014).

Dear Mr. Frederick:

On behalf of the Wyoming Outdoor Council, and the undersigned conservation, outdoor recreation, and other interested organizations and individuals, we are writing to voice our concerns about your August 20, 2014 decision to downgrade recreation-based water quality standards on 87,775 stream miles—approximately 76 percent of the state's surface waters—based on a Categorical Use Attainability Analysis for Recreation.<sup>1</sup>

As we explained in our January 5, 2015 letter to EPA,<sup>2</sup> we believe your August 20, 2014 decision to reclassify recreation use designations on 76 percent of Wyoming's surface waters is based on: 1) a scientifically flawed categorical use attainability analysis; 2) erroneous and incomplete information regarding existing and attainable primary contact recreation uses on so-called "low flow" surface waters; and 3) an inadequate public outreach effort that failed to illicit a single comment from any recreational user group during the multi-year development of the UAA.

In addition to a flawed UAA, your decision fails to satisfy fundamental requirements of the Clean Water Act, the Wyoming Environmental Quality Act, and the Wyoming Administrative Procedures Act. For these and other reasons explained below, we

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<sup>1</sup> See Wyoming DEQ's Categorical Use Attainability Analysis for Recreation, August 2014 at 1.

<sup>2</sup> A copy of our letter to the EPA was provided to DEQ Director Todd Parfitt.

respectfully request that you withdraw your August 20, 2014 decision and begin the process anew, with active engagement of the outdoor recreation and conservation communities as well as other interested stakeholders. In making this request, which we do not take lightly, we are not asking you to disregard the analyses undertaken to date. All of the information gathered by the DEQ and local conservation districts in connection with this process, including photographs, recorded observations and other information collected during site visits, may still be relevant and useful for any future UAA processes. But the public, particularly recreation user groups, should have been involved in the critical, initial development phases of the UAA, phases which led to major determinations regarding the type of UAA (categorical vs. site-specific), the geographic scope of the analysis area (statewide, basin, watershed, or individual segment), the types of streams considered (ephemeral, intermittent, and/or perennial), the level of flow required to be considered “low flow”, exceptions to the downgrade based on access, and many other basic elements which were previously decided by the DEQ without the involvement of key stakeholders.

## **Background**

The DEQ engaged in a three-step process to develop its UAA and the resulting recreation use downgrades. The first step relied on GIS databases “to identify streams that do not support primary contact recreation” due to low flow conditions. Without any input from the outdoor recreation community, the DEQ decided that streams with mean annual flows under 6 cubic feet per second (cfs) do not have sufficient flow to support primary contact recreation.

In step two, the DEQ used “additional GIS databases to identify any ‘low flow’ streams that may be used for primary contact recreation or where primary contact recreation may be an existing use because the stream is located in an area where children and/or the public have easy access to the stream.” UAA at 6. The DEQ reasoned that “[a]lthough these streams will generally not support full body immersion since they are ‘low flow’, the water in these streams might be ingested by children and/or other members of the public and therefore should be protected for primary contact recreation.” Id.

In the third and final step, “the UAA incorporated public feedback received during an August 6 to September 30, 2013 public comment period.” Id. The DEQ concluded that: “Based on the feedback received during the August 6 to September 30, 2013 public comment period, there are not any pools or deep water areas located on ‘low flow’ streams that are used for primary contact recreation that are not designated for primary contact recreation in the UAA.” Id.

Based on this three-step analysis, the DEQ concluded:

For streams where the UAA indicates that there is not sufficient water availability (low flow conditions) to support primary contact recreation, not sufficient access or recreational opportunity to support primary contact recreation, and public feedback has not indicated that the stream is used

for primary contact recreation, primary contact recreation is presumed not to be an existing or attainable use and can be removed. The remaining low flow streams that are not proximate to areas frequented by children and/or the public can be grouped together categorically since the conditions that most influence the recreational use of the streams are sufficiently similar. These streams will be designated for secondary contact recreation.

See UAA at 7.

The on-the-ground result is that of the 115,373 stream miles shown on the 1:100,000 NHD, an astonishing number of surface waters—comprising 87,775 stream miles— were downgraded to secondary contact recreation under the DEQ’s decision. Only 27,598 stream miles would retain their primary contact recreation use designation.<sup>3</sup>

It is the inadequacy of this UAA and decision embodied in the three-step process that has brought about the need for this additional public hearing in order to ensure there is sufficient information from the recreational public to support the UAA decisions. We believe there are several threshold issues that should be considered as the DEQ reviews public comments and evaluates its options going forward, particularly with respect to the specific elements set forth in 40 CFR § 131.6.

**Threshold Issue # 1: Holding a hearing on a “final” decision does not comply with Clean Water Act regulations governing public input into the development or revision of water quality standards.**

In order for the public to have a “meaningful” opportunity to comment on and otherwise participate in the development of the UAA, the DEQ/WQD Administrator must withdraw his August 20, 2014 decision and provide the public with an opportunity to comment on a *proposed* decision and a *proposed* UAA. Aside from applicable legal requirements, common sense and principles of fairness demand nothing less.

In a letter dated June 3, 2015, which precipitated the need for this hearing, EPA Region 8 informed the DEQ that, “in order for the EPA to approve any of the recreation designated uses that are consistent with CWA requirements, the state must first hold a public hearing *consistent with CWA 303(c)(1) and the implementing regulations at 40 CFR Parts 25 and 131.*” (emphasis added). See EPA letter attached as Document Exhibit 1.

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<sup>3</sup> The Categorical UAA states that of the “115,373 stream miles depicted in the 1:100,000 National Hydrography Dataset (NHD) that were addressed in this UAA, primary contact recreation is not an attainable or existing use on 87,775 miles, or 76.1% of the stream miles.” See UAA at 1. Presumably, the remaining 27,598 stream miles in the 100k dataset retain the primary contact recreation use designation. However, the UAA also indicates (at 32) that the more detailed 1:24,000 NHD contains 281,000 stream miles in Wyoming, which presumably include the 116,000 miles in the 100k NHD plus an additional 165,000 stream miles comprised of intermittent and ephemeral streams. The preliminary UAA concludes that, “streams not present in the 100k NHD do not have sufficient flow to support primary contact recreation and will be designated for secondary contact, unless they are located in areas that are easily accessible to children and/or the public.” Id. at 32.

EPA reiterated the applicable Clean Water Act requirements in the last paragraph of its letter:

In summary, in order for the EPA to approve any of the recreation designated uses that are consistent with CWA requirements, the state must first hold a public hearing, satisfy the requirements of 40 CFR Part 25, and submit the transcript from the public hearing, information and written comments submitted during the hearing and the state's responses to written and oral comments to enable the EPA's meaningful review of the state's submission.

Id. The EPA also made it clear that feedback from people living near or recreating on these streams “is critical in *designating* the appropriate recreation use.” (emphasis added).

Although the Wyoming Outdoor Council appreciates the DEQ's decision to conduct a public hearing as requested by EPA in its June 3, 2015 letter, the hearing scheduled on September 16<sup>th</sup> in Casper to accept public comment on a *final decision* issued over a year ago does not satisfy the Clean Water Act's public hearing requirements.<sup>4</sup> Under both 40 CFR 131.20 and 40 CFR 25.5, the public must be given an opportunity to comment at the hearing on a *proposed action*—not a *final decision* as is the case here.

The EPA's public participation regulations implementing the Clean Water Act require states to provide “meaningful” opportunities for public participation in revisions to water quality standards. An essential element of meaningful public participation is a public hearing on the agency's *proposed* action, which of course is intended to solicit public views *before* the agency's decision becomes final. Inviting the public to participate in a public hearing in a single location on a final decision that was made more than a year ago, as the DEQ is doing here, fails to satisfy the Clean Water Act's public participation requirements. It is also an affront to concerned citizens, some of whom must drive 10 hours or more (round trip) in order to attend. Many of our members are asking, “What's the point of sending in a letter or attending the hearing if the DEQ's decision has already been made?” Frankly, we wonder the same thing.

40 CFR 131.10(e) requires that: “*Prior to* adding or removing any use, or establishing sub-categories of a use, the State shall provide notice and an opportunity for a public hearing under § 131.20(b) of this regulation.” (emphasis added). In addition, 40 CFR 131.20(b) provides that: “the State shall hold a public hearing for the purpose of reviewing water quality standards....The *proposed* water quality standards revision and supporting analysis shall be made available to the public prior to the hearing.” (emphasis added).

EPA's revised Water Quality Standards regulation, issued August 21, 2015, clarifies that the Clean Water Act's public hearing requirement applies “whenever revising WQS [water quality standards] regardless of whether the revision is a result of triennial review

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<sup>4</sup> Additional public participation requirements are discussed below.

per § 131.20(a).” See EPA Water Quality Standards Regulatory Revisions, 80 Fed. Reg. 51020, 51042 (August 21, 2015).

In addition to the Section 131 requirements, EPA’s Part 25 requirement governing public hearings provides, in part, that: “Any non-adjudicatory public hearing, whether mandatory or discretionary, under the three Acts shall meet the following minimum requirements.”

A notice of each hearing shall be well publicized, and shall be *mailed* to the appropriate portions of the list of interested and affected parties required by § 25.4(b)(5).... The notice shall identify the matters to be discussed at the hearing and shall include or be accompanied by a discussion of the agency’s *tentative determination* on major issues.... 40 CFR 25.5(b)(emphasis added).

The agency holding the hearing shall inform the audience of the issues involved in the decision *to be made*, the considerations the agency will take into account, the agency’s *tentative determinations* (if any), and the information which is particularly solicited from the public. 40 CFR 25.5(e) (emphasis added).

Taken together, these requirements make clear that a public hearing must be held on a *proposed* revision to water quality standards, and the hearing must provide a meaningful opportunity for the public to express views on tentative determinations on major issues. Yet in this instance, the DEQ’s notice of public hearing provides that the DEQ will accept comments “regarding its *designation* of Wyoming streams for secondary contact recreation as describe in its *final* Categorical Use Attainability Analysis for Recreation.” (emphasis added). Obviously, the goal of meaningful public participation cannot be achieved in circumstances where the DEQ has invited comment on a final decision.

As these requirements make clear, in order to achieve the public participation objectives outlined in the Clean Water Act and its implementing regulations, the public hearing scheduled for September 16, 2015 in Casper must be held on a “proposed” water quality standard revision and the “agency’s *tentative determination on major issues...*” must be made available in the notice of hearing. Here, neither requirement is met.

The DEQ’s August 20, 2014 decision is final, and all of the determinations on major issues have been made. These major determinations include: 1) in an action without precedent anywhere in the nation, developing a categorical UAA covering the entire state instead of a watershed by watershed approach, or based on stream type; 2) using a novel GIS-based approach instead of a process based on specific stream information; 3) choosing to use 6 cfs as the threshold for reclassification; and 4) major assumptions about recreation use and walking distances, etc. So despite the fact that the CWA regulations require that a hearing must be held to consider *tentative determinations on major issues*, and on *proposed* water quality standards revisions, the DEQ specifically is not inviting comment on those fundamental issues.

Instead, the public has been “invited to provide oral and written comments and/or documentation regarding the existing and potential recreation activities on streams designated for secondary contact recreation as described in the Categorical UAA.” See DEQ Notice of Hearing, attached as Document Exhibit 2. To be clear, the DEQ has invited the public to comment on “streams designated for secondary contact recreation...” Not *proposed* for designation as secondary contact, but rather, *designated* for secondary contact.

Because DEQ insists and apparently believes its decision is final (minus a perfunctory public hearing being held under protest<sup>5</sup>), it is now requesting the public to come forward with detailed information and evidence demonstrating existing or attainable primary recreation use on specific stream segments. In essence the DEQ is requiring the public to produce UAAs showing that primary contact recreation is attainable despite the fact that the CWA places the burden on the agency to demonstrate that those uses are not attainable. We categorically reject this approach.

As discussed by the EPA in its June 3, 2015 letter to the Wyoming DEQ calling for this hearing, the purpose of the hearing is to reach out to recreational user groups and get their feedback, which is “critical in designating the appropriate recreation use.” Moreover, the EPA made it clear the burden of proof to sustain any decision to downgrade recreational use designations lies with the state, and that burden has not been met to date as shown by the need for this additional hearing. Thus, the DEQ must fully consider the information received at this hearing before reaching any final decision on recreation use categories, and on all other tentative major determinations regarding this UAA. It can only do so adequately and objectively if it withdraws its August 2014 decision.

**Threshold Issue # 2: The revision of water quality standards by the Administrator does not satisfy the requirements of the Wyoming Environmental Quality Act.**

Wyoming Statute § 35-11-302 provides, in part,

- (a) The Administrator, after receiving public comment and after consultation with the advisory board, shall recommend to the director rules, regulations, standards and permit systems to promote the purposes of this act. Such rules, regulations, standards and permit systems shall prescribe:
  - (i) Water quality standards specifying the maximum short-term and long-term concentrations of pollution, the minimum permissible concentrations of dissolved oxygen and other matter, and the permissible temperatures of the waters of the state. *Id.*

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<sup>5</sup> DEQ indicated in its June 17, 2015 letter to EPA that it is holding a hearing not because it feels more public input is needed or would be helpful, but rather in order to “avoid costly and lengthy litigation.” The DEQ’s letter is attached as Document Exhibit 6.

Contrary to the plain language of § 35-11-302(a), which requires that “standards” be recommended to the Director after receiving public comment and consultation with the advisory board, Section 34 of Chapter 1, Water Quality Rules and Regulations authorizes the Administrator to submit changed water classifications or use designations directly to EPA for review, bypassing both the advisory council and the director, and avoiding a non-adjudicatory rulemaking hearing in front of the Environmental Quality Council. That is precisely what the Administrator did here. But the attenuated process outlined in Chapter 1, Section 34, and utilized by the Administrator, directly conflicts with W.S. § 35-11-302(a) which requires the involvement of the Advisory Board and the Director and a non-adjudicatory hearing before the EQC as part of the development (or revision) of a water quality standard.<sup>6</sup>

Even if, for purposes of discussion, Section 34 comports with § 35-11-302(a) (we believe it does not), the manner in which it was utilized here violates the terms and conditions the EPA placed on its use during the WQS approval process. In a letter dated January 25, 2002, the EPA outlined its concerns about the new process proposed by DEQ:

Section 34, Use Attainability Analysis.

Section 34 establishes a new process for making determinations regarding use classification changes or site-specific water quality criteria adjustments based on the use attainability provision in Section 33. For use classification changes, Section 34(a) allows the Department to administratively amend use classifications in Wyoming’s Water Quality Standards and do so outside the Council’s formal rulemaking process. In comments made during the standards development process, the Region expressed concern with Section 34(a) as initially proposed. Specifically, in a May 31, 2001 letter to the Water Quality Division, the Region explained its concern and noted that the new process could be acceptable to EPA if it were *demonstrated to be functionally equivalent to the current process* and results in enforceable provisions identified as State Water Quality Standards.

In the Region’s May 31, 2001 letter to the Division, we set out our understanding of how the revised Section 34(a) would be implemented. It was then, and continues to be, our understanding that implementation of Section 34(a) would include the following elements [nine bulleted items]:

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<sup>6</sup> In addition, the Administrator may not avail himself of the fast track provision contained in section 34(a) because under section 34(b), “proposed changes in water quality criteria that result from the Administrator’s findings shall be recommended to the council for adoption as revised rules.” See Chapter 1, Section 34(b). In this instance, the Administrator’s findings, set forth in the Categorical UAA and his August 20, 2014 decision, have resulted in a change of a water quality criterion in the affected streams, specifically a 500 percent increase in permissible *E.coli* levels in 76.1 percent of the state’s surface waters.

- Implementation of the process will involve the public, with *participation requirements equivalent to those applied in rulemaking.*

In a letter dated June 8, 2001 from Gary Beach, Administrator for the Water Quality Division, the Division confirmed that the Region's understanding of Section 34(a) ... and its intended implementation was correct.

Based on this understanding, EPA has determined that the revision to Chapter 1, Section 34, are consistent with EPA's water quality standards regulation at 40 CFR Part 131. Accordingly, EPA approves Section 34, Use Attainability Analysis subject to ESA consultation."

See EPA letter to Wendy Hutchinson, Chairperson, Wyoming Environmental Quality Council, dated January 25, 2002, Rationale for EPA's Action on the Revision to Wyoming's Water Quality Standards, Enclosure at 7,8, attached as Document Exhibit 4.

It is clear that DEQ did not involve the public in the development of its UAA "with participation requirements equivalent to those applied in rulemaking." Among other things, there was absolutely no discussion or debate within the advisory board (a body composed of citizens) and no discussion or debate with the Environmental Quality Council (also a citizen board) or within any other representative body or forum that can be considered to be the functional equivalent. The opportunity to appeal the Administrator's decision to the EQC in a trial-type proceeding conducted under the Rules of Civil Procedure with sworn witnesses and the State's AG defending the Administrator's decision is not the functional equivalent of a non-adversarial hearing held on rulemaking. And as discussed in further detail below, the level of opportunities for public participation in the context of Wyoming APA notice and comment rulemaking far surpasses the limited opportunities provided by the DEQ in this instance. Those additional comments include mailed notices of public hearings, and the opportunity for public citizens to request—and be granted—public hearings when 25 or more citizens, or an association with at least 25 members, make such a request. Wyoming APA rulemaking requirements are addressed in the following section.

It is apparent the DEQ has not complied with these statutory requirements due to its use of the attenuated process allowed by Chapter 1, Section 34 of the Wyoming Water Quality Rules and Regulations (WQRR), and in addition, has not provided public participation opportunities that are the functional equivalent to those provided in rulemaking.

**Threshold Issue # 3: The Wyoming Administrative Procedure Act requires the DEQ to hold a hearing on a *proposed* UAA and on a *proposed* reclassification decision.**

The development or revision of a water quality standard, including the removal of a designated use (i.e., primary contact recreation), constitutes a rule under the Wyoming



Administrative Procedure Act (APA). “Rule” is defined in W.S. § 16-3-101(b)(ix) and “means each agency statement of general applicability that implements, interprets and prescribes law, policy or ordinances of cities and towns, or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule....”

The “streamlined” approach used by the Administrator pursuant to Chapter 1, Section 34, of the DEQ’s WQRR to develop the UAA and issue his final determination improperly bypasses the required Wyoming APA notice and comment rulemaking process, including the public notice requirement at W.S. § 16-3-103(a)(i) (notice of proposed rule must be mailed with at least 45 days notice). A proposed rule must also state whether the proposed rule “meets minimum substantive state statutory requirements.” *Id.* § 16-3-103(a)(i)(G). All interested persons must be given an opportunity to submit data, views, and arguments orally or in writing on the proposed rule. *Id.* § 16-3-103(a)(ii). And the agency “shall consider fully all written and oral submissions respecting the *proposed* rule.” *Id.* § 16-3-103(ii)(B) (emphasis added).

And “[i]n the case of substantive rules, opportunity for oral hearing shall be granted if requested by twenty-five (25) persons, or by a governmental subdivision, or by an association having not less than twenty-five (25) members.” W.S. § 16-3-103(a)(ii)A). We understand that the DEQ has received requests for hearings in Laramie, Lander, Cody and Jackson which were submitted by governmental subdivisions, by associations with more than 25 members, and by individual citizens in numbers far greater than the minimum and that all of those requests for additional hearings have been denied.

As explained above, the DEQ has not provided the public with an opportunity that meets the requirements of the Wyoming APA to participate in the development of a *proposed* rule, and the hearing scheduled for September 16<sup>th</sup> in Casper to receive public comment on the DEQ/WQD’s *final* Categorical UAA for Recreation does not meet the basic requirements.

By law, the DEQ must ensure full compliance with the Wyoming APA requirements for rulemaking as part of this UAA reclassification process. As discussed in the prior section, the DEQ has not done this because it used the attenuated process set forth in Section 34 of the DEQ’s Water Quality Rules and Regulations. This shortcoming must be corrected before the UAA is finalized.

In light of the EPA’s view that a purpose of this hearing is to make decisions about “designating” recreational uses, the DEQ must withdraw its UAA decision. This decision was reached before full notice and comment opportunities were afforded to the public, as demonstrated by the requirement to hold this additional hearing in order to get full public input and participation.

Clearly the DEQ’s designated use decisions cannot stand and there is no doubt that the initial findings will have to be modified based on the results of this hearing. We ask the DEQ to acknowledge this reality and withdraw the August 20, 2014 decision. Its

rulemaking is not complete and it should not be treated as such. Further rulemaking activity is required and this requirement should be recognized by DEQ.

On a related note, the DEQ suggests in its June 17, 2015 letter to EPA that “modifications to the UAA” could be submitted to EPA as a result of public comments made at the hearing. But the DEQ letter does not indicate the process it will follow in the event modifications are made. In consideration of the issues discussed above, we believe that any modification to the UAA would also require the issuance of a new decision. However, because of the vague wording of the existing decision—it lacks any information about the specific elements of the UAA and it adopts an *undated* Categorical UAA—it is conceivable that the DEQ—in a misguided effort to expedite the process, could modify the UAA and choose not to issue a new decision. If the DEQ were to proceed in this manner, entities seeking administrative review before the Environmental Quality Council would potentially be deprived of their legally mandated appeal rights because the 60 day period for filing appeals the EQC has long since passed. In sum, any modifications to the UAA would ultimately necessitate the issuance of a new decision with full rights to administrative review available to potentially affected parties.

**Threshold Issue # 4: The Wyoming Environmental Quality Act Requirement for the use of Credible Data has not been met.**

The Wyoming Environmental Quality Act (WEQA) and its implementing regulations require the use of “credible data” to support designating uses of surface waters and determining whether designated uses have been attained. W.S. §§ 35-11-103(c)(xix), 35-11-302(b)(i) and (ii). The DEQ’s categorical UAA failed to comply with Wyoming’s credible data law and should be corrected as a result of information received at the September 16th hearing and information submitted during the related public comment period.

The WEQA requires the use of credible data in both designating uses of surface water and in determining a water body's attainment of designated uses. See W.S. § 35-11-302(b). According to the statute, “Credible data’ means scientifically valid chemical, physical and biological monitoring data collected under an accepted sampling and analysis plan, including quality control, quality assurance procedures and available historical data.” W.S. § 35-11-103(c)(xix).

Specific regulatory requirements concerning the collection of credible data and requirements for its use are set forth in the DEQ’s Water Quality Rules and Regulations at Chapter 1, Section 35. Section 35(b) requires that: “Credible data shall be collected on each water body... [and] shall be used ... to designate uses and determine whether those uses are being attained.”

Section 35(c) provides that, “All changes to use designations after the effective date of this rule shall include the consideration of credible data relevant to the decision. Changes which involve the removal of a use designation or the replacement of a designation shall be supported by a use attainability analysis (UAA).”

And Section 35(d) states that: “After the effective date of this rule, credible data shall be utilized in determining a water body’s attainment of designated uses.”

These requirements could not be stated any more clearly, yet it appears to us that no data meeting the credible data standard were utilized in the development of the DEQ’s UAA. Indeed, the DEQ’s approach was just the opposite: the agency justified the downgrades based on the *absence* of site-specific data demonstrating existing or attainable primary contact recreation uses. Not only does this approach violate the credible data law, it unlawfully shifts the Clean Water Act’s presumption of “fishable/swimmable” to the public. As noted above, the EPA made it clear in its June 3, 2015, letter that this burden lies with the state. And the state’s credible data law increases this responsibility.

If we consider the first two steps in the DEQ’s UAA, step one being the identification of streams with low flow, and step two being the identification of streams that may not support primary contact recreation because of remoteness, it is apparent the credible data, as defined in the statute, was not used by DEQ “in determining water body’s attainment of designated uses[]” as required by W.S. § 35-11-302(b)(ii).

When we consider step one, as discussed in the Wyoming Outdoor Council January 5, 2015, letter to EPA, several deficiencies are apparent relative to the credible data requirement. A total of approximately 850 stream surveys were done, or one survey per 135 stream miles (or per 331 miles depending on the dataset that is used.) As stated in our letter to EPA on page 7, “no site-specific information was available to validate assumptions made regarding flows on thousands of miles of stream segments.” Furthermore, DEQ’s efforts to analyze stream depths in low-flow streams suffered from severe shortcomings, representing little more than guesses about stream depths.

Of the 850 field surveys, local conservation districts visited more than 700 sites but apparently not all of these visits occurred during the summer recreation season which, given the seasonal variability of flows, undermines the relevance of the data for assessing contact recreation activities during the summer recreation season. Moreover, based on the DEQ’s designated uses web map, it appears that the majority of site visits occurred in areas accessible via motor vehicles, with a much smaller sampling of stream accessible only by foot or horseback. As we explained in our January 5, 2015 letter to EPA, streams located in prairie grasslands or sage steppe are morphologically very different from mountain streams, such differences include flow regime, channel width, channel depth, stream gradient, presence of pools, water quality, etc. Step one also did not consider summer weather patterns (i.e., afternoon showers) or mountain snowpack levels and melt-off rates, all of which can influence flows and therefore availability of water for contact recreation.

The DEQ and local conservation districts used worksheets to collect data during field surveys. See UAA Appendix C. Stream location data and responses to questions asking for opinions about opportunities for recreation use listed on the worksheets cannot even remotely be considered credible data as defined by statute. As noted on the survey form,

“the information gathered during the statewide survey will ultimately be compared to the *predictions* of a Geographic Information System (GIS) based Recreational Use Model that is currently being developed by WDEQ.” (emphasis added). Assuming an average of one survey per 135 stream miles, and one mile segment surveyed, that leaves 134 stream miles un-surveyed and therefore subject only to predictions about whether a use is existing or attainable. Not only does this approach not satisfy the requirements of the credible data law, it fails to satisfy the most permissive reading of the EPA’s and DEQ’s UAA requirements, which require a “demonstration” made through a structured scientific assessment that primary contact recreation is neither existing nor attainable to support a downgrade.

The DEQ’s efforts fail to meet the credible data requirement. They provide no indication that “soils, geology, hydrology, geomorphology, climate, stream succession, and human influence on the environment” have been considered. W.S. § 35-11-302(b)(i). It is not apparent that an “accepted referenced laboratory or field method[ ]” has been employed or that the people conducting the surveys had “specialized training and [ ] field experience in developing a monitoring plan.” DEQ Water Quality Rules and Regulations Chapter 1 Section 35(a)(i). Moreover, under the DEQ’s Water Quality Rules and Regulations, these data must be collected on *each* water body, which is certainly not apparent. See Water Quality Rules and Regulations Chapter 1 Section 35(b) (stating, “Credible data shall be collected on *each* water body.”) (emphasis added). And were the DEQ to be seeking the “not practical or feasible” exception to the credible data rule, it would need to provide evidence that collecting these data was in fact not practical or feasible, which has not even been attempted.

Even if true, claims by DEQ that “all readily available data” have been considered<sup>7</sup> do not meet the credible data requirements.<sup>8</sup> Neither the Wyoming Environmental Quality Act nor the DEQ Water Quality Rules and Regulations ever mention ready availability of data as a substitute for “credible data.” Credible data is defined to mean “scientifically valid chemical, physical, and biological monitoring data collected under an accepted sampling and analysis plan, including quality control, quality assurance procedures and available historical data.” W.S. § 35-11-103(c)(xix). This is the standard that must be met, not ready availability, and there is no indication the DEQ has developed the UAA pursuant to these requirements or made its designated use analyses based on the best available science (credible data), as required by law.

There are also significant flaws with respect to step two of the UAA analysis. Here DEQ subjectively decided that streams more than a mile from populated places and schools, or more than half a mile from established campgrounds and trailheads, were too remote to enjoy primary contact recreation. It reasoned that because large areas of the state are uninhabited, low flow streams in these areas would not attract children or the general public for recreational purposes. But in reality, as discussed in the January 5, 2015, WOC letter to EPA, school children roam widely in pursuit of recreation, as does the adult

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<sup>7</sup> See DEQ’s Response to Comments for Comment Period ending March 14, 2014 (August 2014) at 22.

<sup>8</sup> Data from NOLS and other recreational user groups, including information about recreation use of low flow streams, was readily available but not utilized by DEQ.

population. And in fact, for many, remoteness is a major attraction rather than a hindrance to recreation. Wyoming's vast areas of public lands, including the huge areas DEQ downgraded to secondary contact recreation, are almost uniformly open to public recreation and are widely used for recreation by vast numbers of people.

There is no indication the analysis in step two was based on accepted laboratory or field methods or was based on specialized training or field experience for developing a monitoring plan, as is required by the Wyoming Water Quality Rules and Regulations. It was not based on the consideration of "human influence on the environment" as required by the Wyoming Environmental Quality Act (only human *reaction* to the environment was possibly considered). There is no indication it would not be "practical or feasible" to gather this information in a more scientifically valid manner.

Importantly, the credible data requirement is to be based on a "weight-of-evidence approach." Wyoming Water Quality Rules and Regulations Chapter 1 Section 35(b). As shown in the WOC Letter to EPA, it is clear the weight of the evidence does not support a recreation use downgrade under either step one or step two of the existing UAA analysis. And again, we note the burden is on the state to support any downgrades of recreation uses, and that burden, under Wyoming law, cannot be met when credible data is not used.

Quite clearly, the requirement for the use of credible data to support changes to use designations and to determine a water body's attainment of designated uses is not, as asserted by DEQ in its response to comments, limited to data that is "readily available." The record shows that the DEQ did not consider anything resembling "credible data" in making its decision to downgrade waters statewide from primary to secondary contact recreation. As a result, the Administrator's August 20, 2014, decision reclassifying surface waters must be withdrawn.

**Threshold Issue # 5: The Water Quality Division's Implementation Policies forbid it from downgrading recreation-based water quality standards on Class 1 surface waters.**

Implementation policies for antidegradation *and* for use attainability analyses adopted by the WQD and approved by EPA prohibit the Administrator from downgrading Class 1 waters. According to the WQD's Implementation Policy (September 24, 2013), "[a]ntidegradation protection is one of the essential elements of state surface water quality standards programs and is required under Section 303(d)(4)(B) of the Clean Water Act." See Section 1, page 2. Wyoming's antidegradation policy reflects the three-tiered approach adopted by EPA, with Tier 3 providing the highest level of protection under the Clean Water Act. As described in Wyoming's policy, "Tier 3 protections apply to waters that constitute "outstanding national resource waters" (ONRWs). Tier 3 requires maintenance of existing quality with no consideration of assimilative capacity or economic or social development." See Antidegradation Policy at 3. "Though not designated as ONRWs, Class 1 waters are afforded a level of antidegradation protection which is the functional equivalent of EPA's tier 3 concept." *Id.*

In addition to disregarding its antidegradation policies, the WQD's August 20, 2014 reclassification also conflicts with the WQD's policy for use attainability analyses, which provides: "*Class 1 waters are specially designated waters on which the existing water quality is protected regardless of the uses supported by the water.*" See UAA Implementation Policy at 25 (emphasis added). As stated above, the WQD's UAA Implementation Policy is unambiguously clear that water quality of Class 1 waters must be maintained regardless of whether primary contact recreation (or any other use) is an existing or attainable use. The fact that DEQ believes that swimming and other primary contact uses may not be an existing or attainable use on low flow streams in congressionally designated wilderness areas is irrelevant. The DEQ's UAA policy for Class 1 waters expressly prohibits the lowering of water quality standards regardless of whether a use is existing or attainable. Under DEQ policies, existing water quality in Class 1 waters must be protected. Permitting more *E.coli* pollution by virtue of a use downgrade is not permitted.

The Administrator's attempt to downgrade pristine low flow streams within congressionally-designated wilderness areas to secondary contact recreation is an unprecedented assault on Class 1 water quality in Wyoming. This reclassification raises the permissible levels of *E. coli* 500 percent above levels deemed safe for swimming in thousands of miles of Class 1 wilderness streams. While the standard for Class 1 surface waters is no degradation, and no lowering of water quality—this rule authorizes levels of *E. coli* pollution 5 times higher than previously existing limits. Moreover, Class 1 waters are designated by the Environmental Quality Council in accordance with formal rulemaking procedures. See WQRR Chapter 1, Section 4(a). The Administrator's decision to downgrade Class 1 waters to allow for more pollution undermines the authority of the EQC, and defeats the intent of its Class 1 designations. The Administrator's August 20, 2014 reclassification of water quality standards runs afoul of his own policies and therefore must be withdrawn and amended to exclude Class 1 waters.

## **DISCUSSION**

Section 101(a)(2) of the Clean Water Act states the national goal of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" whenever attainable. CWA section 303(c)(2)(A) requires water quality standards to "protect the public health and welfare, enhance the quality of water, and serve the purposes" of the CWA. The EPA's regulations at 40 CFR Part 131 interpret and implement these provisions through a requirement that water quality standards protect the uses specified in section 101(a)(2) (i.e., aquatic life and recreation) unless those uses have been shown to be unattainable. EPA's longstanding interpretation is that the water quality standards regulation establishes a rebuttable presumption that the uses specified in section 101(a)(2) are attainable unless demonstrated otherwise. See 63 Fed. Reg. 36742, 36750 (July 7, 1998).

The mechanism for making such a demonstration is a Use Attainability Analysis, defined at 40 CFR § 131.3(g) as “a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).”

The EPA’s water quality standards regulation states in 40 CFR § 131.10(g) that: “States may remove a designated use which is *not* an existing use, as defined in section 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the demonstrated use is not feasible” based on one of the six factors in 40 CFR § 131.10(g), which are also included in Wyoming’s Water Quality Rules and Regulations Section 33(b) (emphasis in original).<sup>9</sup>

These rules embody a “rebuttable presumption” that certain uses cannot be removed except under narrowly circumscribed conditions. 63 Fed. Reg. 36,742, 36,749 (July 7, 1998). Fishable and swimmable uses are considered attainable and should apply to a water body unless it is affirmatively demonstrated that such uses are not attainable.

Although UAAs are typically completed on a site-specific basis, Section 2.9 of the EPA’s Water Quality Standards Handbook authorizes what are known as “categorical UAAs” for groups of waters: “States may also conduct generic use attainability analyses for groups of water body segments provided that the circumstances relating to the segments in question are sufficiently similar to make the results of the generic analyses reasonably applicable to each segment.”

### **The DEQ’s Categorical Use Attainability Analysis**

The DEQ relied principally on factor 2 (low flows) to support the state-wide downgrade of Wyoming’s surface waters.<sup>10</sup> See UAA at 7; 40 CFR § 131.10(g)(2). EPA Region 8’s policy is that physical factors *may* be considered in combination with “other factors, such as existing uses, waterbody access, bacterial water quality, waterbody location, treatment costs, and the existence of facilities that encourage, or create a potential for, full body contact recreation.” See EPA Region 8 Guidance: Recreation Standards and the CWA Section 101(a)(2) “Swimmable” Goal, May 1992 at 7. This is the so-called “suite of factors” EPA advised DEQ to consider during the development of the UAA. See Letter from EPA Region 8 to Lindsay Patterson DEQ/WQD dated January 22, 2013.<sup>11</sup>

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<sup>9</sup> The six factors include naturally occurring pollution; low flows or water levels; human-induced pollution; dams, diversions or other hydrologic modifications; physical features related to the natural features of the waterbody; and pollution controls more stringent than those required by the CWA would result in substantial and widespread economic and social impacts.

<sup>10</sup> In addition to flow, the DEQ considered access to surface waters and public comment as part of its obligation to consider a suite of factors.

<sup>11</sup> The “suite of factors” approach is discussed in the EPA’s Advanced Notice of Proposed Rulemaking: “EPA’s suggested approach to the recreational use question has been for States and Tribes to look at a suite of factors such as, the actual use, existing water quality, water quality potential, access, recreational facilities, location, safety considerations, and physical conditions of the water body in making any use attainability decision.” See 63 Fed. Reg. 36742, 36756 (July 7, 1998).

As will be described in more detail below, the Administrator's August 20, 2014 decision, and the process used to support it, are directly contrary to the fundamental goals and requirements of the Clean Water Act, and represent an astonishing reversal of the longstanding rebuttable presumption embedded in the Clean Water Act that primary contact recreation is an attainable use that must be protected unless the regulatory authority affirmatively demonstrates otherwise.

***1. A flawed process to identify low flow streams, coupled with a misplaced reliance on low flows to justify a downgrade, led to a legally and scientifically flawed decision.***

In suggesting that the DEQ consider the option of developing a "categorical UAA" the EPA wrote:

The Region cautions that the defensibility of a categorical approach would likely depend on identifying a category or categories of waters that are sufficiently similar such that it is reasonable to use site-specific information for a representative sample of locations to characterize the existing and potential uses for the entire category (e.g., ephemeral waters). However, for the reasons identified above, the Region's perspective is that the most appropriate and defensible method for determining the most appropriate recreation use is to compile and consider site-specific information for each segment of concern.

Letter from EPA Region 8 to Mr. Dennis M. Boal, Chair, Wyoming EQC, dated September 29, 2008, at 20.

The DEQ has failed to provide site specific information that is representative of all the various types of surface waters present in the 115,373 stream miles that flow over 97,914 square miles of Wyoming's landscape.

The DEQ, in conjunction with some conservation districts, conducted approximately 850 surveys, which amounts to one survey per 135 stream miles (100k NHD) and one survey per 331 stream miles (24k NHD). Certainly, any assertion that information collected from these field surveys is representative of the complex surface water system encompassing the entire State of Wyoming and over 115,000 stream miles cannot be accepted. Moreover, although Wyoming conservation districts "visited over 700 sites to help validate the UAA," not all of those site visits took place during the summer recreation season. UAA at 20. The DEQ claims that, "the photographs are shown only to depict channel and flow characteristics" without acknowledging that flows and flow characteristics may vary widely based on any number of factors, and a snapshot taken on a single occasion may not be representative of flows that one might encounter on those streams at other times within the summer outdoor recreation season.

Based on information displayed in the DEQ's *Recreation Designated Uses Web Map*, it appears that most site visits occurred in areas that are accessible by motor vehicle, and a



much smaller number were conducted inside higher elevation forested areas or in other remote mountainous parts of the state where summer flows can vary widely due to snow melt, precipitation and diurnal temperature variation. The model used in this UAA does not predict how much snow will fall (or accumulate on the ground) in any given year (or month or week), nor does it predict temperatures or rainfall during summer months, all of which influence flows. A deep mountain snowpack lingering into early summer will eventually melt off, but the rate of the melt-off, and thus the stream flows, will be influenced by temperatures and rainfall events. The smaller number of field surveys of remote mountainous areas means that in some cases site-specific information was not available to validate assumptions made regarding flows on hundreds, and perhaps thousands, of miles of stream segments. See Recreation Designated Uses Web Map, <https://gis.deq.wyoming.gov/maps/recreation/>

The attached photograph, marked as Photo Exhibit 1, shows a downgraded stream in the Wind River Range. Although the DEQ identified the stream in the photo as a “low flow” stream, one can plainly see that the flows are considerably greater than 6 cfs, perhaps as high as 30 or 40 cfs, or even higher. This photo provides evidence that the model, for whatever reason, is unreliable at estimating stream flows and therefore should not be relied upon to support DEQ’s decisions to downgrade streams.

Stream flow was not the only variable considered in the UAA. Using information from 17 USGS gage sites, DEQ attempted to make estimates regarding the depths of low flow streams. See UAA at 19. In its interpretation of the data, the DEQ employs qualifying terms such as “rarely” and “unlikely” in estimating depths. Clearly, agency guesses about stream depths are not representative of the kind of information that should be included in the “structured scientific assessment” required by 40 CFR § 131.10(g). In addition, the DEQ fails to convincingly demonstrate how data from 17 gage stations are representative of more than 115,000 stream miles flowing over sixty-two million acres of Wyoming’s landscape.

In correspondence with the DEQ during the development of the categorical UAA, EPA Region 8 discussed the limitations of the model with regard to depth estimates:

The EPA acknowledges that stream depth varies along a segment and it would be difficult for any model to accurately capture this variability. The EPA cautions states interested in using depth as the justification for removing primary contact that we are not aware of GIS stream depth data that would be scientifically defensible to make such a demonstration.

Letter from EPA Region 8 to Lindsay Patterson, DEQ/WQD dated January 22, 2013, Note 4.

In an effort to overcome this shortcoming in the model, DEQ solicited information from a limited segment of the public concerning the existence of pools or other deep-water areas on low flow streams. As discussed in section 3, below, this “public outreach” effort fell far short of what is required to reverse the presumption of swimmable uses on these

streams. Attached as Photo Exhibit 2 is a photograph of a woman floating on an air mattress on a warm summer day in a pool located on a downgraded “low flow” stream in the Bridger-Teton National Forest. There is no doubt that this photo, and many others like it, would have been provided to DEQ during the comment period if DEQ had adequately encouraged public participation in the UAA process. Even so, the fact that DEQ required the public to disprove its unsubstantiated assumptions on “low flow” and lack of deep pools is a problem even if public participation had been robust.

EPA Region 8’s guidance on recreation and swimming states that:

With regard to the swimmable component of this national goal, EPA recognizes the physical characteristics (e.g., depth, flow) of some western waterbodies do not lend themselves to swimming and other forms of primary contact recreation. However, the general Agency policy on this issue is to place emphasis on the potential uses of a waterbody and to do as much as possible to protect the health of the public (see 48 FR 51401 and the Water Quality Standards Handbook at p. 1-6) (emphasis in original). In certain instances, the public will use whatever waterbodies are available for recreation, regardless of the flow or other physical conditions. Accordingly, EPA encourages States to designate primary contact designation uses, or at least to require a level of water quality necessary to support primary contact recreation, for all waterbodies with the potential to support primary contact recreation.

EPA Region 8 Guidance: Recreation Standards and the CWA Section 101(a)(2) “Swimmable” Goal, May 1992 (emphasis in the original).

EPA’s statement about the public using “whatever waterbodies are available” is of course true, particularly in arid regions of Wyoming such as the Red Desert, where useable water is both rare and precious, and in most other areas of the state during the late summer season when stream flows have been diminished. For example, see attached Photo Exhibit 3 showing children playing in ephemeral ponds in the Killpecker Dunes area of the Red Desert. This observation is even more correct with respect to children who, as EPA has recognized, “can be very creative about achieving full body contact in even the smallest waterbodies.” See Letter from EPA Region 8 to Dennis Boal, Wyoming EQC, dated September 29, 2008 at 19.

This of course is all the more reason to protect low flow streams for primary contact recreation. Streams flowing at well below 6 cfs will be used for primary contact recreation if that is all that is available, especially in the case of children. See attached photograph marked as Photo Exhibit 4, showing two young boys, ages 11 and 13, playing in a downgraded low flow stream in the Wind River Range. It should be noted that pools occur frequently, even in the smallest of streams, where boulders are present in the stream channel, a common feature of mountain streams not considered by DEQ.

## ***2. The DEQ improperly limited Clean Water Act protections to “easily accessible” surface waters.***

Relying on Wyoming Department of Education school bus policy and questionable assumptions about recreational use of Wyoming’s surface waters, the DEQ has taken the position that “low flow” streams more than a mile from populated places and schools and more than a half-mile from established campgrounds and trailheads do not need to be protected for primary contact recreation because they are not “easily accessible.” UAA at 34. The DEQ acknowledges that those “[d]istances were based on a general understanding of how far children and/or members of the public walk from their homes, schools and recreation sites.” UAA at 33.

There are a number of problems with this approach. First, what is, or is not, easily accessible depends on a variety of factors and varies widely. Second, DEQ’s “general understanding” of recreational use behaviors of both children and adults is demonstrably incorrect, and decisions based on that understanding are completely arbitrary. Third, the Clean Water Act’s recreation use protections are not limited to surface waters deemed to be easily accessible.

Areas of the State that are “easily accessible” to some may for any number of reasons be inaccessible to others. A number of factors such as age, health and fitness of the individual, road and trail access, weather, mode of transportation, land ownership, and many other variables play a role in determining accessibility. We do not dispute that low flow streams near schools and population centers are likely to be frequented by children and adults and therefore deserve to be protected for primary contact recreation. But we fundamentally disagree with the notion that surface waters in rural and “uninhabited” areas of the state, and on the millions of acres of Wyoming’s landscape located more than a mile from schools, towns and recreation sites, categorically do not deserve the same level of protection.<sup>12</sup> The Clean Water Act’s recreation use protections are not limited to urbanized or more developed areas of a state deemed to be “easily accessible” based on school bus policy. Under the DEQ’s approach, a ditch, canal or low flow stream flowing through a rural neighborhood (or a child’s back yard) located more than a mile from a school or town would not be protected for primary contact recreation. This makes no sense.

Regarding school bus policy, it should be noted that elementary school travel takes place when school is in session (i.e., during the fall, winter and spring), when temperatures are much cooler and conditions are often less than ideal for children traveling by foot. Thus, we question how school bus data is relevant in any way to distances school children may travel during summer months, when school is out and temperatures are more conducive to outdoor play. In addition, children walking to school, or to the school bus stop, do so at specific times of day (morning and afternoon) in narrow windows which limit the time children may have to walk and to play. This type of structured activity does not at all

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<sup>12</sup> Low flow streams that flow through or are within one mile of populated places with 55 or fewer persons per square mile have been downgraded to secondary contact recreation.

reflect the play behavior of children on summer vacation, which again is the season the UAA is addressing.

Children will play in streams, canals and ditches miles from the nearest town or school, often near their own or their friends' homes and ranches. Many will walk, but during summer months, even more will ride their bicycles, greatly expanding the distances they may travel. Far ranging expeditions are a normal part of children's development and recreation, especially in a rural and wild state like Wyoming. In Wyoming's rural areas, travel by horseback, or on four-wheelers is also an option for many children. And of course children will play in whatever water source they find, regardless of flow or quality. See attached photograph, Photo Exhibit 5, showing child's play on downgraded stream in the Bridger-Teton National Forest.

With respect to adult recreation behavior, the DEQ's conclusion that "since elementary school children are expected to walk up to a mile to school, WDEQ/WQD anticipates that children and/or members of the public may travel up to 1.0 mile from populated places and potentially use streams within that distance for primary contact recreation[]" is incorrect. UAA at 34. How is the distance traveled by elementary school children to and from school relevant in any way to distances adults may travel for summertime recreation activities? The answer, of course, is that it is not. It is common knowledge that adults travel not only a mile from populated places but 5 miles, 10 miles and even 20 miles in some of Wyoming's wilder and more remote country such as its wilderness areas. See Recreation Exhibit 1 (Meeks Lake trailhead sign).<sup>13</sup> Trips of these distances are normal in Wyoming and contribute to our cultural identity. See, e.g., Washakie Ranger District, Shoshone National Forest visitor information, attached as Recreation Exhibit 2. (unmarked pages 5-6 show hiking distances to popular backcountry destinations, ranging from 1.5 to 16.0 miles). See also Wyoming Atlas & Gazetteer, page 10, Hiking (describing popular hikes of up to 21 miles (each way)), attached as Recreation Exhibit 3, and The Wyoming Range: Wyoming's Namesake Mountains, attached as Recreation Exhibit 4 (noting 75-mile Wyoming Range National Recreation Trail).<sup>14</sup>

The DEQ concluded that because "large areas of the state are uninhabited ... the majority of ephemeral, small intermittent and small perennial streams with insufficient flow to support primary contact recreation do not attract children and/or the general public for recreation because they are not located near population centers, schools or recreation sites." UAA at 33. Yet, what DEQ does not address is that, "in EPA's view, remoteness is not a valid basis for an attainability decision on recreation." 63 Fed. Reg. 36742, 36753 (July 7, 1998) (emphasis added).

The truth is that remoteness and inaccessibility are some of the very features that draw people from across the state and around the world to Wyoming's backcountry areas. See, e.g., Wyoming Recreation Guide, attached at Recreation Exhibit 5 ("The National Landscape Conservation System units in Wyoming offer exceptional opportunities for solitude, exploration, research, recreation, and education."). The state's vast public lands

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<sup>13</sup> See also, <http://www.pinedaleonline.com/TrailInfo.HTM>

<sup>14</sup> See <http://www.summitpost.org/wyoming-range/878644>

offer world-class recreation opportunities that attract people from all over the world. Recreation Exhibit 6 (Greater Yellowstone Visitors Guide). We are familiar with numerous examples of children as young as five and six accompanying their parents on extended backcountry expeditions into remote areas of the Wind River Range and the Absaroka Mountains. The Red Desert also has extremely remote areas that people regularly venture into, such as the Jack Morrow Hills and Adobe Town.<sup>15</sup> See Recreation Exhibit 7, Wyoming's Red Desert Wild Heart of the West.

Sometimes the travel is by foot, other times it may be on the back of a horse, or with goats or llamas. Children in the company of adults travel much greater distances than the DEQ's "general understanding" would suggest, to enjoy outdoor recreation opportunities the state's public land areas provide. See Photo Exhibit 6. Backcountry locations in the Bridger and Fitzpatrick Wilderness in the Wind River Range or the Cloud Peak Wilderness in the Bighorn Mountains are just a few examples of locations that families with children often visit. In addition, children attending summer camps such as Elk Creek Camp<sup>16</sup> and Teton Valley Ranch Camp<sup>17</sup> often backpack several miles from the trailhead to enjoy an overnight camping trip on public lands.

With regard to access, EPA Region 8's guidance explains that:

[I]f people are physically restricted from getting to the waterbody, this would help support a conclusion that establishing a swimmable goal standard is not required at present. On the other hand, if access is provided (e.g., trail is located adjacent to the waterbody), this increases the likelihood that the waterbody will be used for primary contact recreation. Because a critical function of water quality standards is to protect potential uses, access can be an important consideration in reaching a decision about recreational uses.

EPA Region 8 Guidance: Recreation Standards and the CWA Section 101(a)(2) "Swimmable" Goal, May 1992 at 5.

Virtually all of Wyoming's thirty million public land acres are open to public access and myriad recreational activities, and the UAA does not identify any areas of the state closed to recreation. Public lands managed by the USDA Forest Service and the Bureau of Land Management literally contain thousands of miles of trails, paths and "two-tracks" which provide access to millions of acres of lands enjoyed by the public. The laws governing the management of these lands specifically provide for recreation, and numerous policies and programs encourage recreational use on these lands, for both commercial and non-commercial use. See Public Lands Recreation Opportunities, attached as Recreation Exhibit 8. In addition, nearly 3.6 million acres of State Lands are open to recreation.<sup>18</sup>

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<sup>15</sup> See <http://www.blm.gov/wy/st/en/programs/nlcs/wsa/hdd/adobetown.html> and <http://www.backpacker.com/trips/wyoming/the-red-zone-wyoming-s-red-desert/#bp=0/img1>

<sup>16</sup> See <http://www.elkcreekranch.com/index.php/camp-program/backpacking>

<sup>17</sup> See <http://www.tvrcamp.org/page.aspx?pid=580>

<sup>18</sup> See <http://slf-web.state.wy.us/Surface/brochure.pdf>.

The National Outdoor Leadership School (NOLS), based in Lander, WY, reported over twenty-one thousand user days during the summer season on the Shoshone and Bridger-Teton National Forests in 2013. NOLS also reported hundreds of user days on Wyoming's public lands managed by the Bureau of Land Management.<sup>19</sup> Wilderness expeditions led by NOLS are typically 30 days in length; during that period, NOLS students and their instructors may travel one hundred miles or more on foot, both on and off-trail.<sup>20</sup> During the entire time in the backcountry, they rely on naturally occurring surface waters for all their water needs, which include typical recreational activities such as swimming, floating and wading, but also uses such as dunking and splashing to cool off, bathing, cooking, and personal hygiene, etc. All of these activities, to one extent or another, present a risk of ingestion of water, and all are encompassed by the Wyoming DEQ's definition of primary contact recreation. See Chapter 1, Section 2(b)(xlii) ("primary contact recreation' means any recreational or other surface water use that could be expected to result in ingestion of the water or immersion (full body contact).") (emphasis added).

Of course, NOLS is not the only commercial user that travels by foot into the backcountry. Professional guides and outfitters; college outdoor programs; schools and research institutions such as Teton Science School; summer camps and outdoor programs such as Elk Creek Ranch Camp, Teton Valley Ranch Camp, and Wilderness Ventures; guest ranches, scouting organizations and others are authorized by federal land managers and use vast areas of Wyoming's backcountry.<sup>21</sup> Similarly, non-commercial recreational users, which include hikers and backpackers, trail runners, climbers and mountaineers, hunters and anglers, horseback riders, mountain bikers, and many others, travel much farther than one mile to enjoy their pursuits.<sup>22</sup>

In conclusion, there is no basis whatsoever for the DEQ's "general understanding" about distances adults and children may travel for recreational purposes and any conclusion based on that understanding about what is and isn't "easily accessible" is incorrect.

***3. The DEQ may not remove existing and attainable recreational uses of the State's surface waters based on the absence of public comment when no effort was made to encourage comments from recreational users.***

One of the basic requirements of the Clean Water Act is that states may not remove designated uses if they are existing uses. See 40 CFR § 131.10(h). Moreover, states may remove a designated use which is *not* an existing use "only if the State can demonstrate that attaining the demonstrated use is not feasible..." 40 CFR § 131.10(g). Despite these core requirements, the DEQ concluded that since "public feedback has not indicated that

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<sup>19</sup> Per. Comm. with Andy Blair, Assistant Director, NOLS Rocky Mountains, 10/23/2014.

<sup>20</sup> See <https://www.nols.edu/courses/wind-river-wilderness/>

<sup>21</sup> See, e.g., [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5371120.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5371120.pdf)

<sup>22</sup> A search for "hiking guide to Wyoming" on Amazon.com reveals dozens of hiking and backpacking guide books covering virtually all areas of Wyoming.

the stream is used for primary contact recreation, primary contact recreation is presumed not to be an existing or attainable use and can be removed.” UAA at 7.

As we will describe in detail below, given the nature of the DEQ’s flawed public participation process, this result was a foregone conclusion. Although the water quality standard downgraded by DEQ is a recreation-based standard, no recreation user groups were consulted at any time during the multi-year process. Based on information available on the DEQ’s website, it appears the state’s public outreach and consultation efforts were focused almost exclusively on individuals and organizations who either actively advocated for or supported the downgrade of the state’s water quality standards.<sup>23</sup>

Section 101(e) of the Clean Water Act provides, in part, that “public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e) (emphasis added). There is no evidence anywhere in the documents available on DEQ’s website that DEQ “encouraged” the participation of any potentially interested stakeholder except some conservation districts and their constituents, which is to say, the proponents of the state-wide downgrade.

EPA’s public participation requirements applicable to the DEQ’s Categorical UAA are set forth in 40 CFR § 131.10(e); 40 CFR § 131.20(b); and 40 CFR Part 25. Under these rules, the State must provide notice and opportunity for a public hearing “under § 131.20(b)” before removing any use. 40 CFR § 131.10(e). In addition, 40 CFR § 131.20(b) requires that the state’s public outreach efforts satisfy the public participation requirements of Part 25. In turn, Part 25 “sets forth minimum requirements and suggested program elements for public participation in activities under the Clean Water Act...” 40 CFR § 25.1 (emphasis added).

Some of the key public participation requirements contained in Part 25 that the DEQ failed to implement are listed below:

Agencies “shall provide for, encourage, and assist the participation of the public.” 40 CFR § 25.3(a).

“Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunities for interested and affected parties to communicate their views.” 40 CFR § 25.3(b).

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<sup>23</sup> Only one organization, Western Watersheds Project, submitted comments critical of the state’s proposal, and those comments were categorically rejected, including comments indicating the existence of primary contact recreation uses on specific water bodies. See Response to Comments for Comment Period Ending March 14, 2014 at 19. And WWP is only nominally a recreation group, it is fundamentally an environmental advocacy group and outdoor recreation is certainly not its purpose, mission or focus.

Agencies shall “use all feasible means to create opportunities for public participation, and to stimulate and support participation.” 40 CFR § 25.3(c)(7).

“Providing information to the public is a necessary prerequisite to meaningful, active public involvement. Agencies shall design informational activities to encourage and facilitate the public’s participation in all significant decisions covered by § 25.2(a), particularly where alternative courses of action are proposed.” 40 CFR § 25.4(b)(1).

“Each agency shall identify segments of the public likely to be affected by agency decisions and should consider targeting informational materials toward them (in addition to the materials directed toward the general public).” 40 CFR § 25.4(b)(2).

“Each agency shall develop and maintain a list of persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in any covered activity. \* \* \* Those on the list ... shall receive timely and periodic notification of the availability of materials under § 25.4(b)(5).”

Agencies “shall provide for early and continuing public consultation in any significant action covered by this part.” 40 CFR § 25.4(d).

“A notice of each hearing shall be well publicized, and shall also be mailed to the appropriate portions of the list of interested and affected parties required by § 25.4(b)(5).” 40 CFR § 25.5(b) (emphasis added).

Procedures for the conduct of hearings “shall not unduly inhibit free expression of views (for example, by onerous written statement requirements or qualification of witnesses beyond minimum identification).” 40 CFR § 25.5(e).

“The requirements of § 25.5 (b) and (c) are applicable to public meetings...” 40 CFR § 25.6.

As described in the UAA’s Response to Comments (dated January 28, 2013 and August 2014), and reiterated in the DEQ’s December 1, 2014 letter to the Wyoming Outdoor Council, efforts taken by DEQ to notify the general public during the nearly two-year process leading up to the decision consisted entirely of the following:

- Email notice to the DEQ’s unreliable list-serve announcing the August 2013 and January 2014 comment opportunities.
- Legal notice in the Casper Star Tribune published once in 2013 and once in 2014.
- Numerous meetings with Wyoming conservation districts.
- News article in the Pinedale Roundup.
- Two news articles in the Livestock Roundup.
- Notice on Water Quality Division webpage.
- Public meeting in Cheyenne, WY.



- Wyoming Public Radio interview with Lindsay Patterson, DEQ/WQD spokesperson on February 5, 2014.

These limited actions to engage the general public, described in greater detail below, fail to meet the minimum public participation requirements set forth in Part 25.

Notice to list-serve. Notice of the two comment opportunities and the public meeting in Cheyenne was not provided to any party via U.S. Mail, but rather by electronic “email” notice transmitted by a DEQ/WQD list-serve to entities that requested notice.<sup>24</sup> Based on our experiences, the DEQ’s list-serve is unreliable and ineffective at meeting the requirements of Part 25. Despite attempts to sign on to the list-serve, and despite our longstanding interest in water quality standards, electronic notice was not transmitted to the Wyoming Outdoor Council, nor to any of the organizations which endorsed the October 10, 2014 letter to DEQ, nor to any other identifiable recreational user group. A DEQ official stated that technical difficulties with the Water Quality Division’s list-serve may have been responsible for the Wyoming Outdoor Council’s inability to sign on, and for certain entities listed on the list-serve, such as Environmental Defense Fund, not receiving notice.<sup>25</sup>

Legal notice. Notice was published in the Casper Star-Tribune’s classified pages a single time in 2013 and a single time in 2014.

Meetings with conservation districts. The DEQ participated in an ongoing and extensive collaborative process with some of Wyoming’s conservation districts, but neglected to extend the same opportunities to conservation organizations and recreational users of Wyoming’s surface waters.

News story in the Pinedale Roundup. With a population of approximately 2,000, Pinedale is one of Wyoming’s smallest towns, and Sublette County ranks 16<sup>th</sup> in population of Wyoming’s twenty-three counties.

Two news stories in the Livestock Roundup. The Livestock Roundup is a trade publication for the livestock industry. A story in this publication would be unlikely to reach college outdoor programs, summer camps, mountaineering clubs, outdoor leadership schools, mountain bikers, anglers, backpackers, trail runners or other outdoor enthusiasts or the general public.

Website notice. Notice on the DEQ website was embedded several clicks within the Water Quality Division section and was not highlighted in any way on the DEQ’s or WQD’s main webpages, where other important agency information is displayed. See Document Exhibit 5 (main DEQ webpage) and Document Exhibit 6 (main Water Quality

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<sup>24</sup> Email communication between Lindsay Patterson, WDEQ Water Quality Division, and Amber Wilson, Wyoming Outdoor Council, October 1, 2014.

<sup>25</sup> Problems with the list-serve were discussed during a meeting of the Department of Environmental Quality and the Wyoming Outdoor Council in Cheyenne, Wyoming on October 23, 2014.

Division webpage). The Wyoming Outdoor Council routinely receives notice by U.S. Mail from other divisions of the DEQ for actions and proposals that are much more limited in scope, and has come to rely on such notices. See Document Exhibits 7 & 8 (landfill notices). In addition, in what appears to be contrary to the requirements of Part 25, the Water Quality Division has informed the public that it will no longer provide notice by mail. See Document Exhibit 5 (notice on DEQ/WQD website).

Public meeting. Notice of the public meeting in Cheyenne held on August 26, 2013 was not distributed by U.S. Mail, but rather was published a single time in the Casper Star-Tribune, in the same notice that announced the comment opportunity.

Wyoming Public Radio. The radio interview with DEQ spokesperson Lindsay Patterson was less than a minute long and aired on a single day in February. According to the transcript of the interview obtained from Wyoming Public Media website, Ms. Patterson is quoted as saying: “What we’re really talking about is dry draws in the state. We’re talking about ephemeral water bodies, intermittent water bodies that have no water.” See Document Exhibit 9. She went on to state that, “imposing the highest environmental standards on water that people don’t touch is unnecessary regulation.” Id. Arguably, this kind of “notice” is far worse than no notice at all, because its effect is to reassure the public that the action proposed by DEQ is limited to ephemeral and intermittent streams with no water and no recreation use. When a public official confidently reassures the listeners of a state-wide radio broadcast that there is nothing to worry about, it is reasonable to assume that most listeners will take that statement at face value and quickly turn their attention elsewhere.

Hearing. A non-adjudicatory hearing was not held, nor was one offered. The notice announcing the decision to downgrade the state’s surface waters indicated the decision was a *final action* “which may be appealed to the Wyoming Environmental Quality Council [internal citations omitted].” The only hearing offered by the DEQ was a post-decision adjudicatory hearing conducted in accordance with the Wyoming Rules of Civil Procedure. Such a trial-like adversarial hearing that pits ordinary citizens against a state agency defending its decision is hardly a setting that encourages public participation and a free and open exchange of viewpoints. Notice of the August 20, 2014 decision was not provided to the Wyoming Outdoor Council nor to any of the organizations that endorsed the Council’s October 10<sup>th</sup> letter to DEQ.

The result of this flawed and fundamentally unfair public participation process was predictable: “WDEQ/WQD did not receive any comments indicating that there are pools or other deep water areas on ‘low flow’ streams that are used for primary contact recreation.” UAA at 3. Had the DEQ *encouraged* the participation of recreational users and environmental interests, as required by Section 101(e) of the Clean Water Act and by EPA’s public participation regulations, the results of the UAA would have undoubtedly been very different. For example, DEQ would have learned that primary contact recreation uses routinely occur on low flow streams throughout the state, particularly on public lands managed by the Forest Service and Bureau of Land Management. DEQ would also have learned that many streams identified as “low flow” actually contain

flows well in excess of 6cfs during the summer months, as illustrated by Photo Exhibit 2. And DEQ would have learned that streams with flows of less than 6 cfs located more than a mile from schools and towns are frequently used for primary contact recreation, quite often by young children.

The lack of attention to the public participation process is even more troubling given the EPA's continuous emphasis on the importance of engaging knowledgeable citizens and recreational users:

Public review of the revised UAA and the proposed use designations for individual water bodies will be critical. We urge WDEQ to reach out to recreational user groups as part of the public process to identify any areas where the model may be underestimating flows or missing isolated pools that may support primary contact recreation.

Letter from EPA Region 8 to Lindsay Patterson, DEQ/WQD, dated January 22, 2013.

And again:

EPA is particularly interested in seeing the public feedback on pools within the low flow streams addressed by the UAA that are used for or would support primary contact recreation. Our understanding is that WDEQ proposed primary and secondary use designations based on the best information available to the state, but feedback from people that live near the streams at issue is critical in making the right environmental decisions.

Letter from EPA Region 8 to Lindsay Patterson, DEQ/WQD, dated September 25, 2013.

Even earlier, the EPA wrote:

The approach utilized by Wyoming did not consider site-specific information that can be vital in determining the potential for recreation uses to occur, such as water flows and depths, location of the waterbody and its proximity to residences, presence of features which facilitate and encourage recreation uses (e.g., trails and parks), substrate composition, and water quality conditions. Even more importantly, the Wyoming approach did not consider site-specific information regarding existing recreation uses, including information that can be readily obtained from knowledgeable individuals living in the area.

Letter from EPA Region 8 to Mr. Dennis M. Boal, Chair, Wyoming EQC, dated September 29, 2008, disapproving revisions to Wyoming's surface water standards pertaining to recreational use.

By failing to encourage participation from myriad recreational users, diverse environmental and sportsmen's organizations, and other knowledgeable individuals in the UAA process, the DEQ failed to utilize the best information available about recreation uses of the State's surface waters. Organizations such as NOLS possess a vast wealth of information about recreational uses of the state's public lands and surface waters. Other groups that could have provided useful information include hunting organizations such as Backcountry Hunters and Anglers; commercial users such as professional guides and outfitters; college outdoor programs offered at Central Wyoming College and Wyoming Catholic College; schools and research institutions such as Teton Science School; summer camps and outdoor programs such as Elk Creek Ranch Camp, Teton Valley Ranch Camp, and Wilderness Ventures; guest ranches, and various scouting organizations. Non-commercial recreational users such as hikers and backpackers, trail runners, mountain bikers and climbers and mountaineers could have provided DEQ with additional information about existing and attainable uses of so-called "low flow" streams throughout Wyoming. Unfortunately this outreach did not take place, and the result is thousands of stream miles where primary contact recreation is an existing or attainable use have been improperly downgraded to secondary contact.

## **OTHER CONCERNS AND QUESTIONS**

Tribal waters. The DEQ's "designated uses web map" shows numerous surface waters within the exterior boundaries of the Wind River Reservation that appear to have been downgraded to secondary contact recreation. It is our understanding that the Tribes have designated their own water quality standards. We would appreciate clarification of this point.

Wild and Scenic Rivers. The downgrade of designated and eligible wild and scenic river segments and their tributaries may interfere with the Federal Land Managers' responsibility to protect the water quality and related "outstandingly remarkable values" of these streams. We recommend that the DEQ consult with the Bureau of Land Management and Forest Service to consider the potential impacts to designated and eligible surface waters, and include the analysis and findings in a revised UAA.

Impact to downstream users. The UAA should include a discussion of potential impacts to recreation and other water uses downstream of downgraded segments. Higher permissible *E.coli* levels in tributary streams may cause increased levels of *E.coli* level in segments that retain their primary contact recreation classification. The introduction of additional *E.coli* allowed by the downgrade into primary contact streams has the potential to raise the risk of *E.coli* illness, even if maximum permissible levels are not exceeded.

Drinking water. The UAA did not discuss the potential impact of the downgrade on municipal watersheds, sole source aquifers, wellhead protection areas and domestic water supplies. It appears likely that higher levels of *E.coli* allowed in downgraded surface waters could present a greater risk to public health and safety.

Other streams and ditches. The UAA (at p. 32) notes that the DEQ “is also aware of other streams and ditches not depicted in either the 100k or 24k NHD.” The UAA should have provided information about those surface waters, including location, physical, biological and chemical properties, whether primary contact recreation is existing or attainable, and whether they are being downgraded. What is the status of those “other streams and ditches”?

Public Notice of unsafe waters. As a headwaters state, the public understandably assumes Wyoming’s surface waters are safe to swim and play in. However, as a result of the downgrade, many surface waters currently used for primary contact recreation will no longer be protected for that use. Children and other members of the public will of course continue to engage in primary contact recreation activities in streams located more than one mile from schools and towns, and more than one-half mile from established recreation areas. The DEQ has not indicated what, if any, steps it will take to ensure that members of the public, particularly children, are made aware that more than 75 percent of the state’s surface waters are no longer protected for primary contact recreation. For example, who will inform the seven-year old girl that the ditch flowing through the back of her parent’s rural property is no longer safe to play in? Will signs be posted on all downgraded surface waters?

Recreation datasets.

- No trailheads or dispersed camping sites are noted in the data set for Sweetwater County. Similarly, only two trailheads in Natrona County and no dispersed camping sites are identified.
- It appears that county and state park trails and trailheads are not identified or included in the data sets.
- Forest Service system trails, user created trails, and off-trail areas and destinations used by hikers and backpackers, and information easily obtained from recreation user groups is apparently not included in the data sets, and if this information was included, there is no indication it was considered.
- Bureau of Land Management trails, primitive roads, two-tracks, historic trails, Special Recreation Management Areas, Wilderness Areas, Lands with Wilderness Characteristics, backcountry byways, etc. apparently were not included in the data sets, and if this information was included, there is no indication it was considered.
- Wyoming Game and Fish Department public easements, Access Yes properties and Hunter Management Areas apparently were not included in the data sets.
- Dispersed Campsites. This data layer does not have a definition and is apparently not populated into the DEQ’s GIS from any external resource. Hundreds, perhaps thousands of dispersed campsites exist across Wyoming’s public lands.

Effect on *E. coli* impaired streams. The UAA should identify *E. coli* impaired streams, and discuss the potential impacts of the downgrade on ongoing and future efforts to restore water quality in those impaired streams. It seems reasonable to conclude that allowing higher levels of *E. coli* in tributaries to streams that are currently not meeting *E. coli* standards will undermine or complicate efforts to bring impaired streams back into compliance with water quality standards.

Effect of downgrade on public health and safety. The UAA should clearly explain that the practical effect of the reclassification is that it allows a 500 percent increase in the levels of *E. coli* permissible in streams designated for secondary contact recreation. This significant omission in the UAA should be corrected.

Magnitude and scale of surface water downgrade. The Categorical UAA states (at 1) that of the “115,373 stream miles depicted in the 1:100,000 National Hydrography Dataset (NHD) that were addressed in this UAA, primary contact recreation is not an attainable or existing use on 87,775 miles, or 76.1% of the stream miles.” Presumably, the remaining 27,598 stream miles in the 100k dataset retain the primary contact recreation use designation. This should be stated clearly in the UAA.

The UAA also indicates (at 32) that the more detailed 1:24,000 NHD contains 281,000 stream miles in Wyoming, which presumably include the 116,000 miles in the 100k NHD plus an additional 165,000 stream miles comprised of intermittent and ephemeral streams. The UAA concludes that, “streams not present in the 100k NHD do not have sufficient flow to support primary contact recreation and will be designated for secondary contact, unless they are located in areas that are easily accessible to children and/or the public.” *Id.* at 32. Based on these figures, it appears that a total of 253,402 stream miles have been reclassified to secondary contact recreation. Is that correct?

Survey sites. Figure 39 on page 39 reveals the absence of survey sites in Sweetwater County. Were any surveys conducted in Sweetwater County? If not, the failure to validate model results for this very large county should disqualify it from further consideration in the UAA.

In conclusion, for the reasons stated above, we request that the DEQ/WQD withdraw its Categorical UAA for Recreation and August 20, 2014 decision. The geographic scope of the analysis is much too broad, the number of stream miles affected much too extensive and the characteristics of stream segments much too varied to be susceptible to a generic use attainability analysis. Wyoming DEQ’s consideration of the “suite of factors,” which included inaccurate and incomplete information about stream flows and the presence of pools and other deep water areas; incorrect assumptions about recreation uses and access; and a woefully deficient public participation process, fail to satisfy minimum legal and scientific standards required by the Clean Water Act. We therefore ask DEQ to withdraw its Categorical UAA and reclassification decision.

We would appreciate a timely response to this letter and an opportunity to be involved in any further meetings, discussions or deliberation regarding this or any processes related to the development or revision of Wyoming Water Quality Standards.

Sincerely,

A handwritten signature in black ink that reads "Dan Heilig". The signature is written in a cursive style with a prominent loop at the end of the last name.

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Enclosures: Exhibits

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