# Department of Environmental Quality

*To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.*

Matthew H. Mead, Governor

Todd Parfitt, Director


June 17, 2015

Martin Hestmark
Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202

Dear Mr. Hestmark,

This letter responds to your June 3, 2015 letter regarding the Wyoming Department of Environmental Quality's (WDEQ) water quality standards submission designating many streams in the State for secondary contact recreation based on the *Categorical Use Attainability Analysis for Recreation* (Categorical UAA). As noted in your letter, WDEQ's submission was the culmination of more than five years of work by WDEQ, the U.S. Environmental Protection Agency (EPA), and other interested stakeholders. WDEQ appreciates EPA's recognition of the significant effort WDEQ has made to address EPA's comments on the Categorical UAA, as well as EPA's support of WDEQ's approach for identifying streams with insufficient flow to justify the designation of secondary contact recreation for these waters. These comments are consistent with those articulated by Regional Administrator McGrath at our recent mid-year review. WDEQ, however, is disappointed that EPA is delaying approval of the UAA until additional opportunity for public participation is provided.

As you know, during development and revision of the Categorical UAA, WDEQ went beyond the public participation requirements outlined in state rule and policies. WDEQ's water quality standards identify that "public notice and opportunity for comment shall be provided prior to making" a determination, while DEQ's UAA Implementation Policy identifies that "the public notice shall provide a 45-day public review period." With the Categorical UAA, WDEQ held two written comment periods that extended for more than 45-days, held a public meeting, provided opportunity for additional public meetings, hosted a webinar, and provided other opportunities for stakeholders and the public to engage during the UAA process. Moreover, WDEQ identified that the *Categorical UAA for Recreation* was in development in public outreach documents released in September 2011 as part of the state's triennial review process, long before the formal public process for the UAA began.

The authority to modify designated uses, with public notice and opportunity for comment, was given to Wyoming's Water Quality Administrator when Wyoming revised (2001) and EPA approved (2002) revisions to our surface water quality standards. Any determinations made by the Administrator can be reviewed during a public hearing by the Wyoming Environmental Quality Council, and "any person at any time may petition the department or the council to change the classification, add or remove a designated use" on any surface water (Chapter 1, Section 33). Wyoming's process therefore provides an opportunity for the public to request a hearing, consistent with 40 C.F.R §131.10(e). Since 2001, WDEQ

has utilized this process to modify the designated uses of dozens of surface waters. EPA has acted on at least 31 of these UAAs in approximately seven separate actions; none of EPA's actions have requested that the State conduct a hearing or that the State modify its UAA process. Moreover, none of EPA's comment letters on the Categorical UAA articulated that a hearing was required.

We therefore disagree with EPA's position that WDEQ must hold a public hearing in order for EPA to approve our December 2014 submission. EPA is misreading both the Clean Water Act and its own regulations. The Clean Water Act requires states to hold mandatory public hearings in support of the triennial review process, and "as appropriate" for modifying and adopting water quality standards. 33 U.S.C. § 1313(c)(1). The same language is mirrored in EPA's regulations at 40 C.F.R. § 131.20(a). The "as appropriate" language is discretionary – states may hold public hearings when modifying standards, but such hearings are not required. EPA does not have the authority to ignore the "as appropriate" language in the statute, which is precisely what EPA has done by mandating a public hearing in this instance. Nor does EPA have the authority to change its regulations without complying with the notice and comment provisions of the Administrative Procedure Act.

EPA refers to 40 C.F.R. Part 25 to support its position that Wyoming failed to hold a public hearing within the technical meaning of that term, but reference to that regulation is inapplicable. The Part 25 requirements apply to the mandatory public hearings associated with the triennial review process pursuant to 40 C.F.R. § 131.20(b). Nothing in that provision extends the Part 25 requirements to the discretionary hearings associated with modifying water quality standards. In fact, EPA acknowledges that very limitation in its current proposal to modify 40 C.F.R. § 131.20(b). *See* 78 Fed. Reg. 54518, 54545 (Sept. 4, 2013). EPA is attempting to extend the mandatory hearing requirement to water quality standard *revisions* by inserting the phrase "or revising" into the existing regulation. Setting aside the fact EPA does not have the authority to limit the discretionary nature of the public hearing requirement as crafted by Congress, EPA's current rulemaking effort underscores the fact that EPA's existing regulation does not support the Region's current interpretation.

EPA's interpretation also ignores 40 C.F.R. § 131.10(e). This provision specifically governs the process for modifying designated uses, including WDEQ's Categorical UAA. Part 131.10(e) requires agencies like DEQ to notify the public of proposed changes to designated uses and offer "an opportunity" for a public hearing. This provision does not mandate that a hearing be held, only that that the public be afforded an opportunity to request one. This regulation furthers the legislative mandate from Congress that public hearings be held "as appropriate" when modifying water quality standards, by providing the public an opportunity to request a hearing when one is deemed necessary. EPA's current interpretation writes the phrase "an opportunity" out of the regulations, which EPA cannot do without complying with the notice and comment rulemaking requirements of the Administrative Procedure Act.

In summary, WDEQ complied with the Clean Water Act and EPA's implementing regulations when adopting the Categorical UAA and we disagree with EPA's position. We are disappointed that EPA would discount the thousands of hours of work our staff has invested in the process of developing the Categorical UAA, and the participation of other interested stakeholders who took the time to engage in that process during the appropriate time periods. WDEQ, however, has decided to engage in further stakeholder outreach, as requested, because EPA is supportive of the technical and scientific approach for the UAA and has only raised a procedural objection. This approach will also avoid costly and lengthy litigation. We will hold a formal public hearing and consider any additional relevant evidence that is put forward during that process. WDEQ will submit the comments and responses to EPA following the public hearing, along with any modifications to the UAA.

As outlined by EPA, in order for WDEQ to modify any of the surface water designated uses made by the Water Quality Division Administrator on August 20, 2014, the public will need to provide information sufficient to identify: (1) the location of the stream (e.g., latitude and longitude, object ID provided in the web map, etc.); and (2) existing and potential recreational activities given the physical condition of the stream. This information must be sufficient for WDEQ to confirm that primary contact recreation (full body contact, immersion, or frequent use of the stream for child's play) is an existing or attainable use.

Since EPA has been involved in development and revision of the Categorical UAA from the beginning stages and supports WDEQ's approach for identifying streams with insufficient flow to support primary contact recreation, WDEQ anticipates a timely review and approval of the designated use changes by EPA following the public hearing and submission by WDEQ. We also remind EPA of its obligation to review the submission expeditiously. *See* 33 U.S.C. § 1313(c)(3).

WDEQ looks forward to working collaboratively with EPA on future water quality standards submissions, and we will continue to work with interested stakeholders to ensure that surface water designated uses are protective of existing and attainable uses.

Sincerely,

Todd Parfitt, Director
Wyoming Department of Environmental Quality

cc: Shaun McGrath
Kevin Frederick
Dave Ross