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DELIVERED BY U.S. MAIL AND EMAIL

January 5, 2015

Dr. Elizabeth Southerland
U.S. Environmental Protection Agency
Office of Science and Technology
1200 Pennsylvania Ave., N.W.
Mail Code 4301T
Washington, DC 20460

Mr. Shaun McGrath
Administrator
U.S. EPA Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

Re: Wyoming DEQ's Final Determination Regarding The Categorical Redesignation Of Streams In The State From Primary Contact Recreation To Secondary Contact Recreation (August 20, 2014).

Dear Dr. Southerland and Mr. McGrath:

On behalf of the Wyoming Outdoor Council, and the undersigned conservation, outdoor recreation, and other interested organizations, we are writing to voice our concerns about the Wyoming Department of Environmental Quality, Water Quality Division's August 20, 2014 decision to downgrade recreation-based water quality standards on approximately 76% of the state's surface waters appearing in the 1:100,000 National Hydrography Dataset.[1] See Wyoming DEQ's Categorical Use Attainability Analysis for Recreation, August 2014 at 1.

We believe the DEQ's decision is based on: 1) a legally and scientifically flawed "categorical" use attainability analysis; 2) erroneous and incomplete information regarding primary contact recreation activities taking place on so-called "low flow" surface waters across large regions of the state; and 3) an inadequate public outreach effort that failed to illicit a single comment from any recreational user group of Wyoming's surface waters. For

[1] As discussed elsewhere in the DEQ's Use Attainability Analysis (UAA), it appears that approximately 90% of the state's 281,000 stream miles contained in the 1:24,000 NHD have been downgraded. See UAA at 32.

these and other reasons explained below, we respectfully request that you exercise your authority under the Clean Water Act and EPA's implementing regulations at 40 CFR § 131.21 and disapprove the revisions to Wyoming's revised water quality standards.

**Background**

Since EPA's approval of Wyoming's clean water program decades ago, all of the state's surface waters have been protected for primary contact recreation. However, in July 2007, the DEQ submitted revised water quality standards to EPA Region 8 that included an unprecedented downgrade of the majority of the state's surface waters from primary to secondary contact recreation. The impetus for that action appears to have been concerns over a lawsuit filed by environmental organizations against Region 2 of the U.S. Forest Service, which alleged, among other things, violations of water quality standards for fecal coliform in the Medicine Bow National Forest. See Center for Native Ecosystems, et al., v. U.S. Forest Service, 509 F.3d. 1310 (December 17, 2007).

In September 2008, EPA disapproved that revision based on the DEQ's failure to prepare a use attainability analysis. In explaining the disapproval, 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.... 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.
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> Wyoming should have considered site-specific information in determining what recreation standard is appropriate for each segment. The importance of considering site-specific information has long been a key point of emphasis in EPA guidance regarding designations and protection of recreation uses, both at the national and Regional level and is a key underpinning of the federal Use Attainability Analysis (UAA) requirements.

Letter from EPA Region 8 to Mr. Dennis M. Boal, Chair, Wyoming Environmental Quality Council (EQC), dated September 29, 2008, at 19. In this letter, EPA suggested that DEQ consider the option of developing a "categorical UAA." In identifying this option, 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.

Id. at 20.



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Following EPA's 2008 disapproval of Wyoming's revised standards, the DEQ submitted, and the EPA approved, a number of recreation use downgrades that were supported by site-specific UAAs. See letters from EPA Region 8 to DEQ dated November 30, 2010 and December 28, 2011. However, as explained in its Categorical UAA (at 2), the DEQ in 2009 or 2010 "determined that a statewide categorical UAA would be the most effective and efficient method to identify primary and secondary contact recreational uses for waters in Wyoming." In concert with conservation districts, the DEQ began work on a categorical UAA for the entire state of Wyoming. In February 2012, a draft was submitted to EPA Region 8 for review. The DEQ finalized its UAA in the summer of 2014, and issued a decision on August 20, 2014 approving the state-wide downgrades.[2]

The Wyoming Outdoor Council discovered the DEQ's August 20, 2014 decision in late September. On October 10, 2014, the Council transmitted a letter to the DEQ raising concerns about the DEQ's decision, and the process used to support it. A copy of that letter was provided to EPA Region 8, and is attached as Document Exhibit 1. Individuals representing fourteen organizations with interests in outdoor recreation who, like the Wyoming Outdoor Council, also failed to receive notice of the DEQ's action endorsed the letter, including the American Alpine Club, Jackson Hole Mountain Guides, Elk Creek Ranch Camp, Sunlight Sports, American Rivers, and many others. The DEQ replied to the Outdoor Council letter on December 1, 2014. EPA Region 8 was copied on that letter, which is attached as Document Exhibit 2.

**Clean Water Act Requirements**

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)."

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[2] The practical effect of changing the designated use from primary to secondary contact recreation is that the applicable *E.coli* bacteria levels permissible in the water body during the summer recreation season increase to a geometric mean of 630 organisms per 100 milliliters, from the current criterion of 126 organisms per 100 milliliters, five times the level EPA has set for primary contact recreation waters.



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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).[3]

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.[4] 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.[5]

Having determined that stream flows would be the focal point of the analysis, the DEQ engaged in a three-step process to develop its UAA and the resulting use downgrades. The first step relied on GIS databases "to identify streams that do not support primary contact

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[3] 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.

[4] 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.

[5] 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).



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recreation" due to low flow conditions. DEQ decided that streams with mean annual flows less than 6 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 waters 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 agency 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—have been downgraded to secondary contact recreation. Only 27,598 stream miles retain their primary contact recreation use designation.[6]

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[6] 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 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.

As will be described in more detail below, this decision, and the process used to support it, are directly contrary to the fundamental goals and requirements of the Clean Water Act, and represent a shocking 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.

**Discussion**

***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.***

As noted earlier, 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 cannot be accepted. Moreover, although Wyoming conservation districts "visited over 700 sites to help validate the UAA," none 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 flow characteristics during the fall are not at all representative of flows that one would likely encounter on those streams in June, July and August, the primary 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 very few 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.[7] The model used in this UAA does not predict how much snow will fall (or accumulate on the ground) in any given year, 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 lack of field surveys of remote mountainous areas means that no site-specific information was available to validate assumptions made regarding flows on thousands of miles of stream segments. See Recreation Designated Uses Web Map, http://159.238.120.99/recreation/index.html

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

[7] Figure 39 on page 39 reveals the absence of survey sites in Sweetwater County. The failure to validate model results for this very large county should disqualify it from further consideration in the UAA.

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 very accurate, 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. 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 3, showing two young boys, ages 11 and 13, cooling off on 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.[8] 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 limits the time children may have to walk and to play. This type of structured activity does not at all 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,

[8] 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.



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Photo Exhibit 4, 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).[9] 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).[10]

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 offer world-class recreation opportunities that attract people from all over. 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.[11] See Recreation Exhibit 7., Wyoming's Red Desert Wild Heart of the West.

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[9] See also, http://www.pinedaleonline.com/TrailInfo.HTM

[10] See http://www.summitpost.org/wyoming-range/878644

[11] 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

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 5. 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[12] and Teton Valley Ranch Camp[13] 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.[14]

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.[15] 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.[16] 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

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[12] See http://www.elkcreekranch.com/index.php/camp-program/backpacking
[13] See http://www.tvrcamp.org/page.aspx?pid=580
[14] See http://slf-web.state.wy.us/Surface/brochure.pdf.
[15] Per. Comm. with Andy Blair, Assistant Director, NOLS Rocky Mountains, 10/23/2014.
[16] See https://www.nols.edu/courses/wind-river-wilderness/



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such as dunking and splashing to cool of, 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.[17] 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.[18]

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 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 two-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.[19]

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[17] See, e.g., http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5371120.pdf

[18] A search for "hiking guide to Wyoming" on Amazon.com reveals dozens of hiking and backpacking guide books covering virtually all areas of Wyoming.

[19] 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



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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).

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

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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 or mission or focus.

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.[20] 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. See Document Exhibit 3. A DEQ official

[20] Email communication between Lindsay Patterson, WDEQ Water Quality Division, and Amber Wilson, Wyoming Outdoor Council, October 1, 2014.



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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.[21]

Legal notice. Notice was published in the Casper Star-Tribune once in 2013 and once 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 environmental 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 16th 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 4 (main DEQ webpage) and Document Exhibit 5 (main Water Quality 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 6 & 7 (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 contained in the legal notice published once in the Casper Star-Tribune.

Wyoming Public Radio. The radio interview with DEQ spokesperson Lindsay Patterson was less than a minute 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 8. 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

[21] 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.



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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 10th letter.

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; 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 Issues for EPA consideration:**

1) Rebuttable presumption and the burden of proof. The DEQ has effectively created a two-tiered process in which a state-wide categorical downgrade of a recreation use designation can be made on the basis of questionable modeling of flows, pools and channel depths; incorrect assumptions about recreation use of Wyoming's surface waters; and a deeply flawed public participation process, while on the other hand, an onerous administrative process requiring

citizens to submit detailed, site specific information to support an upgrade.[22] The process created by DEQ improperly shifts the burden of proof to the public to prove the existence of recreation uses that the Clean Water Act already presumes exist.

Our concern about this double standard was borne out during the comment period, during which one commenter submitted information to support a primary contact recreation designation only to have that information categorically rejected by DEQ. See Response to Comments for Comment Period Ending March 14, 2014 at 18. Given the vast number of stream miles being downgraded, and with many thousands of stream miles located within remote public lands areas accessible only by foot or horseback, the information gathering and reporting requirements impose an impossible burden on citizens striving for accurate and appropriate stream designations. In many instances, such as high mountain wilderness areas, the required information such as annual flows, is not even available.

2) No water quality data. The DEQ's failure to consider water quality data undermines EPA Region 8's goal to maintain and protect existing water quality and violates a basic requirement of Wyoming's "credible data" law. The Wyoming Environmental Quality Act and its implementing regulations require the use of credible data[23] in both designating uses of surface water and in determining water body's attainment of designated uses. See W.S. § 35-11-103(b), and Chapter 1, Section 35, DEQ Water Quality Rules and Regulations. Quite clearly, the requirement for the use of credible data to support changes to use designations and in determining a water body's attainment of designated uses is not, as asserted by DEQ, limited to data that is "readily available." If credible data is not available, the law requires the agency to collect it or develop it. It is clear that the DEQ did not consider statutorily defined "Credible Data" in making its decision to downgrade waters statewide from primary to secondary contact recreation.

3) Administrative procedures. We request that EPA review the administrative process used to downgrade streams from primary to secondary contact recreation for compliance with Wyoming Statute § 35-11-302(a). This section provides, in part, that "[t]he 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."

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[22] The DEQ's January, 2014 Public Notice specifies that comments about recreational uses "should be accompanied by detailed information such as photos, landowner testimony, mean annual flow, user surveys and also include information to identify the location of the stream (i.e., stream name, latitude, longitude, stream ID number, etc." Petitions for re-designation would also have to comply with the DEQ's credible data law. WQRR, Chapter 1, Section 35(c), which DEQ itself failed to follow.

[23] "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).



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Section 34 of Chapter 1, Water Quality Rules and Regulations, authorizes the Administrator to submit revised water quality standards directly to EPA for review, bypassing both the advisory council and the director, and avoiding a non-adjudicatory hearing in front of the EQC. Section 34's attenuated process seems to be at odds with W.S. § 35-11-302(a) which requires the involvement of the Advisory Board and a non-adjudicatory hearing before the EQC. The streamlined approach used by DEQ also bypasses the standard Wyoming APA rulemaking process, including the public notice requirement at W.S. § 16-3-103(a)(i) (notice must be mailed).

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

4) Anti-degradation policy. We request that EPA review the DEQ's categorical UAA for consistency with the Clean Water Act's anti-degradation requirements. Many of the downgraded streams are located in federally-protected wilderness areas and are therefore designated Wyoming Class 1 waters, which are equivalent to Outstanding National Resource Waters. EPA's regulations at 40 CFR § 131.12(a)(3) provide that in those areas, "water quality shall be maintained and protected." Further, outside of those areas, "[w]here the quality of waters exceed levels necessary to support ...recreation in and on the water, that quality shall be maintained and protected..." 40 CFR § 131.12(a)(2). See also, Wyoming Surface Water Quality Standards Implementation Policies for Antidegradation ("Under no circumstance, however, may water quality be lowered below the criteria established in the standards or below a level that would impair an existing use.").

5) Unclear stream designations. The UAA at page 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"?

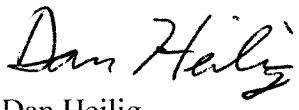
6) Public Notice of downgrade. The public assumes Wyoming's surface waters are fishable and swimmable. However, as a result of the downgrade, many surface waters currently used for primary contact recreation will no longer be protected for that use. Children and other members of the public will continue 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. 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?

In conclusion, for the reasons stated above, we request that the EPA disapprove Wyoming's Categorical UAA for Recreation. 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 access; and a deficient public participation process, fails to satisfy minimum legal and scientific standards required by the Clean Water Act. We therefore ask EPA to reject Wyoming's Categorical UAA.

We appreciate EPA's willingness to consider the concerns of recreational users and others who were not made aware of this process. We would appreciate a timey response to this letter in accordance with 5 U.S.C. § 555(e).

Sincerely,



Dan Heilig
Senior Conservation Advocate &
Attorney for Wyoming Outdoor Council

Cc: Mr. Todd Parfitt, WY DEQ Director (hard copy provided without recreation exhibits)

Enclosures: Exhibits



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