To: Spence, Sandra[Spence.Sandra@epa.gov]; Fish, Tonya[Fish.Tonya@epa.gov]
From: Schmit, Ayn
Sent: Tue 9/8/2015 9:04:14 PM
Subject: FW: [WQ News] Water hearing to be held under protest - Wyoming will hold a public hearing next week on its plan to allow five times more E. coli in 76 percent of the state's waters

From: wq-news@googlegroups.com [mailto:wq-news@googlegroups.com] **On Behalf Of** Loretta Lohman
Sent: Tuesday, September 08, 2015 1:00 PM
To: Gerald N. Johnson; wQ-news@googlegroups.com; AGteam@googlegroups.com
Subject: [WQ News] Water hearing to be held under protest - Wyoming will hold a public hearing next week on its plan to allow five times more E. coli in 76 percent of the state's waters

Why would Wyoming want to do this?

Water hearing to be held under protest

By Angus M. Thuermer Jr. | September 8, 2015

20SHARES

Wyoming will hold a public hearing next week on its plan to allow five times more E. coli in 76 percent of the state's waters, but only to "avoid costly and lengthy litigation," against the federal government.

Wyoming's Department of Environmental Quality has agreed to give another comment opportunity to backcountry users and others who feel they were left out when the plan was formed. But the state is being dragged — practically kicking and screaming — to the hearing by the U.S. Environmental Protection Agency.

The EPA said although Wyoming held a public meeting, it failed to record testimony and also failed to advertise the gathering for 45 days as mandated by regulations. "Neither of these requirements was satisfied by the state's public meeting," the EPA told Wyoming DEQ director Todd Parfitt in a June 3 letter.

But Wyoming feels it doesn't have to hold a hearing to satisfy the federal law, Parfitt responded.

"… WDEQ complied with the Clean Water Act and EPA's implementing regulations when adopting the [water plan] and we disagree with EPA's position," Parfitt wrote June 17. "EPA is misreading both the Clean Water Act and its own regulations."

Nevertheless, Parfitt said the DEQ will hold a hearing and record testimony.

"WDEQ, however, has decided to engage in further stakeholder outreach, as requested, because EPA is supportive of the technical and scientific approach for the [water plan] and has only raised a procedural objection," Parfitt wrote. "This approach will also avoid costly and lengthy litigation."

Who muddied the waters?

Some see the hearing as part of a growing conflict between recreation and agriculture. Perhaps the perception arises because agricultural interests have been deeply engaged in forming the water rule while recreation and environmental groups just realized what's going on.

While Wyoming disagrees that it operated behind closed doors, EPA is on the side of recreation. A transcript of a public hearing is necessary, EPA said, so it can analyze criticism of Wyoming's approach and the state's response to such criticism. Only after examining such a record, the federal agency said, can it certify Wyoming's change of status for 87,775 miles of streams. This is actually the second time the EPA has rejected Wyoming's classifications.

Exhausted climbers, like this one in a Wyoming range, might seek to immerse themselves in small pools after a long day, recreation advocates say. A change in state regulations would make people identify such places to maintain the toughest E. coli standard. (Angus M. Thuermer Jr./WyoFile)

Here's how the conflict arose.

In the early 2000s, as the result of lawsuits, EPA clarified the Clean Water Act and Wyoming agreed to rewrite its own rules. "They basically put a lot of pressure on the states," DEQ spokesman Keith Guille said. Wyoming agreed, saying "we'll kind of upgrade our standards, make them consistent with EPA standards."

In 2007, Wyoming's revisions set a "primary contact recreation" level for E. coli bacteria and also a less strict secondary level. Primary waters are where there's "recreational or surface water that could be expected to result in ingestion of the water or immersion (full body contact.)" Primary contact recreation is defined as where "there is contact with the water sufficient to pose a significant health hazard (i.e., water skiing, swimming)." One consultant, RESPEC, of Rapid City, S.D., included boating and wading as recreation uses in a report to the DEQ about the Shoshone River watershed.

Primary recreation waters must have fewer than 126 E. coli organisms per 100 ml of water during the summer recreation period of May 1 through Sept. 30. Secondary waters can have an E. coli count of up to 630. E. coli is a bacterium that can cause severe stomach and intestinal illnesses, depending on the type and amount ingested.

The designation was applied to a list of waterways and lakes, "with the thought, obviously, this is going to be looked at with streams that don't need this type of protection," Guille said. In other words, adjustments could be made. Wyoming also published a list of "secondary" waters. The lists basically designated all the large rivers and reservoirs as primary and the rest as secondary, DEQ officials said.

EPA's first rejection of Wyoming's approach

But the EPA rejected the approach and the secondary list. "Their rationale is we hadn't conducted a use attainability analysis," said Lindsay Patterson, a DEQ water supervisor. "That is the analysis the EPA requires when you want to remove a recreation use [designation]."

As the use attainability analysis name implies, to reclassify a waterway from primary to secondary designation, one must analyze whether the primary recreation use is attainable. Stockmen and conservation districts said many streams where nobody could swim were improperly classified for the primary standard. They began petitioning the DEQ to change classifications in some areas, a process seen as laborious.

The federal government said Wyoming could use another approach. It could reclassify many streams at one time through a categorical use attainability analysis. This would be a scientific approach that used a model to select the secondary streams. Wyoming proposed a model that set 6 cubic feet a second as a threshold below which primary recreation contact — swimming and such — would not occur.

Without using the model to reclassify many streams at the same time, the DEQ would have faced "all these individual UAAs," Guille said. "It would have been a very long, drawn-out process. It gave us pause."

Some of Wyoming's 34 conservation districts — local and regional agencies funded with public tax money that seek to improve natural resource conditions often associated with agriculture — were filing petitions for reclassifications from primary protections to secondary. They promised more, Guille said. "Certainly that was a concern when we started looking at our [staffing] resources."

In choosing to reclassify many sites at one time, DEQ sought verification that streams that averaged less than 6 cfs a year were actually places you couldn't swim or otherwise recreate. Brenda Ashworth, district manager for the Star Valley Conservation District, was one of those who participated in the model's verification. "The conservation district went out and spot-checked 720 random spots," she said. "Each district was given pinpoints in their district [to verify] the use of that particular stream. We did go out and verify the areas that were given to us by the DEQ."

New model for reclassifying streams

The results backed up the DEQ model for the broad reclassification, Wyoming contends. Streams with less than 6 cfs, measured according to standards, were not places where people went to swim or otherwise get wet. The Star Valley Conservation Districts and others believe they confirmed the model is an appropriate way to make the broad reclassification. "We're supportive of the model," Ashworth said.

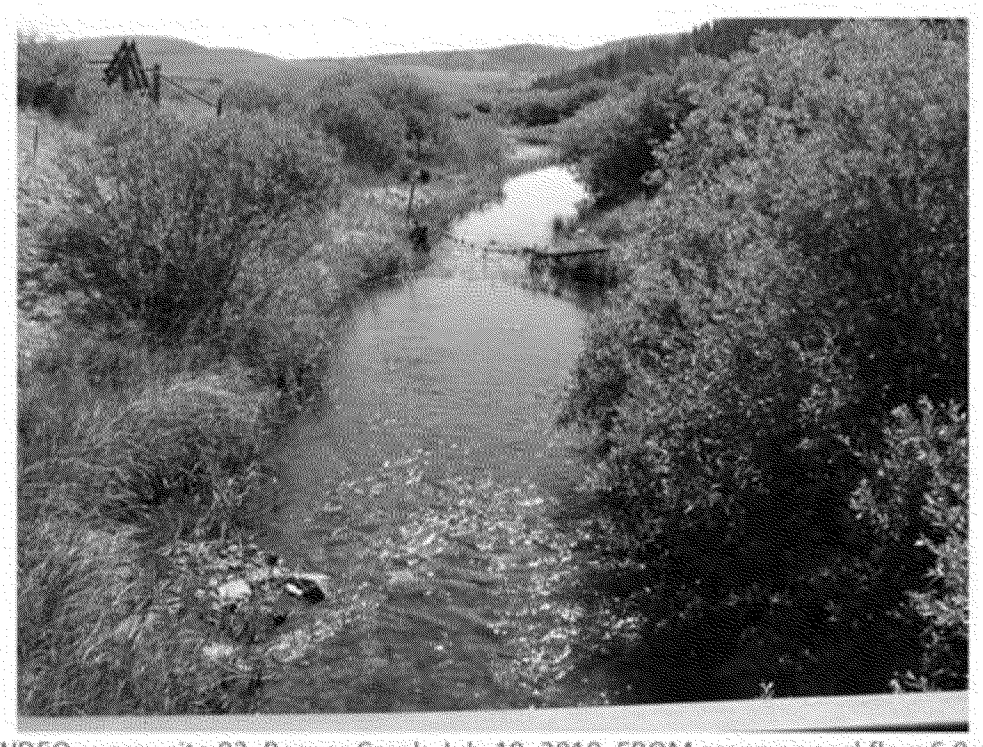

Figure 27. WDEQ survey site 93, Beaver Creek, July 19, 2010. EROM mean annual flow 6.0 cfs, 1st order. Mean annual precipitation 17 inches.

This photograph in a document outlining Wyoming's proposed change in water standards shows a creek with an average annual flow of 6 cfs. Conservation districts checked hundreds of sites to validate a state model to reclassify 87,775 miles of streams as too shallow for recreation and immersion. (Wyoming DEQ)

Bobbie Frank, director of the Wyoming Association of Conservation Districts, would like to see EPA accept the model. "It's just a recognition that if there's minimum or no opportunity for full-body contact, you treat it differently," she said. "Let's don't throw four or five years of work out because of this issue of missed participation."

There's no way DEQ veiled its actions, she said. "We don't agree with that notion at all," Frank said. "It's a little concerning — DEQ's really been thrown under the bus."

Some disagree strongly with Wyoming's sweeping reclassification. The 6 cfs model isn't worthy, said Gary Wilmot, director of the Wyoming Outdoor Council, a group that advocates for a healthy backcountry.

"The problem is the model the DEQ established to deal with a small problem ended up getting really big," he said. "Three-quarters of the state — that's a lot of surface water to deal with. We don't think enough people were part of the conversation in building the model. There are some flaws in how it was developed."

In wilderness areas, for example, many streams flow at less than an annual average of 6 cfs. Nevertheless, hikers, backpackers, horse packers and others rush to their banks after a long day. "Those, uniquely, are waters people are refreshing themselves in," he said of wilderness streams and lakes.

Another flaw is the state's reliance on what Wilmot called a "school-bus standard." Waters flowing at less than 6 cfs maintain the primary standard if they are within a mile of populated places. (A mile is how far a schoolchild has to live from a school before a bus picks her up. Areas within a quarter mile from trailheads and some other community gathering places also would be protected by the primary standard regardless of low flow. The high use of such areas is the reason for that designation.)

Wilmot said the distances are not far enough. "My kids … 9 and 11 … traversed the Wind Rivers this summer," he said. "They walked 100 miles. I don't think that's unique. A lot of kids are traveling much more than a mile off the beaten path to access clean water."

"The models should look at some sort of corridor," he said, along trails where streams would remain in the primary-use category. "A trail, like a road, creates access," he said.

Also, streams that flow at an average of 6 cfs may flow at a higher rate during the summer recreation season. That would allow for more swimming or immersion. Plus, even streams with 6 cfs of flow have pools in which people can dunk, he said.

An example of a 6 cfs flow can be seen in Jackson at Cache Creek, a few miles east of town where a U.S. Geological Survey gauging station records flows. Last week, the creek dipped below 6 cfs twice, but otherwise flowed at up to 10 cfs. Cache Creek is a popular recreation site and the creek itself has several bridges to allow hikers and cyclists to cross. Without them, one could wet a boot trying to cross. It's deep enough there are pools where one might dunk.

"There's some challenge when you're just trying to put a model across a landscape," Wilmot said. As it did that, DEQ "missed the boat … largely because people that use the backcountry in those ways weren't involved in the decision," he said.

"If you tell [Wyoming residents] you're going to promulgate a rule that's called a CUAA [categorical use attainability analysis], most faces would go blank," Wilmot said. "They have no idea what you're talking about. They [DEQ] were describing it as affecting dry draws, ephemeral streams. That's not how most Wyoming folk would describe these streams. It doesn't accurately describe to people what's happening."

How to change the classification

Conservation association's Frank said people can get streams reclassified as primary. "We hope if people have information and data that indicates any of the design be adjusted, that they bring them," she said of the Sept. 16 meeting in Casper. "But let's don't change the rules of the race at the finish line — and we're at the finish line."

Environmental activist Jonathan Ratner, who works for Western Watersheds Project, said there's a Clean Water Act presumption that all water can meet the primary standard. But that's a "rebuttable presumption," meaning waters that don't meet the primary definition can be excluded if a petitioner supplies the appropriate data.

Wyoming's plan categorically downgrades 76 percent of the state's waters, he said. People who want primary classification reinstated must supply the latitude and longitude or web-map ID of a stream segment. Information also must identify existing and potential recreation activities.

"It completely turns the rebuttable presumption of the Clean Water Act on its head," he said. "That's a massive problem. This downgrade is orders of magnitude greater than anything that has been done," by the EPA.

"The DEQ does not have flow data for one-hundredth of the streams it's downgrading," Ratner said. "We're talking thousands of streams and they haven't measured flows in these things. They're just guessing."

Ratner has seen Western Watersheds' water-quality data — known as third-party data — that he's submitted for stream classification to the DEQ rejected by that agency. This is despite receiving approval for his methods of collection. DEQ and Western Watersheds disagree over an E. coli incubator Ratner replaced after his methods were approved. The state says it doesn't comply with its collection-program approval. Ratner said the machine is superior to the one

approved by Wyoming.

Upcoming meetings:
Jonathan Ratner of Western Watersheds Project will talk about water quality at 6 p.m. September 10 in the Teton County Library in Jackson.
The DEQ public hearing will be from 5:30 to 8:30 p.m. September 16 at the Oil and Gas Conservation Commission building, 2211 King Blvd. in Casper.
Those wishing to comment beforehand can submit them in writing to:
David Waterstreet, Watershed Section Manager, 122 W. 25th Street, Herschler Building 4-W, Cheyenne, WY 82002, or by fax at (307) 777-5973.

"Clean Water Act listings are not based on data any more," Ratner said. "They're based on politics."

For Star Valley's Ashworth, the conflict is overblown. "I wish we could get away from the us-and-them," she said. She rejected what "seems to be the public impression," that reclassified streams will be polluted.

"There's not anybody in the conservation district that wants to allow more pollution," she said. Star Valley's own Salt River and a tributary currently exceed the primary standard and the conservation district is launching a voluntary program to clean up the waterways. It would cost $172,000 over a three- to five-year period, money that would come from public grants and matching private funds or in-kind work. "We are all working toward better water quality in our state," she said.

Frank says the debate also is off-center because people refer to the change as a downgrade. Instead, "it's an accurate designation of surface water," she said. "There will always be a commitment to clean water in this state."

Gov. Matt Mead and his administration are welcoming input on Sept. 16, despite Parfitt's letter that insists the state doesn't have to hold a hearing. "I expect each agency to go above and beyond to include the public and, in this case, the DEQ has done that," he said in a statement.

Read the EPA's letter to Wyoming officials, regarding public hearings:
http://www.wyofile.com/water-hearing-to-be-held-under-protest/

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Loretta Lohman, PhD
Lohman and Associates
3375 W Aqueduct Ave
Littleton, CO 80123-2903
303-549-3063
lorettalohman@gmail.com

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