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Project**

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Terri A. Lorenzon, Director  
Environmental Quality Council

*Working to protect and restore Western Watersheds*

February 10, 2007

Dear Members of the Environmental Quality Council,

On May 10<sup>th</sup>, 2005 a meeting was held in the Cheyenne DEQ offices to discuss the draft Chapter 1 changes. Present at the meeting were various agriculture interests, the DEQ, the Forest Service, the BLM, WACD, Western Watersheds Project and the EPA. Nearly the entire meeting was taken up with discussions of the proposed elimination of use support for primary contact recreation from all waters not on the Table A list (see Section 27a). The last part of the meeting was a discussion of the proposed variance for the e. coli standard (see Section 27d).

These two issues were the major sticking points of the discussions. In both cases, it was made very clear to the DEQ by the EPA and ourselves that as currently proposed, these two proposals would be a clear violation of federal regulations implementing the Clean Water Act and the state's own language in Chapter 1 and would thus be illegal.

Unfortunately, the DEQ failed to listen to this input and has moved ahead with a second draft that made no significant changes to these two issues from the pre-May 10<sup>th</sup> 2005 draft. The DEQ put the proposed changes in front of the Water and Waste Advisory Board which approved the changes in spite of the legal issues raised against them. We are disappointed by this attitude on the part of DEQ which further wastes time and resources of all those involved with further discussions of insupportable proposals.

Given that the current draft before the Council maintains the above mentioned violations of federal regulations and the state's own direction in Chapter 1, we appeal to the Council to reject the direction the DEQ is taking.

If the current direction on these two issues is continued and the changes are adopted by the state, then one of two results will be likely: a) If the final draft is approved by the EPA management, in spite of EPA's clear comments outlining the violations of regulation and statute, litigation against the EPA to overturn its approval is likely, thus returning the State to step 1 of the process. b) If the EPA management takes the advice of its expert staff and abides by the clear direction of the statute and regulations, and rejects the DEQ's proposal, then all the time, effort and resources that have been put into the process will have been wasted as the whole process will need to begin again. If the DEQ adopts the proposal without the EPA's approval, then litigation against the State is likely.

Any of the scenarios described above reflect poorly on the State's handling of these issues. WWP prefers a more intelligent and thoughtful approach where by the approved

from Western Watersheds to 3077775973  
 changes to Chapter 1 are fully supported by the Clean Water Act and its implementing regulations as well as the current language in Chapter 1.

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Regarding the specifics of the current draft, we have the following primary concerns in addition to the issues described above:

- 1) Chapter 1-11 The removal of "primary contact" from lines 18, 23, 35 and 42 downgrade these water body categories by eliminating primary contact recreation use support. This downgrade does not follow the framework for permitting downgrades of use support.
- 2) Chapter 1-24 The adding of a variance for the e. coli standard is likewise contradictory to the Clean Water Act and its implementing regulations by allowing across the board elimination of the standard without going through a full standards review. In addition, the current language is so vague "otherwise in the public interest" as to be a blanket exception to the standard, thus eliminating the standard. In discussions on the variance at the May 10<sup>th</sup> 2005 meeting Bill DiRienzo mentioned that the Upper Tongue River was a case where a variance should be granted. In response, I asked Bill how the Upper Tongue River area differed from the other 85% of the state where livestock grazing takes place and his response was that it did not differ. So it was clear from this that the intent of the variance is to give a free pass to every situation with elevated e. coli levels.

We repeat our comments of the prior draft since they are still applicable to the current draft:

P1-23 Lines 5-15:

The requirement that streams classified as primary contact be limited to those listed in Table A and purposefully excluding all streams not listed in A is arbitrary and unsupported. For instance, I work throughout the state with much of my summer spent in the field on Forest Service and BLM administered lands. During these projects I have primary contact with many streams that are not listed in Table A. There is no reason that these streams should be excluded from the primary contact category during the dates proposed in the draft changes to Chapter 1. Such arbitrary classifications would leave the final changes to Chapter 1 open for challenge, as there is no logical reason to exclude waters not in Table A.

40 CFR 131.10(j) of the implementing regulations of the Clean Water Act clearly requires a UAA where a state "wishes to remove a designated use that is specified in Section 101(a)(2) of the Act". The State's own language in Chapter 1 echoes this requirement, but the proposed changes violate both of these regulations. A UAA is also required in cases where the state wishes to adopt subcategories with less stringent criteria. The proposed changes would do both over a vast area of the State's waters. Further, the EPA has outlined a fairly simple method for completing a downgrade of ephemeral streams from primary to secondary which complies with the Clean Water Act and other State regulations.

We request that this section be struck from the final changes.

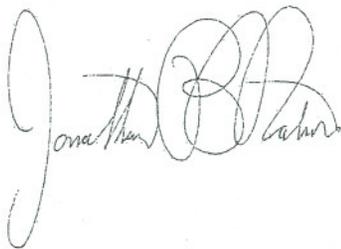
P 1-24 Lines 1-4:

This section is too vague and open-ended to adequately comply with the Clean Water Act and its implementing regulations. In particular, the word "unavoidable" is far too

nebulous. This is further indicated by the inapplicable example given. In addition, "or otherwise in the public interest" is also too vague and undefined to provide anything but indiscriminant permitted violations of the Clean Water Act. This section is further vitiated by the lack of any definitions or guidance of how this section would be applied or its limitations. This lack of clarity invites challenges to this section if implemented in the final revision.

We request that this section be struck from the final changes.

We sincerely hope that the Environmental Quality Council takes the time to thoroughly understand the issues brought forward here and those of provided repeatedly by the EPA so that the final decision will not violate the Clean Water Act and its implementing regulations as well as current Chapter 1 language but improve Wyoming's implementation of the Clean Water Act,

A handwritten signature in black ink, appearing to read "Jonathan B. Ratner". The signature is stylized with large, flowing loops and is positioned above the typed name.

Jonathan B Ratner  
Director - Wyoming Office