

Triennial Review of Wyoming's Surface Water Quality Standards

Response to Comments Received During Written Comment Period and Water and Waste Advisory Board Meeting, June 13, 2024

October 2024

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Table of Contents

1.0 Summary	4
2.0 Commenters and Commenter Index.....	5
2.1 Commenters and Acronyms.....	5
2.2 Commenter Index.....	5
3.0 Proposed Changes Not Based on Public Comments	6
3.1. Proposed Changes Throughout.....	6
3.2. Section 2. Definitions.....	6
3.2.1. General.....	6
3.2.2. Perennial.....	6
3.3. Section 8. Flow and Water Level Conditions.....	6
3.3. Section 10. Mixing Zones – Incomplete Mixing.....	6
3.4. Section 11. Designated Uses - Recreation.....	6
3.5. Section 28. Incorporation By Reference.....	6
4.0 Comments and Responses.....	7
4.1. General Comments.....	7
4.2. Section 1. Authority.....	8
4.3. Section 2. Definitions.....	8
Conventional Drinking Water Treatment.....	8
Ephemeral.....	8
Hydrophytic Vegetation.....	8
Natural.....	9
4.3. Section 5. Credible Data.....	9
4.4. Section 8. Flow and Water Level Conditions.....	10
4.5. Section 9. Dilution Allowances.....	11
4.6. Section 10. Mixing Zones and Dilution Allowances.....	12
4.7. Section 11. Designated Uses.....	12
4.8. Section 12. Modifying Designated Uses.....	13
4.9. Section 13. Antidegradation.....	13
4.10. Section 14. Designation of Outstanding Aquatic Resource Waters.....	14
4.11. Section 15. Water Quality Criteria Applicable to All Surface Waters of the State.....	14
4.12. Section 16. Water Quality Criteria for Protection of Aquatic Life Uses.....	15
4.13. Section 17. Water Quality Criteria for Protection of Drinking Water Use.....	23
4.14. Section 19. Water Quality Criteria for Protection of Industry Use.....	23
4.15. Section 22. Water Quality Criteria for Protection of Recreation Uses.....	23
4.16. Section 23. Water Quality Criteria for Protection of Scenic Use.....	24
4.17. Section 23. Water Quality Criteria for Protection of Terrestrial Wildlife Use.....	25
4.18 Section 25. Modifications to Water Quality Criteria.....	25
4.19. Section 26. Discharger Specific Variances.....	25
4.20. Section 27. Mitigation Requirements for Wetlands Not Subject to the Jurisdiction of the Clean Water Act.....	26
4.21. Section 28. Incorporation By Reference.....	26
4.22. Surface Water Designations.....	27
4.23. Lower Murphy Creek Site-Specific Selenium Criteria.....	27
Appendix A. Public Notices Regarding Comment Period That Ended June 13, 2024.	A-1
A.1. Casper Star Tribune Proof of Publication.....	2
A.2. WDEQ Listserv Notice.....	3
Appendix B. Written Comments Received During the Comment Period That Ended June 13, 2024.	B-1
B.1. Environmental Protection Agency	2

B.1. Wyoming Outdoor Council.....21

Appendix C. Transcript of Water and Waste Advisory Board Meeting, Casper, WY, June 13, 2024..... C-1

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1.0 Summary

Wyoming Water Quality Rules, Chapter 1, Wyoming Surface Water Quality Standards, implements portions of the Wyoming Statutes, W.S. § 35-11-302, and the federal Clean Water Act, 33 United States Code (U.S.C) § 1251 et seq., and includes designated uses, water quality criteria, antidegradation requirements, and provisions to guide implementation of the water quality standards. The Clean Water Act requires states to review, and modify as necessary, their water quality standards at least every three years, known as a triennial review. Pursuant to the Clean Water Act and implementing regulations at 40 CFR § 131, the water quality standards must be submitted to EPA for review and become effective for Clean Water Act purposes upon approval by the United States Environmental Protection Agency (EPA).

In August 2018, the Wyoming Department of Environmental Quality-Water Quality Division (WDEQ-WQD) formally initiated a review of Wyoming Water Quality Rules, Chapter 1, Wyoming Surface Water Quality Standards. On April 11, 2024, following an extensive scoping and development process¹, WDEQ-WQD released for public comment proposed revisions to Wyoming Water Quality Rules, Chapter 1, Wyoming Surface Water Quality Standards (Chapter 1) and minor revisions to Chapter 2, Permit Regulations for Discharges to Wyoming Surface Waters (Chapter 2), that address changes to Chapter 1 (see Appendix A for public notices). Comments were accepted at the June 13, 2024, Water and Waste Advisory Board meeting and written comments accepted until 5 PM on June 13, 2024.

Section 4 of this document provides responses to comments received during the written comment period that ended at 5 PM on June 13, 2024, (see Appendix B for written comments) and comments received during the June 13, 2024, Water and Waste Advisory Board meeting (see Appendix C for a transcript of the June 13, 2024, Water and Waste Advisory Board meeting). These comments and additional review and consideration by WDEQ-WQD informed the proposed revisions to Water Quality Rules, Chapter 1 and Chapter 2, that were made available for public comment in October 2024. Section 3 of this document describes proposed changes to Chapter 1 made since April 2024 that were not based on a specific public comment.

¹ Wyoming Department of Environmental Quality. Water Quality Division. Triennial Review of Wyoming's Surface Water Quality Standards. Response to Comments Received During Scoping. April 2024.

2.0 Commenters and Commenter Index

2.1 Commenters and Acronyms

Commenter	Acronym
Water and Waste Advisory Board	WWAB
Wyoming Farm Bureau Federation	WFBF
United States Environmental Protection Agency	EPA
Wyoming Outdoor Council	WOC

2.2 Commenter Index

EPA 7, 9, 10, 11, 12, 13, 16, 18, 19, 20, 22, 23, 27, 28, 29

WFBF 7, 26

WOC 7, 11, 25

WWAB 8, 9, 10, 11, 12, 13, 14, 15, 23, 24, 25, 26

3.0 Proposed Changes Not Based on Public Comments

3.1. Proposed Changes Throughout.

- WDEQ-WQD is proposing to revise formatting to remove or add spaces where necessary.
- WDEQ-WQD is proposing to change the word “effluent limits” to “effluent limitations” because “effluent limitations” is the defined term in Chapter 1, Section 2.
- WDEQ-WQD is proposing to revise use of the terms “point sources,” “permitted point sources,” and “permitted discharges” where appropriate. “Permitted point sources” is the appropriate term when referring to discharges from specific sources permitted through the Wyoming Pollutant Discharge Elimination System Program (WYPDES) where a waste load allocation is calculated and use of a mixing zone or dilution allowance considered. In other circumstances, the more general term “permitted discharges” is appropriate, as permitted discharges can include dredge and fill activities permitted under Clean Water Act Section 401, stormwater discharges, and other point source discharges permitted through WYPDES.
- WDEQ-WQD is proposing to change “or” to “add” within water quality criteria to ensure all the elements are considered when implementing the narrative criteria.

3.2. Section 2. Definitions.

3.2.1. General.

- WDEQ-WQD is proposing to revise roman numerals where necessary.

3.2.2. Perennial.

- WDEQ-WQD is proposing to revise the definition of “perennial” to clarify that perennial systems are “typically” present during the entire calendar year. WDEQ-WQD is proposing this change because a perennial system may not have water during atypical conditions such as those associated with drought.

3.3. Section 8. Flow and Water Level Conditions

- WDEQ-WQD is proposing to remove the term “stream” from Section 8 because low flows are also applicable to rivers, creeks, and other flowing waters.

3.3. Section 10. Mixing Zones – Incomplete Mixing.

- WDEQ-WQD is proposing to add “low flow” where appropriate to clarify that in streams and rivers, the mixing zone should be limited to not more than one-half of the narrowest cross-sectional area at low flow or a length 10 times the narrowest wetted width at low flow, whichever is more limiting.

3.4. Section 11. Designated Uses - Recreation.

- WDEQ-WQD is proposing to change “fully body contact water recreation season” to “summer water recreation season” in Section 11(c)(viii)(B) to be consistent with the term used in the 2018 version of Chapter 1 the term used in Section 11(c)(viii)(A) of the proposed rule.

3.5. Section 28. Incorporation By Reference.

- WDEQ-WQD is proposing to add the June 2000 Wyoming Game and Fish Stream and Lake Database that is referenced in the document, *Wyoming Surface Water Designations*, which is also incorporated by reference in Section 28.
- WDEQ-WQD is proposing to revise the dates of the incorporated material from April 1, 2024, to October 1, 2024 to ensure the most recent versions of the referenced material is incorporated.

4.0 Comments and Responses

4.1. General Comments.

WOC: Beyond these standards, we encourage the department to consider the long-term landscape level stressors such as climate change, species decline, and the alterations of ecosystem services which play a crucial role in naturally, supporting clean water and healthy riparian ecosystems. These complex natural systems, as they are impacted, are essential in determining future changes to Surface Water Quality Standards. Further, we need to look at microplastics and PFAS, both their impacts on human health, but also the concentrations we have and their interaction with aquatic and riparian habitats. Comprehensive, forward thinking and comprehensive policy and water quality standards are the best chance people and wildlife have in maintaining access to high quality, healthy waters, for current and future generations.

Department Response: WDEQ-WQD will continue to work with local, state, and federal partners as well as other stakeholders to identify strategies to address emerging contaminants and other stressors that may impact water quality as well as priorities for future revisions to Wyoming's surface water quality standards.

EPA: WDEQ needs to develop written explanations of why it is not adopting any of EPA's nationally recommended CWA Section 304(a) criteria that have become available since its last triennial review.

Department Response: WDEQ-WQD is aware of the requirements at 40 CFR § 131.20 and plans to submit the required written explanation to EPA with the final rule package.

WFBF: In the supporting documents, there is discussion regarding the potential impacts of the changes being made and that there should not be any changes in the way DEQ does things or that there will be minimal changes to the way DEQ does things. This evaluation seems like one of those circumstances where there may be some important changes that we did not recognize. Who makes the determination regarding the impact of the changes? Is this determination something the user would bring forward and say that they think this is more than just a minimal change?

Department Response: WDEQ-WQD included an evaluation of the potential impacts of proposed changes within the *Supplementary Guidance to the Statement of Principal Reasons* to assist reviewers and members of the public with evaluating the proposed changes and potential impacts of the proposed changes. The evaluation was based on input from WQD staff from the Wyoming Pollutant Discharge Elimination System Section and Watershed Protection Section, including the Surface Water Monitoring Program, Nonpoint Source Pollution Program, Quality Assurance and Quality Control Program, 401 Certification Program, Water Quality Assessment Program, Total Maximum Daily Load Program, and WDEQ-WQD's Water Quality Laboratory. The evaluation also considered input from the Triennial Review Stakeholder Group obtained during the collaborative stakeholder process in 2021 as well as feedback from the Environmental Protection Agency on a May 2023 draft of Chapter 1.

WDEQ-WQD welcomes feedback on the evaluation as well as any other aspects of the proposed rules and information included in the rule materials. WDEQ-WQD encourages members of the public to reach out to WDEQ-WQD with questions or concerns, either informally at any time or through public comment opportunities provided as part of the rulemaking process. In instances where there may have been unintended consequences neither WDEQ-WQD, EPA, nor members of the public identified during the rule revision process, members of the public can petition WDEQ or the Environmental Quality Council to initiate the rulemaking process to address the issue using the process in WDEQ's Rules of Practice and Procedure, Chapter 3.

4.2. Section 1. Authority.

WWAB: Appreciate the clarification around limiting the reach of the US EPA and the Army Corps of Engineers. That was a good catch.

Department Response: WDEQ-WQD appreciates the WWAB's support for the proposed addition to Section 1 that describes Chapter 1 is not intended to grant authority to the United States Environmental Protection Agency or United States Army Corps of Engineers beyond the authorities specifically provided in the Clean Water Act.

4.3. Section 2. Definitions.

Conventional Drinking Water Treatment.

WWAB: Should the definition of conventional drinking water say "coagulation, flocculation, sedimentation, filtration, [or, and/or] disinfection" rather than "coagulation, flocculation, sedimentation, filtration, and disinfection." I know you're trying to get away from "and/or", but this might be an example where "and/or" might be appropriate. Does every conventional drinking water treatment include every one of these five things?

Department Response: Conventional drinking water treatment typically involves every one of these five steps. As such, WDEQ-WQD is not proposing additional changes to the definition of "conventional drinking water treatment." The National Primary Drinking Water Regulations at 40 CFR § 141.73 require public water systems that use a surface water source or a ground water source under the direct influence of surface water, if they do not meet the criteria for avoiding filtration, to provide treatment consisting of both disinfection and filtration. "Conventional filtration treatment" is defined in the National Primary Drinking Water Regulations at 40 CFR § 141.2² as "a series of processes including coagulation, flocculation, sedimentation, and filtration resulting in substantial particulate removal" and "disinfection" as "a process which inactivates pathogenic organisms in water by chemical oxidants or equivalent agents."

Ephemeral.

WWAB: Should the definition of ephemeral say, "precipitation or snowmelt event(s) in the immediate watershed" rather than "single precipitation or snowmelt event in the immediate watershed." Also, is the channel bottom always above the prevailing water table in an ephemeral waterbody or are there circumstances where the water table could rise in an ephemeral stream and then drop, and the waterbody dries up?

Department Response: WDEQ-WQD is proposing to change the definition of ephemeral to: (1) remove the concept of a "single precipitation or snowmelt event" since ephemeral waterbodies may be present due to multiple precipitation or snowmelt events; (2) clarify that ephemeral systems are "ordinarily dry" so as to help reinforce the concept of water being present due to precipitation or snowmelt events; (3) remove the requirement that the precipitation or snowmelt must occur in the immediate watershed since a large precipitation or snowmelt events may result in water many miles down gradient; and (4) clarify that in ephemeral systems the channel bottom is ordinarily above the prevailing water table rather than "always" above the prevailing water table, as there may be instances during atypically wet years where an ephemeral system may temporarily have a perched water table. The proposed definition reads "means a waterbody or portion of a waterbody that is ordinarily dry, water is present only in direct response to precipitation or snowmelt, and the waterbody bottom is typically above the prevailing water table."

Hydrophytic Vegetation.

WWAB: Should the definition of hydrophytic vegetation read "a prevalence index of less than or equal to three" rather than "a prevalence index of less than three"?

² United States Environmental Protection Agency. 40 CFR § 141. National Primary Drinking Water Regulations. Accessed from: <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-D/part-141>.

Department Response: WDEQ-WQD is proposing to change the definition of hydrophytic vegetation to read “a prevalence index of less than or equal to three” rather than “a prevalence index of less than three” to be consistent with United States Army Corps of Engineers wetland delineation guidance³. The change is necessary because facultative species, which are assigned a “three” in the prevalence index calculation, are considered hydrophytic plants. Thus, in order for a site comprised entirely of facultative species to have a prevalence of hydrophytic vegetation, the prevalence index must be less than or equal to three rather than less than three.

Natural.

EPA: At Section 2(b)(xxvii), WDEQ is proposing to revise the term “natural” from “...that condition which would exist without the measurable influence of man's activities” to “...the condition that would exist with minimal or no anthropogenic influence.” EPA recommends deleting “minimal” as it is a subjective phrase that is difficult to implement and does not truly represent natural, unaltered conditions. This recommendation is consistent with EPA expectations and policy that “natural background is defined as background concentrations due only to non-anthropogenic source, i.e., non-manmade sources.”

Department Response: WDEQ-WQD is proposing to revert the definition of “natural” to the 2018 version of Chapter 1 in order to address EPA’s concerns. WDEQ-WQD is also proposing non-substantive revisions, including changing “man” to “human,” and “which” to “that.” The proposed definition reads “means the condition that would exist without the measurable influence of human activity.”

4.3. Section 5. Credible Data.

WWAB: Are you going to have to send people to every waterbody in the state to have them determine what designated uses should be assigned? What kind of protocol will you use as you are readjusting the rule?

Department Response: If the proposed revisions are finalized, in general, the same designated uses and water quality criteria will continue to apply to all waterbodies in the state. Thus, the removal of the classification system will not result in practical changes on the ground. Once the rule is adopted and approved, if WDEQ-WQD or another entity would like to modify the designated uses or water quality criteria that apply to a surface water, WDEQ-WQD will follow the processes outlined in Chapter 1, Section 12, Modification of Designated Uses, and Chapter 1, Section 25, Modifications of Water Quality Criteria.

WWAB: I have a question about credible data. For example, let's say Forest Service property, where there's a nearby lease for agriculture for grazing cattle, and the rancher's not keeping the cattle on the leased part of the property or keeping his watering tanks full, and allowing the cattle to go to a lake, so the water quality of the lake has deteriorated. It used to be a swimming hole and now no longer is a place that people want to swim because there's cattle on it that aren't supposed to be there. What happens in a situation like that where the water quality has been deteriorated?

Department Response: When evaluating which uses should be assigned to an individual waterbody, we evaluate both the existing uses and the attainable uses for the waterbody. A use is considered attainable if it can be achieved by establishing effluent limitations for point sources or best management practices (BMPs) for nonpoint sources. In this example, the waterbody may not currently be meeting water quality criteria to support full body contact recreation but could meet water quality criteria if BMPs were implemented to keep the cattle away from the waterbody. WDEQ-WQD would work with the Forest Service and other stakeholders to identify and implement BMPs such as water tanks or fencing to keep livestock away from the waterbody and in the leased area, which would allow the waterbody to achieve water quality criteria. WDEQ-WQD's Nonpoint Source Program has had very good success working collaboratively with our agricultural community, agricultural associations, and state and federal land managers to provide technical and financial assistance to

³ United States Army Corps of Engineers Wetland Determination Data Sheet – Arid West Region. Accessed from: https://www.publications.usace.army.mil/Portals/76/Users/028/00/3100/Eng_Form_6116-1_2024Feb.pdf

implement BMPs. The program works with land managers such as the Forest Service to meet objectives of both the Nonpoint Source Program and the land management agency.

WWAB: Is there room for interpretation of specialized training? Has anybody pushed back against DEQ in circumstances where they believe they have sufficient specialized training and DEQ does not agree? A similar issue arose a few years ago related to registered engineers and geologists.

Department Response: WDEQ-WQD has had challenges in the past regarding credible data. In some instances, people have said they were qualified to collect water quality data and WDEQ-WQD or others disagreed. *Wyoming's Methods for Determining Surface Water Quality Condition*⁴ (Assessment Methods), the document that provides guidance on the data and other requirements necessary to determine whether the surface water quality standards in Chapter 1 are being met, provides additional details on the specialized training requirements. The Assessment Methods describe that a sampling and analysis plan that includes the sampler's qualifications must be developed and approved by WDEQ-WQD. The WDEQ-WQD's Quality Assurance and Quality Control (QAQC) Officer reviews each of the sampling and analysis plans to determine whether the qualifications meet the requirements outlined in the Assessment Methods. In addition, the Assessment Methods describe that samplers must have a field audit at least every four years or at the discretion of the QAQC Officer. Therefore, we address concerns regarding specialized training using a combination of listing the qualifications of samplers in the sampling and analysis plan and implementing the audit process. This is not a certification program but is a fairly robust way of ensuring samplers have sufficient specialized training.

4.4. Section 8. Flow and Water Level Conditions.

EPA: Regarding Section 8(a), not applying numeric water quality standards at low water levels could allow exceedances to occur more frequently than what is acceptable and protective of the designated use because water quality criteria already include exceedance frequencies. EPA is concerned that neither the existing provision nor the proposed revision is consistent with the CWA and its implementing regulations. We would like to discuss the proposed revision with WDEQ to make sure we fully understand how the current provision is implemented and the intent for revision. For example, does WDEQ implement this requirement for assessment of waters pursuant to CWA Section 303(d)? Please provide any other information on how these exceptions will protect designated uses and why WDEQ is proposing to add this language.

Department Response: WDEQ-WQD is proposing to remove the reference to low water levels from proposed Section 8(a) because the reference is not included in the 2018 version of Chapter 1.

EPA: EPA supports the addition of language establishing a linkage between low flows and water quality based effluent limits and the specification of statistical metrics for low flows. The intent behind, and utility of, identifying specific metrics for low water levels in addition to metrics for flow is less clear. As specified at proposed Section 10(c)(iii), permitting of discharges to lakes and reservoirs is primarily accomplished through use of a mixing zone and is limited based on factors that do not necessarily depend on dilution. Proposed Section 10(c)(iii) states: "For lakes and reservoirs, the dilution allowance is limited to no more than five percent of the lake surface area at low water levels or a 200-foot radius at low water levels, whichever is more limiting." Does WDEQ currently rely on low water levels for developing WQBELs for direct discharges to lakes and reservoirs? If so, how does it identify those low water levels? Will the addition of low water level metrics change or improve WQBEL permitting to lakes and reservoirs?

⁴ Wyoming Department of Environmental Quality. Water Quality Division. Wyoming's Methods for Determining Surface Water Quality Condition. December 21, 2020. Accessed from: <https://deq.wyoming.gov/water-quality/watershed-protection/water-quality-assessment/>.

Department Response: WDEQ-WQD does not currently have a method for deriving low water levels in lakes and reservoirs because no direct discharges to lakes and reservoirs have been permitted for which WDEQ-WQD has had to establish water quality based effluent limits. That said, as described in EPA’s comments, in the event WDEQ-WQD needs to develop water-quality based effluent limits for a direct discharge to a lake or reservoir, WDEQ-WQD would use the methods in proposed Section 10(d)(iii), “for lakes and reservoirs, the mixing zone is limited to no more than five percent of the lake surface area or a 200-foot radius at low water levels, whichever is more limiting.” Since five percent of the lake surface area and 200-foot radius may be quite different at low water levels, consideration of low water level is necessary to ensure lakes and reservoirs are sufficiently protected in the event WDEQ-WQD does need to permit a direct discharge to a lake or reservoir. As such, WDEQ-WQD is proposing to retain the proposed revisions to Section 8(d) that describe the need to consider low water levels to ensure that water quality based effluent limits are sufficiently protective of lakes and reservoirs.

EPA: Table 1 describes low flow metrics for implementing criteria; however, it does not describe how low water levels will be determined. We recommend clarifying how low water levels will be identified.

EPA: Recommend deleting “water level” from Table 1 and footnoted definitions or clarify the intent of metrics.

Department Response: WDEQ-WQD is proposing to remove “water level” from Table 1 to avoid confusion. WDEQ-WQD is also proposing to clarify that low flow will be determined using one of the methods in Table 1 (or other scientifically defensible methods) and that low water levels will be determined using one of the methods in Table 1 where water level is used in the calculation instead of flow (or other scientifically defensible methods).

EPA: Table 1: Recommend rephrasing the probability-based flows as the “lowest x-day that occurs, on average, once every Y years” rather than “lowest x-day average flow or water level that occurs once every Y years.”

Department Response: WDEQ-WQD is proposing to revise the phrase “lowest x-day average flow that occurs every x years” to “lowest x-day average flow that occurs every x years on average.”

WOC: Under Section 8(d) Flow and Water Level Conditions, it states: “(d) For the purpose of developing water quality-based effluent limits, the Department shall determine low flow or low water level using one of the methods in Table 1 or other scientifically defensible methods.” In other instances where the Department can consider “other scientifically defensible methods”, (e.g. Section 16(c) and Section 4(a)(ii)), it is stated “at its sole discretion, by the Department,” the ability to choose such an option. In the case of Section 8, is it still the sole discretion of the Department to choose other scientifically defensible methods or does the permittee have discretion or input to make that recommendation? We suggest the Department clarifies this within the language of Section 8 of the revised standards.

Department Response: WDEQ-WQD is proposing to modify Section 8(d) to clarify that the Department has the sole discretion to determine which methods will be used to identify low flow or low water level that will be used in the derivation of water-quality-based effluent limits. The proposed provision reads, “For the purpose of developing water quality-based effluent limits, the Department shall determine, at its sole discretion, low flow using one of the methods in Table 1 or other scientifically defensible methods.”

4.5. Section 9. Dilution Allowances.

WWAB: What is an effluent diffuser? Is that on the outlet pipe, you have something that breaks up the water, the power of the effluent?

Department Response: An effluent diffuser is a device used to distribute treated effluent in a receiving waterbody. Distributing the effluent allows the permittee to take advantage of a larger area for mixing the effluent.

EPA: WDEQ-WQD should add a statement that dilution allowances cannot be used for acute WET testing limits to be consistent with current text in Section 9, Mixing Zones, and the Mixing Zones and Dilution Allowances Implementation Policy.

Department Response: WDEQ-WQD is proposing to include an additional provision in Section 9(e) stating that a dilution allowance... “cannot be used to comply with acute whole effluent toxicity requirements.”

4.6. Section 10. Mixing Zones and Dilution Allowances.

EPA: Recommend deleting the term “dilution allowance” because the term “dilution allowance” is only used in circumstances where near instantaneous and complete mixing occurs.

Department Response: WDEQ-WQD is proposing to revise the text in Section 10 to remove the term “dilution allowance” to avoid confusion.

EPA: Recommend adding language linking Section 10 to Section 8, Low and Water Levels, “The low flow and associated mixing zone of the receiving water are determined using the methods in Section 8 of this Chapter.”

Department Response: WDEQ-WQD is proposing to include additional text in Section 10 to clarify that “The low flow and low water level for the mixing zone of the receiving water are determined using the methods in Section 8 of this Chapter.”

EPA: Section 10(c) should read “zone of initial dilution” not “initial zone of dilution.”

Department Response: WDEQ-WQD is proposing to change “initial zone of dilution” to “zone of initial dilution” to be consistent with the term defined in Chapter 1, Section 2.

EPA: Recommend adding a second sentence to 10(g)(vi) that reads “Effluent limits for acute WET must be met end-of-pipe” to be consistent with the current Mixing Zones and Dilution Allowances Implementation Policy.

Department Response: WDEQ-WQD is proposing to add a sentence that reads “Effluent limits for acute whole effluent toxicity requirements must be met end-of-pipe” to be consistent with the current Mixing Zones and Dilution Allowances Implementation Policy.

EPA: Recommend adding a provision that prohibits mixing zones for substances with a low acute to chronic ratio.

Department Response: WDEQ-WQD is proposing to add a provision based on language within the *Mixing Zones and Dilution Allowances Implementation Policy*⁵ that reads “The mixing zone may be limited or denied for pollutants where acute effects may occur at concentrations similar to chronic effects.”

4.7. Section 11. Designated Uses.

WWAB: The designated use “effluent-dependent fish consumption” is not very clear. You are referring to treated water, such as discharge from a power plant or something like that, that is keeping the fish alive and that we can consume those fish, correct? The way it is worded is poor and confusing. Recommend reviewing to improve clarity.

WWAB: It is not clear whether the use is intended to support consumption of fish by wildlife such as bears or eagles.

Department Response: Both of the fish consumption designated uses are intended to ensure that water quality is sufficient to protect humans who consume fish from the waterbody. As such, WDEQ-WQD is proposing to modify both the “fish consumption” and “effluent-dependent fish consumption” use to clarify

⁵ Wyoming Department of Environmental Quality. Water Quality Division. *Implementation Policies for Antidegradation, Mixing Zones and Dilution Allowances, Turbidity, and Use Attainability Analysis*. September 2013.

that the use is intended to protect human consumption of fish. The revised uses are “human consumption of fish” and “human consumption of effluent-dependent fish.”

WWAB: Is effluent-dependent fish consumption for an artificial fish hatchery? Would that be an example of something like that, where it was dependent on the effluent?

Department Response: An example would be a discharge, such as a coalbed methane discharge, where the permittee is discharging to an ephemeral waterbody where the aquatic life downstream of the discharge is only present because of the discharge of wastewater. We may want to assign the waterbody an effluent-dependent aquatic life use and a human consumption of effluent-dependent fish use so that the water quality criteria that is applicable can be modified to the quality of the effluent rather than the criteria applicable to the previously assigned aquatic life or human consumption of fish designated uses.

WWAB: Would this be an instance where, if it was coalbed methane, the effluent-dependent fish consumption designation, rather than a fish consumption designation, would account for the fact that effluent is the sole source of the life of the fish, so the discharger is not going to be penalized for the fact that fish start popping up.

Department Response: Yes, the intention with the effluent dependent designated uses is to provide a means to modify the water quality criteria because the uses present are dependent on the presence and quality of the effluent.

4.8. Section 12. Modifying Designated Uses.

EPA: Lack of credible data cannot be used as a basis to overcome the rebuttable presumption that aquatic life and recreation (i.e., CWA section 101(a)(2) uses) are attainable.

Department Response: WDEQ-WQD is aware of the rebuttable presumption requirements associated with Clean Water Act Section 101(a)(2) as well as the use attainability analysis (UAA) requirements at 40 § CFR 131.10(g). WDEQ-WQD does not anticipate potential conflicts with the provisions in Section 12 related to credible data.

4.9. Section 13. Antidegradation.

EPA: Reducing the universe of water subject to Tier 2 requirements, although consistent with EPA’s regulations, would remove antidegradation protections for water quality levels that are better than the criteria to support drinking water or “fish consumption and drinking water uses” and “diminish the Department’s regulatory authority to protect water bodies that are source waters for public drinking water systems.” This is important for parameters where criteria have been adopted to protect drinking water or “fish consumption and drinking water” uses, but none have been adopted to protect aquatic life, fish consumption, recreation, and terrestrial wildlife uses (e.g., radioactive materials, nitrate, certain pesticides).

Department Response: WDEQ-WQD is proposing to revise the provisions in Section 13(a)(ii) such that the uses subject to high quality water (i.e., Tier 2) antidegradation requirements are consistent with the 2018 version of Chapter 1. As such, high quality water protections (i.e., Tier 2 protections) will be applicable to all uses for waters subject to the jurisdiction of Clean Water Act.

EPA: The antidegradation requirements for high quality waters states that “the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources of pollution **have been achieved.**” However, the federal regulations require that “the State **shall assure that there shall be achieved** the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.”

Department Response: WDEQ-WQD is proposing to revise Chapter 1, Section 13(a)(ii) so that the text will read the “The highest statutory and regulatory requirements for all new and existing point source discharges and all cost-effective and reasonable best management practices for nonpoint source of pollution shall be achieved.”

4.10. Section 14. Designation of Outstanding Aquatic Resource Waters.

WWAB: Section 14 identifies the criteria the Department will use to evaluate a petition to designate an Outstanding Aquatic Resource Water and specifies that that Department shall consider “and other values of present and future benefit to people.” Should this statement also include the concept of animals and natural resources in general because you work with the Wyoming Game and Fish Department and others to protect the environment beyond that which is a benefit to humans? Or is DEQ’s mandate to protect resources specifically for people? If the mandate is broader, should the phrase be “and values of present and future benefit to people and animals”?

WWAB: What may be confusing is the use of “and” in line 660 that reads “and other values of present and future benefit to people.” Is it possible that the “and” may need to be an “or” because the concepts of botanical, zoological, fish and wildlife, are not necessarily values of present and future benefit to people?

WWAB: Maybe the issue is the word “other” because it implies that everything on the list is for benefit to people. In this case, it may be appropriate to remove the word “other” and say, “and values of present and future benefit to people.”

WWAB: It is fine as is.

Department Response: WDEQ-WQD reviewed the proposed text and is proposing to change “and other values of present and future benefit to people” to “and other values of present and future benefit to people and the environment” to capture values other than human values to be more consistent with the Wyoming Environmental Quality Act. Changing “and” to “or” is not appropriate given that the designation should take into consideration all applicable values associated with an Outstanding Aquatic Resource Water. Further, removing “other” is not appropriate because the phrase is intended to capture other elements that were not previously captured in the list. Adding “and the environment” is consistent with provisions in the Environmental Quality Act. W.S. § 35-11-301 that prohibit the discharge of “pollution” or “wastes” into waters of the state. The definition of “pollution” at W.S. § 35-11-103(c)(i) details a number of specific changes and uses that should be protected and also includes a provision that pollution includes anything that “adversely effects the environment.”

4.11. Section 15. Water Quality Criteria Applicable to All Surface Waters of the State.

WWAB: On line 742 through 745, which is Section 15(f), “Odors and colors,” to keep with our goal of making the regulations simple and easy to understand, and using plain language and active voice, in the phrase that says “substances that directly or indirectly, through interaction with other substances,” change “through interaction” to “interact.” In the second part the phrase “unacceptable adverse...” is repeated on line 744. If revised, it would read: “Substances that directly or indirectly interact with other substances shall not be present in amounts that result in unacceptable adverse odors or alterations to the natural color of the water.”

Department Response: WDEQ-WQD is proposing to revise Section 15(f) to read “Substances shall not be present in amounts that result in unacceptable adverse alterations to the odor and color of the water, skin, clothing, vessels, or structures. Substances shall not result in odor and colors that impair designated uses.” The proposed revisions recast the sentence into the active voice and minimize duplication of unnecessary words.

4.12. Section 16. Water Quality Criteria for Protection of Aquatic Life Uses.

WWAB: In Table 4, line 854(a) says that the permit applicant must demonstrate that early life stages are not present in the water body. I remember taking logic class in high school and remember that it is very difficult to prove a negative. Can you tell me how somebody would demonstrate that early life stages are not present?

Department Response: A permit applicant could demonstrate that early life stages are not present in a waterbody by obtaining information from the Wyoming Game and Fish Department that demonstrates that the waterbody only has adult fish, as is the case for some stocked or a put and take fisheries. An applicant could also work with WDEQ-WQD and the Wyoming Game and Fish Department to collect samples to determine whether fish eggs or embryos were present. Documentation that no spawning activity has been observed would also be an indication that early life stages are not present.

WWAB: Can you give an example where a permittee would use this process?

Department Response: Table 4 describes Wyoming's ammonia criteria. Therefore, the criteria and demonstration would come into play in circumstances where a facility such as a wastewater treatment plant plans to discharge wastewater that contains ammonia, and the Wyoming Pollutant Discharge Elimination System (WYPDES) Program is developing water quality-based effluent limits for ammonia to be included in the discharge permit. Whether or not the wastewater treatment plant will be able to demonstrate that early life stages are not present in the waterbody will depend on the receiving waterbody. If they are discharging to the North Platte River, for example, WDEQ-WQD knows that the North Platte River has a naturally reproducing trout population. In that circumstance, the permittee would not be able to successfully demonstrate that early life stages are not present. If the wastewater treatment plant were discharging to an intermittent or ephemeral drainage, it might be fairly easy for the permittee to demonstrate that early life stages are not present. The permittee could work with WDEQ-WQD and the Wyoming Game and Fish Department to determine whether the waterbody has a naturally reproducing fish population. In circumstances where the permittee can demonstrate that early life stages are not present, WDEQ-WQD would use the "Early Life Stages Absent" criteria.

WWAB: Table 3 and Table 4 are not constructed the same. Table 3 is confusing. Table 3 lists "Dissolved Oxygen (mg/L)" as the heading in the first column whereas Table 4 has "Total Ammonia Nitrogen (mg/L)" within the whole first row and applicable to the entire table. In Table 3, "Dissolved Oxygen (mg/L)" should be the top row instead of at the top of the column

Department Response: WDEQ-WQD is proposing to format all the tables such that each of the tables has the table description in the table title rather than the first row of the table.

WWAB: In Table 3, if you look at "Coldwater Aquatic Life" and "30-Day Mean," it says "none." However, it is not clear what "none" means. This should be explained. In Table 7 on page 1-22, on the right-hand column, there is no entry for Aldrin for chronic criteria, it's just blank. I am not sure what the blank means.

WWAB: Maybe rather than blank we should say "no criteria" or "none" or something.

WWAB: We could add into the footnotes below the table that any values that are blank do not have a limit.

Department Response: WDEQ-WQD is proposing to remove "none" from Table 3 and include a footnote that reads "Blank cells indicate there is no value for that criteria element." This footnote was also added to other tables with blank cells, including Tables 7, Table 9, and Table 10.

WWAB: Should the site-specific values for chloride in the footnotes in Table 7 be listed in micrograms per liter rather than milligrams per liter because the values for chloride within the table are in micrograms per liter?

Department Response: WDEQ-WQD is proposing to modify the units for the chloride concentrations in the footnotes in Table 7 so that the units in the footnotes are the same as the units within the rest of the table.

EPA: Exceedance Frequency for pH, Temperature, and Dissolved Oxygen. The proposed draft of Chapter 1 includes a proposed one-in-three-year exceedance frequency for pH, temperature, and dissolved oxygen. The Supplementary Guidance to the Statement of Principal Reasons cites EPA WQS handbooks' rationale that this exceedance frequency allows time for ecosystem recovery. The exceedance frequency and rationale are specific to EPA's toxics criteria developed based on 1985 guidelines. Wyoming has adopted EPA's criteria recommendations for DO and pH into its WQS. EPA's criteria documents do not explicitly recommend an exceedance frequency and EPA recently stated that "EPA does not typically apply this construct to criteria for conventional water quality parameters like dissolved oxygen due to inherent differences between these parameters and toxic pollutants." Does WDEQ have information supporting application of the one-in-three-year exceedance frequency for pH, temperature, and DO? How does the one-in-three-year exceedance frequency work with the DO criteria implemented as instantaneous minima to be achieved at all times?

Department Response: WDEQ-WQD is not proposing to change the one-in-three-year exceedance frequency applicable to pH, dissolved oxygen, and temperature.

For dissolved oxygen and pH, the one-in-three-year exceedance frequency is specified in the 2018 version of Chapter 1. In the 2018 version of Chapter 1, dissolved oxygen and pH are included along with other aquatic life criteria as a "Chronic Value" in the Non-Priority Pollutants table in Appendix B. The table in Appendix B is referenced in Section 21, which describes "Specific numeric standards for a number of toxicants are listed in the "Aquatic Life Acute Value" and "Aquatic Life Chronic Value" columns in Appendix B of these regulations. These standards apply to all Class 1, 2 and 3 waters. For these pollutants, the chronic value (four (4) day average concentration) and the acute value (one (1) hour average concentration) **shall not be exceeded more than once every three (3) years.**"

WDEQ-WQD reviewed EPA's recent statements regarding application of a one-in-three-year exceedance frequency to the dissolved criteria EPA promulgated for the Delaware River. Application of a one-in-three-year exceedance frequency to the Delaware River criteria would not have been appropriate because the criteria were percentile-based and thus included an inherent exceedance frequency.

Continued application of the one-in-three-year exceedance frequency for pH and dissolved oxygen is appropriate because it (1) recognizes that aquatic ecosystems can, and do, tolerate periodic excursions above the dissolved oxygen and pH requirements protective of aquatic life included in Wyoming's surface water quality standards; (2) is consistent with the one-in-three-year exceedance frequency applicable to other aquatic life criteria in Wyoming's surface water quality standards, helping to facilitate consistent implementation of aquatic life criteria; and (3) is consistent with EPA aquatic life criteria guidance^{6,7,8} that recommends a one-in-three-year exceedance frequency for toxics criteria based on the ability of aquatic ecosystems to recover from disturbance, including disturbances unrelated to toxic pollutants. WDEQ-WQD has revised the *Supplementary Guidance to the Statement of Principal Reasons* to clarify the one-in-three-year exceedance frequency applicable to pH and dissolved oxygen included in the 2018 version of Chapter 1.

Regarding the instantaneous dissolved oxygen minima to be achieved at all times, proposed footnote (d), includes text carried over from footnote (4) in Appendix D of the 2018 version of Chapter 1: "Minima are considered instantaneous concentrations to be achieved at all times." Because the minima must be achieved

⁶ United States Environmental Protection Agency. Guidelines for Deriving Numerical Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses. PB85-227049. Office of Research and Development. Electronic version created December 2010 from 1985 version. Accessed from: <https://www.epa.gov/sites/default/files/2016-02/documents/guidelines-water-quality-criteria.pdf>.

⁷ United States Environmental Protection Agency. Technical Support Document for Water Quality-Based Toxics Control. EPA-440/4-85-032. Office of Water. September 1985. Accessed from: <https://www.epa.gov/nscep>.

⁸ United States Environmental Protection Agency. Technical Support Document for Water Quality-Based Toxics Control. EPA/505/2-90-001. Office of Water. March 1991. Accessed from: <https://www3.epa.gov/npdes/pubs/owm0264.pdf>.

at all times, the one-in-three-year exceedance frequency is not applicable. WDEQ-WQD is not aware of issues with implementation of the not-to-exceed maxima.

The temperature criteria included in the 2018 version of Chapter 1 do not include an explicit exceedance frequency. Thus, the addition of the one-in-three-year exceedance frequency in the proposed revisions to Chapter 1 could be considered a change. Given this, WDEQ-WQD has revised the *Supplementary Guidance to the Statement of Principal Reasons* to include additional rationale regarding the derivation of the one-in-three-year exceedance frequency for Wyoming's two temperature criteria elements. The rationale describes the following:

WDEQ-WQD proposed the one-in-three-year exceedance frequency for temperature to (1) recognize that aquatic ecosystems can, and do, tolerate periodic excursions above the temperature requirements protective of coldwater aquatic life and warmwater aquatic life included in Wyoming's surface water quality standards; (2) be consistent with the one-in-three-year exceedance frequency applicable to other aquatic life criteria in Wyoming's surface water quality standards, helping to facilitate consistent implementation of aquatic life criteria; and (3) be consistent with EPA aquatic life criteria guidance^{6,7,8} that recommends a one-in-three-year exceedance frequency for both acute and chronic toxics criteria and provides additional considerations regarding exceedance frequencies based on the ability of aquatic ecosystems to recover from disturbance. In addition, proposed one-in-three-year exceedance frequency is consistent with other state's temperature exceedance frequency. For example, Colorado's temperature criteria⁹ require the mean weekly average temperature and daily maxima criteria to not be exceeded more than once every three years.

EPA's 1985 Guidelines⁶, which provides guidance on deriving acute and chronic aquatic life criteria for toxic pollutants, describes "Most aquatic ecosystems can probably recover from most exceedances in about three years." Many states, including Wyoming, have used this as the basis for applying a one-in-three-year exceedance frequency to aquatic life criteria. EPA's 1985 Guidelines⁶ do not provide a rationale for applying the same one-in-three-year exceedance frequency to chronic versus acute criteria. The 1985 Guidelines include general information applicable to derivation of an exceedance frequency, describing that the exceedance frequency should be "based on the ability of aquatic ecosystems to recover from the exceedances, which will depend in part on the magnitude and durations of the exceedances," and "the abilities of ecosystems to recover differ greatly, and depend on the pollutant, the magnitude and duration of the exceedance, and the physical and biological features of the ecosystem. Documented studies of recoveries are few, but some systems recover from small stresses in six weeks whereas other systems take more than ten years to recover from severe stress." This discussion references EPA's 1985 Technical Support Document for Water Quality-Based Toxics Control⁷.

EPA's 1985 Technical Support Document For Water Quality-Based Toxics Control⁷ notes the challenges of predicting the number of events that may exceed criteria to inform an appropriate exceedance frequency, but ultimately concludes that "most biological communities would not be sufficiently affected if on the average there was one event every three years." EPA's 1985 Technical Support Document also describes that in recovery studies where there was no toxicant residual present, which would be the case for temperature, "most fish species could repopulate in as few as three weeks if conditions were advantageous." In addition, the document describes "It is possible in very select situations that a frequency of once every one or two years on average might be acceptable" and "for such cases, it would have to be demonstrated that the affected area was small and the potential for biological recovery was high."

⁹ Colorado Department of Public Health and the Environment. Water Quality Control Commission. Regulation No. 31 – The Basic Standards and Methodologies for Surface Water. 5 CCR 1002-31. Effective Date June 14, 2023. Accessed from: <https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=10835&fileName=5%20CCR%201002-31>.

The 1991 updated version EPA's Technical Support Document for Water Quality-Toxics Control⁸ also describes "EPA recommends a once in 3-years average frequency of excursions of both acute and chronic criteria" and outlines that the allowable frequency depends on site-specific factors, including whether the system is exposed to high degree of natural disturbances such as floods and droughts such that the resident species are predisposed to recover more rapidly because species that are able to recolonize and reproduce quickly, or to avoid disturbances, can persist there. The 1991 document outlines that "although the average frequency of one criterion every 3 years should usually be protective of lotic communities, more frequent excursions might be acceptable in certain situations." Such situations include lotic systems with refugia such as well-developed riparian zones, connected flood plains and meanders, snags, etc. Such systems can recover more rapidly from disturbances than segments without refugia because organisms are better able to avoid disturbances and return or repopulate. Another situation includes lower-order (i.e., headwater) streams where, because of their natural high variability, communities are comprised of species that have short life cycles and/or high dispersal ability and can recover from major disturbances in a year or even less. Thus, many lower-order streams, particularly those where refugia are available, may be able to tolerate somewhat higher excursion frequencies. For example, discharges to lower order streams, particularly those for which refugia are available, may be able to tolerate somewhat higher excursion frequencies, unless other considerations are important."

Given that most of Wyoming waters are (1) likely adapted to natural excursions of the temperature criteria due low flows or elevated ambient air temperatures; (2) likely to be adapted to natural disturbances such as droughts and floods; (3) lower order/headwaters streams or reservoirs with relatively short residence times where aquatic communities typically have shorter life cycles and/or high dispersal abilities; (4) likely to have refugia since significant alterations of Wyoming's waters are limited due to the low population and development in the state, the proposed one-in-three year exceedance frequency should allow more than sufficient time for systems to recover from excursions of the acute and chronic temperature criteria elements.

EPA: EPA understands WDEQ intends to revise its temperature criteria to be more protective and encourages WDEQ to also consider seasonality and chronic endpoints.

Department Response: WDEQ-WQD does intend to revise its temperature criteria in the future once sufficient scientifically defensible information can be compiled and a method for applying the temperature criteria to surface waters in Wyoming is identified. When developing this information and approach, WDEQ-WQD plans to consider seasonality and chronic endpoints.

EPA: Section 16(c). In Section 16(c), Wyoming's proposed draft WQS state: "For those pollutants without numeric criteria in this Section, maximum allowable concentrations for protection of aquatic life shall be determined **in its sole discretion, by the Department**, using the biological monitoring procedures outlined in the following procedures or other scientifically defensible methods..."

- i. The EPA notes that the reference to "sole discretion" at Section 16(c) does not change the EPA's CWA authority granted to the Agency by Congress.
- ii. Please explain what is meant by maximum allowable concentrations and how that will ensure protection of the aquatic life use.
- iii. Will methods and procedures other than biologically monitoring procedures be considered for pollutants without numeric criteria?
- iv. How and when will multiple lines of evidence be considered when interpreting narrative criteria?

Department Response: Section 16(c) is intended to direct the use of biomonitoring procedures such as whole effluent toxicity tests to derive effluent limitations. As such, WDEQ-WQD is proposing to revise the provisions in Section 16(c) to clarify that the biomonitoring methods will be used to derive effluent limitations for permitted discharges of pollution and replace reference to EPA's 1985 Guidelines with the newly published National Pollutant Discharge Elimination System Whole Effluent Toxicity Permit Writers' Manual. The

previously proposed text, which was based on Section 21(c)¹⁰ of the 2018 version of Chapter 1, was not clear regarding the Department's intent to use the biological monitoring methods in proposed Section 16(c) to derive effluent limitations for permitted discharges. In addition, the previous reference to EPA's 1985 Guidelines for Derivation of Aquatic Life Criteria, which was included in Appendix E of the 2018 of Chapter 1, created confusion because the 1985 Guidelines do not include guidance regarding whole effluent toxicity requirements in establishing effluent limitations. The proposed text reads "For those pollutants without numeric criteria in this Section, effluent limitations for permitted discharges of pollution protective of aquatic life shall be determined, in its sole discretion by the Department, using the biological monitoring methods outlined in the follow procedures or other scientifically defensible methods."

EPA: pH (Section 16(f)). Section 15(h) includes pH criteria of 6.5-9.0 for all surface waters of the state and does not identify an acceptable exceedance frequency, which means that there is not one. Section 16(f) identifies pH criteria of 6.5-9.0 specific to aquatic life uses with an acceptable exceedance frequency of one in three years. How do the pH criteria at 16(f) for the aquatic life use only work with the pH criteria at Section 15(h) which apply to all surface waters of the state? Although the magnitudes of the criteria are the same (6.5-9.0), the criteria for the aquatic life use at 16(f) include an allowable exceedance frequency of one in three years. One option for WDEQ to consider is deleting the criteria at 16(f) to eliminate confusion and to protect waters with an aquatic life use equally to those without one.

Department Response: WDEQ-WQD is not proposing changes to the pH criteria in Section 15 or Section 16, as the criteria are consistent with the 2018 version of Chapter 1. The 2018 version of Chapter 1 includes pH in Section 26, which applies the 6.5-9.0 criteria to all surface waters without an exceedance frequency. The 2018 version of Chapter 1 also includes pH within the Non-Priority Pollutant Table in Appendix B. The Non-Priority Pollutant Table in Appendix B is referenced in Section 21, which reads "For these pollutants, the chronic value (four (4) day average concentration) and the acute value (one (1) hour average concentration) **shall not be exceeded more than once every three (3) years.**" As such, WDEQ-WQD has applied the one-in-three-year exceedance frequency to protection of aquatic life uses and not applied the one-in-three-year exceedance frequency to other designated uses. WDEQ-WQD is not aware of implementation challenges associated with this approach.

EPA: Dissolved oxygen (Section 16(h), Table 3, footnote (a)). It is our understanding that WDEQ intends the new footnote a to allow for DO to be lower than the applicable criteria in the hypolimnion when the DO and temperature criteria are met in a location with adequate habitat at the time the hypolimnetic DO excursion occurs. We recommend WDEQ revise the language to clarify that hypolimnetic excursions of the DO criteria can occur when DO and temperature are both met in a location with adequate habitat. WDEQ could revise footnote a to read: "In the lower portion of a lake or reservoir, dissolved oxygen may be less than the applicable value provided that, when those excursions occur, there is adequate habitat for aquatic life where both the applicable biologically based temperature requirements and dissolved oxygen criteria are met."

Department Response: WDEQ-WQD is proposing to include "when those excursions occur" within footnote a in Table 3.

EPA: Aluminum fraction (Section 16(k), Table 7). In the criteria table at Section 16(k), the aluminum criteria are the EPA's 1988 nationally recommended aquatic life criteria for aluminum. WDEQ identifies the dissolved fraction for these criteria. However, since 1999, the EPA has recommended the total recoverable fraction for these criteria because it better accounts for, and limits, any physical effects of aluminum flocculates or particles to aquatic life. If aluminum criteria are based on dissolved concentrations, toxicity will be underestimated, because aluminum hydroxide precipitates that contribute to toxicity would not be measured.

¹⁰ "Others. For those pollutants not listed in Appendix B or C of these regulations, maximum allowable concentrations on Class 1, 2 and 3 waters shall be determined through the bioassay procedures outlined in the references listed in Appendix E of these regulations."

Although WDEQ is not updating these criteria, the EPA recommends implementing these aluminum criteria as the total recoverable fraction.

Department Response: WDEQ-WQD is not proposing changes to the aluminum criteria at this time. WDEQ-WQD plans to review EPA’s 2018 nationally recommended aluminum criteria during a subsequent triennial review. As part of that review process, WDEQ-WQD plans to review recent information and recommendations regarding adopting and implementing aluminum criteria in the bioavailable form for characterizing ambient water quality. For example, as described in EPA’s 2021 promulgation of aluminum aquatic life criteria for the State of Oregon¹¹, “total recoverable aluminum concentrations measured in natural waters may overestimate the potential risks of toxicity to aquatic organisms if suspended solids, clays, or particulate matter to which aluminum may be bound are present, because total recoverable methods measure bioavailable and non-bioavailable forms of aluminum.” Further, EPA’s promulgation of Oregon’s aluminum criteria states “for characterizing ambient waters, Oregon may also utilize, as scientifically appropriate and as allowable by State and Federal regulations, analytical methods that measure the bioavailable fraction of aluminum.”

EPA: Turbidity. In Wyoming’s current WQS, Section 23 applies numeric turbidity criteria of a 10 NTU increase to the current coldwater fisheries and drinking water uses (Classes 1, 2AB, 2A and 2B) and a 15 NTU increase to warm water or nongame fisheries. The *Supplementary Guidance to Statement of Principal Reasons* explains that Wyoming is replacing these numeric criteria with narrative criteria because the current 10 and 15 NTU criteria were not scientifically derived and Wyoming will continue to implement the substance of its Turbidity Implementation Policy (i.e., turbidity waiver program) by moving it to Chapter 2 for oversight by the WYPDES program (pp. 42-44). The drinking water use in Wyoming’s draft WQS includes a narrative turbidity criterion at Section 17(a)(iii); however, it does not appear that the proposed aquatic life criteria include a narrative specific to turbidity.

- i. The EPA understands from WDEQ that it considers the general narrative criteria (at proposed Section 15) to encompass narrative turbidity criteria for the aquatic life uses. We recommend, however, that WDEQ include a narrative specific to turbidity for the proposed coldwater aquatic life and warmwater aquatic life designated uses (equivalent to the current Class 1, 2AB, 2A and 2B cold water fisheries and warm water or nongame fisheries uses) to avoid the implication that turbidity criteria specific to the aquatic life use no longer apply.
- ii. Wyoming’s assessment methodology for turbidity references the current 10 and 15 NTU thresholds and states that “Due to the variable nature of turbidity data, WDEQ requires that credible data and a weight of evidence approach be used to make designated use support determinations with turbidity data (p. 7).” The *Supplementary Guidance to Principal Statement of Reasons* explains this statement: “In other words, evaluation of turbidity data also requires consideration of biological and physical data, as relevant, rather than just consideration of turbidity data (p. 58).” Can WDEQ provide any more detail or an example of how it will assess the narrative turbidity criteria?

Department Response: WDEQ-WQD is proposing to revise Section 15(e) to clarify that the “floating and suspended” provisions are intended to protect surface waters from excess turbidity. The proposed revisions include (1) revising the section title from “Floating and suspended solids” to “Floating, suspended, or dissolved materials” and (2) adding turbidity to the narrative. “Floating and suspended solids” was changed to “floating, suspended, or dissolved materials” because turbidity can include more than just “solids.” For example, turbidity can include dissolved materials that can scatter light. The proposed text reads “Floating, suspended, or dissolved materials. Floating, suspended, or dissolved materials, including excess sediment and turbidity, shall not be present in amounts that constitute pollution or impair designated uses.” As noted in the *Supplementary Guidance to the Statement of Principal Reasons*, WDEQ-WQD included specific provisions related to turbidity for the drinking water use because the Safe Drinking Water Act implementing regulations

¹¹ United States Environmental Protection Agency. Federal Aluminum Aquatic Life Criteria Applicable to Oregon. Federal Register Volume 86. No 52. March 19, 2021. Accessed from: <https://www.epa.gov/wqs-tech/aluminum-aquatic-life-criteria-applicable-oregon-fresh-waters-final-rule>

include specific requirements for turbidity levels applicable to public water systems. WDEQ-WQD is not proposing to include turbidity within Section 16, Protection of Aquatic Life, because Section 16(b) already includes a number of general narratives for protection of aquatic life that can be used to protect aquatic communities from turbidity pollution. Section 16(b) does not identify any specific constituents. Thus, inclusion of turbidity could be interpreted to mean that turbidity is more important than other constituents captured within the narrative criteria.

WDEQ-WQD anticipates implementing the proposed narrative provisions, including those for floating, suspended, or dissolved materials in Section 15, aquatic life protections in Section 16, and both general and turbidity-specific narratives applicable to drinking water protections in Section 17 in a similar manner to that described in *Wyoming's Methods for Determining Surface Water Quality Condition* (Assessment Methodology). As described in the Assessment Methodology, WDEQ-WQD plans to use credible data, and a multiple-lines-of-evidence approach to make designated use support determinations using turbidity data.

WDEQ-WQD utilized this approach in the *December 2023 Badwater Creek Project Water Quality Criteria Evaluation Report*¹² that resulted in the inclusion of a 17.1-mile segment of Badwater Creek on Wyoming's 2024 303(d) of Impaired Waters for not meeting its aquatic life uses due to a number of causes, including turbidity. In the evaluation of narrative provisions in Section 16, Floating and Suspended Solids, and Section 32, Biological Criteria, of the 2018 version of Chapter 1, which are similar to the proposed narrative provisions in Section 15 and Section 16 of Chapter 1, WDEQ-WQD: (1) documented degraded biological conditions of both the macroinvertebrate and fish communities by comparing communities upstream and downstream of the source of elevated turbidity; (2) summarized median and mean turbidity data collected over 15 sampling events; (3) provided photographs of typical elevated turbidity conditions; (4) noted the increase in turbidity upstream and downstream of the source; (5) described that the elevated turbidity occurred during all hydrologic conditions, including baseflow and runoff, suggesting that the turbidity increase was not due to precipitation events, runoff events, or geology; (6) compared turbidity increases observed in similar tributary/confluence scenarios; and (7) outlined how suspended and bedded sediments can impact and degrade aquatic communities.

WDEQ-WQD routinely uses a similar multiple lines evidence approach to determine attainment of narrative criteria and assess designated use support. As another example, 3 segments of Crow Creek in the South Platte Basin totaling 7.8-miles were identified as not meeting their aquatic life uses due to sedimentation/ siltation. In this assessment¹³, macroinvertebrates and physical data (bed material size; bankfull stream power; ratio of run and riffle slopes to reachwide channel slope; bankfull channel width; depositional feature; bankfull pool depth; reachwide slope; channel scour) were used to determine attainment of narrative criteria. WDEQ-WQD also translated the applicable narrative criteria into a restoration plan in the Crow Creek Watershed Sediment Total Maximum Daily Loads¹⁴. In this plan, WDEQ-WQD used three categories of targets to meet narrative water quality standards. One was a direct measure of the health of the aquatic community; one represented stream-bottom sediment deposition that consisted of four indicators; and one represented water column sediment concentration that was the TMDL target.

¹² Wyoming Department of Environmental Quality. Water Quality Division. Badwater Creek Project Water Quality Criteria Evaluation Report. December 2023. Accessed from:

https://gis.deq.wyo.gov/MAPS/WQD_ACTIVE_PROJECTS/IR/AR/WYBH_BadwaterCreekAlkaliCreek_2020.pdf

¹³ Wyoming Department of Environmental Quality. Water Quality Division. Water Quality Condition and Designated Use Determination for Crow Creek, South Platte Basin, 2007-2008. June 2009. Accessed from:

https://gis.deq.wyo.gov/MAPS/WQD_ACTIVE_PROJECTS/IR/AR/WYSP_CrowCreek_2009.pdf

¹⁴ Wyoming Department of Environmental Quality. Water Quality Division. Technical Support Provided by Tetra Tech, Inc. Crow Creek Watershed Sediment Total Maximum Daily Loads. September 19, 2022. Accessed from:

<https://drive.google.com/file/d/1eScOkx4K5QURhAABaqRX4mAYOXitUbD/view?pli=1>

WDEQ-WQD anticipates using a similar multiple-lines-of-evidence approach for determining attainment of narrative turbidity criteria protective of drinking water uses. Turbidity data from surface waters could be coupled with turbidity data from public water systems and their efforts to address excess turbidity. Turbidity data from surface waters could involve sampling near the raw water intake and sampling at a location that lacks anthropogenic sources of turbidity (e.g., sites on the same waterbody upstream of sources of turbidity or sites from a comparable waterbody without anthropogenic sources of turbidity). Information from public water system could include exceedances of Safe Drinking Water Act turbidity requirements; changes to operations that have been implemented or that would need to be implemented to address excess turbidity (e.g., turning off raw water intakes for periods of time); additional treatment or infrastructure necessary to address excess turbidity (e.g., additional flocculant and coagulant; alternative filtration systems; water storage to rely upon during periods of time when turbidity exceeds requirements, etc.); costs associated with any necessary changes to treatment; and potential impacts of treatment costs on rate payers. References and resources may include EPA's Guidance Manual for Compliance with the Surface Water Treatment Rules: Turbidity Provisions¹⁵; EPA's Clean Water Act Financial Capabilities Assessment Guidance¹⁶; and Oregon's Turbidity Technical Review¹⁷.

WDEQ-WQD also may, as resources allow, develop more detailed Assessment Methods for determining attainment of narrative criteria protecting designated uses from excess turbidity.

EPA: Ammonia. The Supplementary Guidance to Statement of Principal Reasons explains that numeric ammonia criteria apply to the coldwater and warmwater aquatic life uses and then goes on to state: Also consistent with the previous version of Chapter 1, narrative, but not numeric ammonia criteria, are applicable to other aquatic life uses. Narrative ammonia criteria are applicable to the new modified aquatic life use because waters designated for modified aquatic life may have cold water fish, warm water fish, or no fish. Thus, neither the cold water nor the warm water criteria are appropriate (p. 51). To achieve consistency with 40 CFR § 131.11, the EPA recommends Wyoming update its numeric ammonia criteria to reflect the EPA's 2013 recommendations and apply numeric criteria to all aquatic life designated uses, including those intended to protect organisms other than fish. As reflected in the EPA's 2013 recommended ammonia criteria for the protection of aquatic life, ammonia is toxic to aquatic invertebrates. Wyoming's ammonia criteria are based upon the EPA's 1999 recommended criteria, which do not protect the more sensitive freshwater invertebrate species such as unionid mussels and gill-breathing snails. The 1999 recommended aquatic life criteria for ammonia were based on the most sensitive endpoints known at the time: the acute criterion was based on salmonid fish toxicity information, and the chronic criterion was based on bluegill sunfish early life stage toxicity. In 2003, the EPA became aware of new toxicity studies indicating the relative sensitivity of freshwater mussels to ammonia and began to update the 1999 criteria to reflect this new information. In April 2013, EPA finalized the updated ammonia criteria that are applicable nationally, taking into account the latest toxicity information for freshwater species, including unionid mussels and gill-breathing snails. The 2013 criteria supersede EPA's previously recommended 1999 criteria. WDEQ has not updated its ammonia criteria to reflect the EPA's current 2013 recommendation.

Department Response: WDEQ-WQD is not proposing changes to its ammonia criteria at this time. WDEQ-WQD plans to review EPA's 2013 recommended ammonia criteria during a subsequent triennial review.

¹⁵ United States Environmental Protection Agency. Office of Water. Guidance Manual for Compliance with the Surface Water Treatment Rules: Turbidity Provisions. EPA 815-R-20_004. June 2020. Accessed from: https://www.epa.gov/sites/default/files/2020-06/documents/swtr_turbidity_gm_final_508.pdf

¹⁶ United States Environmental Protection Agency. Office of Water. Clean Water Act Financial Capability Assessment Guidance. 800B24001. March 2024. Accessed from: <https://www.epa.gov/system/files/documents/2023-01/cwa-financial-capability-assessment-guidance.pdf>

¹⁷ Oregon Department of Environmental Quality. Water Quality Standards. Turbidity Technical Review. Summary of Sources, Effects, and Issues Related to Revising the Statewide Water Quality Standard for Turbidity. April 24, 2014. Accessed from: <https://www.oregon.gov/deq/FilterDocs/TurbidityTechRev.pdf>

4.13. Section 17. Water Quality Criteria for Protection of Drinking Water Use.

WWAB: There are a number of double negatives. In Section 17(a) on line 881, it says “Narrative criteria. Pollution shall not result in non-support of drinking water uses.” What are you trying to say? Are you trying to say that degradation of drinking water uses? What does “non-support of” mean?

WWAB: Is it possible to wordsmith? Maybe where it...? I understand what you're trying to say, if you read it, it kind of cancels each other out. Pollution shall not result in what to drinking water uses?

Department Response: WDEQ-WQD is proposing to reword the water quality criteria in Sections 15-24 to remove double negatives. In most cases, the proposed text reads, pollution (or some pollutant or condition) “shall not impair” the designated use.

WWAB: Given the pollutant concentrations in the tables, are laboratories able to easily meet these limits with standard analytical methods?

Department Response: There are instances where water quality criteria are below standard analytical methods. An example WDEQ-WQD has encountered with WDEQ’s water quality laboratory is our aquatic life criteria for cadmium. In the case of cadmium, WDEQ-WQD takes the reporting limit into consideration when evaluating attainment of the criteria and when establishing effluent limitations for permitted point source discharges. In most cases, WDEQ-WQD would consider the criteria and any effluent limits to be met if concentrations are below the reporting limit. The federal Clean Water Act water quality standards regulation at 40 § CFR 131 requires that water quality criteria protect the designated use. As such, EPA’s recommended criteria and Wyoming’s water quality criteria cannot consider whether an analytical method can meet the criteria.

4.14. Section 19. Water Quality Criteria for Protection of Industry Use.

WWAB: Section 19, says “pollution shall not result in the non-support of industry use,” yet in “ii,” it says, “unacceptable adverse effects to raw water treatment”. Would it be okay if we said “unacceptable adverse impacts to industrial uses” since these are saying the same thing?

Department Response: WDEQ-WQD is not proposing additional changes to the proposed narrative criteria, outside of removing the double negative, because each of the narrative elements have a specific purpose. The first narrative in Section 19(b)(i) is a general narrative to broadly protect the industry use. This narrative element can be used in any circumstance when designated use support is necessary (e.g., assessing whether pollutant levels support or impair a designated use; derive effluent limits to protect the designated use; addressing illegal discharges of pollution). The second narrative in Section 19(b)(ii) identifies a specific endpoint to ensure water quality is of sufficient quality to support industrial uses. This narrative can facilitate translation of the narrative criteria into numeric thresholds. Similar to the general designated use protection narrative, the more specific narrative can be used to assess attainment of the designated use, derive effluent limits, and to address illegal discharges of pollution that may impact the use. The proposed narrative criteria in Section 19 are similar to the narrative criteria in Sections 16, 17, 18, 20, 21, 22, 23, and 24, which all include both the general designated use protection narrative and the specific endpoint narrative(s).

4.15. Section 22. Water Quality Criteria for Protection of Recreation Uses.

EPA: Deletion of the single sample maxima without adoption of the STV value for the proposed full body contact use appears inconsistent with 40 CFR § 131.11(a)(1), which requires, “States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.”

In WDEQ’s *Response to Scoping Comments* it responds to the EPA’s recommendation in our July 31, 2023,

letter to adopt STVs to protect the recreational use (pp. 38-39). Neither the *Response to Scoping Comments* nor the *Supplementary Guidance to Statement of Principal Reasons* include a scientific rationale for why the STV is not necessary to protect waters in Wyoming. The EPA requests that WDEQ provide any additional rationale and, specifically, a scientific rationale for why the STV is not necessary to protect the proposed “full body contact” (and currently “primary contact”) recreational designated use in Wyoming.

The EPA recommends that Wyoming adopt the STV recommended in our 2012 national recommended water quality criteria for the “full body contact” use. For the fecal indicator bacteria *E. coli*, this value is 410 cfu/100 mL implemented as a 90th percentile.

Department Response: To address EPA’s concerns, WDEQ-WQD is proposing to retain the four single sample maxima concentrations included in the 2018 version of Chapter 1 for the purpose of deriving single-sample maximum effluent concentrations for permitted discharges. WDEQ-WQD is proposing to remove text discussing the use of these values to post recreational use advisories because Wyoming’s Waterborne Pathogen Public Notification Process¹⁸ utilizes the beach action value of 235 cfu/100 mL included in EPA’s 2012 Recreational Water Quality Criteria¹⁹. WDEQ-WQD considered adoption of the statistical threshold value of 410 cfu/100 mL outlined in EPA’s 2012 recreational water quality criteria and concluded that additional time is necessary to evaluate implications to Wyoming’s Water Quality Monitoring, Assessment, TMDL, and Permitting Programs.

4.16. Section 23. Water Quality Criteria for Protection of Scenic Use.

WWAB: On line 999, I would move “wastes” up to after “settleable solids” so that there's only one “and” as opposed to “floating materials and suspended solids, and wastes.” So it would read “colors, taste, settleable solids, ‘comma’, wastes ‘comma’”. Yeah, “floating materials and suspended solids”.. Line 999 – remove “wastes” after “settleable solids” colors, taste, settleable solids.

Department Response: WDEQ-WQD is proposing to revise Section 23(b)(ii) to read “Pollution shall not result in unacceptable adverse impacts to the aesthetics of Surface Waters of the State, including but not limited to, odors, colors, tastes, settleable solids, wastes, and floating, suspended, and dissolved materials.”

WWAB: Do we have areas that are designated as scenic use already? Who makes that determination? And how does that work?

WWAB: Are there plans to do assessments in the future?

WWAB: If the state is not using the scenic value use, it may be appropriate to remove the use., lest it be used as vehicle for pursuing litigation or certain agendas against the state for values that are very subjective. If you find something very subjective and you cannot scientifically defensible numbers to it, it seems like that could draw the state into litigation that would problematic.

Department Response: Wyoming’s surface water quality standards have included a scenic value use since 1979 and all surface waters of the state have been assigned the scenic value use by default. WDEQ-WQD does not typically assess attainment of the scenic value use and no waters are currently included in Wyoming’s 303(d) List of Impaired Waters due to non-support of scenic value use. WDEQ-WQD contemplated removal of the scenic value use and is not proposing to remove the scenic value use at this time. WDEQ-WQD may consider removing the scenic value use in the future.

¹⁸Wyoming Department of Environmental Quality. Water Quality Division. Waterborne Pathogen Public Notification Process for Publicly Accessible Water Recreation Sites. April 14, 2023.

¹⁹ United States Environmental Protection Agency. Recreational Water Quality Criteria. Office of Water 820-F-12-058. 2012. Accessed from: <https://www.epa.gov/sites/default/files/2015-10/documents/rwqc2012.pdf>.

4.17. Section 23. Water Quality Criteria for Protection of Terrestrial Wildlife Use.

WWAB: Why this was broken out into all these little sections that are essentially structured the same, where they have “narrative criteria” and “the non-support of...” and then “unacceptable adverse impacts to...”. Is there a reason to have them all broken out separately in separate sections rather than kind of...Would it be too confusing to have them all combined? Or anyways, just that was my question, I don't have a strong feeling about it. I'm just wondering why you chose to do it this way.

Department Response: WDEQ-WQD is proposing to retain the proposed rule text for water quality criteria applicable to each designated use because the format (1) makes it easy to identify the criteria elements applicable to each designated use; and (2) is consistent with rule guidance that requires a minimum of two subsections (i.e., (a) and (b)) whenever subsections are used. WDEQ-WQD is also proposing to retain the proposed rule text such that each designated use has its own section of applicable water quality criteria because: (1) separate sections make it more clear which water quality criteria are applicable to each designated use; (2) the rule is simpler and easier to read, as some designated uses have a number of water quality criteria that would require multiple paragraphs, subparagraphs, etc. if all the water quality criteria were included in one section; and (3) separate sections will make it easier to modify water quality criteria for specific designated uses in the future.

4.18 Section 25. Modifications to Water Quality Criteria.

WWAB: On page 1-32 on line 1019, it appears that “be” was inadvertently left in. It should say “water quality criteria shall protect downstream” rather than “shall be protect.”

Department Response: WDEQ-WQD is proposing to revise Section 25(a) to remove “be.”

WWAB: Where it says requirements “SubParagraphs (A) through (D),” I think we're missing an “of” or an “in”. There appears to be a word missing there.

Department Response: WDEQ-WQD is proposing to revise Section 25(b)(i) to include the word “in” before “Subparagraphs (A) through (D)” to be consistent. WDEQ-WQD is also proposing to revise “SubParagraph” to “Subparagraph.”

4.19. Section 26. Discharger Specific Variances.

WWAB: The sentence in line 1130, “The Department shall publicly notice the reevaluation and provide an opportunity for public comment for a minimum of 30 days,” is an awkward construction.

Department Response: WDEQ-WQD is proposing to revise Section 26(f)(ii) to clarify the public notice requirement. The proposed text reads “The Department shall notify the public of the reevaluation and provide a minimum of 30 days for the public to comment.”

WOC: Our primary concern is the potential removal of the public comment opportunity pertaining to the Department’s process for granting discharge specific variances. Within the existing Chapter 1 standards’ Section 37(a), Discharger Specific Variances (pg. 1-25), it states: (a) Following public notice and opportunity for comment, including at least one public hearing with a minimum of 45-day notice, the administrator may grant a permittee a variance to a designated use and water quality criteria for ammonia and/or nutrients (e.g., total nitrogen, total phosphorus). Upon reviewing the corresponding section in the revised Chapter 1 standards, Section 26(a), Discharger Specific Variances states: (a) The Department may adopt a time-limited designated use and water quality criteria for ammonia or nutrients (e.g., total nitrogen, total phosphorus) through revision of this Chapter, either at its discretion, or upon receipt of a petition in accordance with the Department’s Rules of Practice and Procedure, Chapter 3, Section 3. While the 30-day opportunity for public comment during the Department’s regular re-evaluation for discharger specific variance found in Section 26(f)(ii), there is no mention or retention of the 45-day public comment period on the front end of the process

for granting discharger specific variance. We question why public review has been removed in the revised rules and the justification for why this change was not included in the Statement of Principle Reasons for Adoption. We were unable to understand whether or not this was done to bring rules consistent with the Department's Rules of Practice and Procedure, Chapter 3, as stated, or just an intentional removal of opportunity for public comment. Regardless, we urge the department to restore the 45-day public comment period as stated in Section 37(a) of the current Chapter 1 standards.

Department Response: The Department is proposing that all discharger specific variances be adopted through the rulemaking process. Thus, public comment opportunities would be provided as part of the rulemaking process and are not described separately within the Chapter. WDEQ-WQD has clarified this intent within the *Supplementary Guidance to the Statement of Principal Reasons*.

4.20. Section 27. Mitigation Requirements for Wetlands Not Subject to the Jurisdiction of the Clean Water Act.

WWAB: How often is this section utilized?

Department Response: WDEQ-WQD advises project proponents of these requirements, but rarely sees circumstances where more than one acre of non-Waters of the United States (WOTUS) wetlands are impacted and require mitigation. It is more typical that WDEQ-WQD evaluates projects where the potentially impacted wetland is a WOTUS that would require a 404 permit and a 401 certification.

WWAB: Are you still receiving notice if there's an intent to drain a non-WOTUS wetland?

Department Response: WDEQ-WQD has not seen a notice to drain a non-WOTUS wetland during the time Administrator Zygmunt has been Administrator.

WWAB: On line 1160 the phrase “man-made” is used. The literature you sent regarding the changes you made described your attempt to eliminate the use of “man-made.” Is it possible to use the term artificial wetlands? I know “human made wetlands” is an awkward thing to say, but if there is a way to get rid of “man,” that would be preferable.

Department Response: WDEQ-WQD is not proposing to modify “man-made wetlands” because “man-made wetland” is a defined term in the Wyoming Statutes.

4.21. Section 28. Incorporation By Reference.

WFBE: When you incorporate materials by reference and there is a change to the reference, does that necessitate an entire rulemaking process by the body, and if, so, how often is that going to be?

Department Response: The incorporated materials include a specific date and do not incorporate any updates to the materials. As such, in circumstances where the WDEQ-WQD would like to update the incorporated reference, that change would need to be made through the rulemaking process. WDEQ-WQD is required under the Clean Water Act to review our surface water quality standards every three years, so WDEQ-WQD anticipates undertaking regular rulemakings for Chapter 1.

WFBE: One of the incorporated materials is a Wyoming Game and Fish database. This has always been a concern for me because it is incorporating another agency's database into this document. If I were affected by Game and Fish's classification and you do not feel that this is accurate information. Are you required to go through revisions to Wyoming DEQ's or would you argue with Wyoming Game and Fish?

Department Response: The Wyoming Surface Water Designations document incorporates the June 2000 version of the Wyoming Game and Fish's Stream and Lake Database. Updates to the database are not incorporated. Incorporating a new version of the database would require a separate rulemaking. WDEQ-WQD

anticipates updating the aquatic life uses in the future and identifying a way to assign those uses to surface waters that considers more than just the Game and Fish database.

4.22. Surface Water Designations

EPA: The EPA appreciates WDEQ's resolution of outstanding designated use revisions by reassigning the limited aquatic life use, which is equivalent to the previously assigned Class 3 aquatic life use for waters without fish (*Supplementary Guidance to the Statement of Reasons*, pp. 80- 81, Table 7). The EPA did not approve the Class 4 assignment to these waters because UAAs that sufficiently demonstrated that the aquatic life use is not attainable were not completed.

CWA Section 101(a)(2) and the CWA regulations at 40 CFR § 131.10 establish a rebuttable presumption that aquatic life, fish consumption and recreational uses should be designated and protected unless data and information exist affirmatively demonstrating, through a UAA, that those designated uses cannot be attained. Although these waters were designated Class 3 prior to the downgrade to Class 4, these uses will not include a fish consumption use (and the associated criteria). Additionally, numeric aquatic life criteria for DO, temperature, chloride, and ammonia do not apply.

Without data or information in the form of a UAA to demonstrate that fish do not occur in these waters, the EPA recommends that WDEQ apply either the fish consumption use and a coldwater or warmwater and nongame fish use to these waters. The EPA also recommends WDEQ explain how it will apply its narrative criteria to protect aquatic life in these waters from impacts to DO, temperature, chloride and ammonia.

Department Response: Proposed changes to surface water designations are intended to align the designations with those previously approved by EPA. WDEQ-WQD is not proposing additional changes at this time due to the number of other changes associated with this revision to Wyoming's surface water quality standards. WDEQ-WQD's *Methods for Determining Surface Water Quality Condition*⁴ provides details on how WDEQ evaluates attainment of narrative criteria. In circumstances where WDEQ-WQD determines water quality criteria are not being met, WDEQ-WQD will work with partners to develop a restoration plan, and if needed, a total maximum daily load. Wyoming's Pollutant Discharge Elimination System Program conducts a reasonable potential analysis to determine whether a proposed discharge may cause a violation of Wyoming's surface water quality standards. In circumstances where a violation may occur, the WYPDES Program includes effluent limitations within the permit. As part of this process, whole effluent toxicity testing can be included, as necessary, for protection of aquatic life. Wyoming's 401 Certification Program evaluates projects to determine whether they will cause a potential violation of Wyoming's surface water quality standards and provides conditions for the 404 Permit to ensure compliance with the standards.

4.23. Lower Murphy Creek Site-Specific Selenium Criteria

EPA: Anthropogenic selenium contributions. A sand and gravel mining operation is located at the upper end of the reach for which the site-specific criteria are proposed (Location ET1590 on Figure 1). Table D shows that runoff concentrations of selenium at MC, near the sand and gravel operation, are much higher than those in MC-2, which is further downstream and farther from the sand and gravel operation.

- Are there conditions under which the sand and gravel operation facility discharges? If so, when?
- Have any data been collected to document whether there are elevated concentrations of selenium downstream of the sand and gravel mining operation, including during a storm event (as was documented for the bentonite mines)?
- Is the stormwater land-applied within the watershed? If so, where? Are there data characterizing the quality of the stormwater that is land-applied?

Department Response: WDEQ-WQD is not aware of discharges from the sand and gravel mining operation. As noted in the proposal, reports from the facility indicated no surface discharges occurred in 2021, 2022, or

2023. WDEQ-WQD does not have data from immediately downstream of the sand and gravel operation, including following a storm event. However, during synoptic sampling in September 2009, the site downstream of the gravel mine was dry despite concentrations of 17 µg/L dissolved selenium even further downstream of the gravel pit (see Figure 1 of the proposal). WDEQ-WQD is also not aware of stormwater being land-applied within the watershed and as such does not have data characterizing the quality of land-applied stormwater.

EPA: Data. The proposal states, “Samples not collected at MC or MC-2 were excluded from analysis due to suspected collection from standing water and general unrepresentativeness. Further, samples collected upstream of MC...were below the detection limit or the stream channel was dry.”

- a. What data were excluded? Can WDEQ provide, or point to, these data? How does including these data affect the proposed criteria values?
- b. Are these stations that were excluded within the reach identified for site-specific criteria? Was aquatic life present in these pools of standing water? If so, those values may be relevant to assuring that aquatic life is protected during dry periods where limited pools of water are present rather than flowing water.
- c. Non-detects are important to consider and would influence the value identified as the 85th percentile. Were non-detect data generally included in derivation of the proposed criteria?

Department Response: All data collected as part of the study were described and included in the site-specific criteria technical support document (see Appendix C of the April 2024 *Technical Support Document for Site-Specific Selenium Aquatic Life Criteria for Lower Murphy Creek* for documentation provided from WWC Engineering). For deriving the site-specific criteria, WDEQ-WQD included all data collected on Murphy Creek at MC and MC-2, including data collected during synoptic sampling in 2009. WDEQ-WQD only excluded a small number of samples from the synoptic sampling sites collected in 2009 and 2011 at sites other than MC and MC-2. Inclusion of data from both 2009 and 2011 would have over-represented the September 2009 and June 2011 sampling periods relative to other sampling dates for Murphy Creek. As noted in the April 2024 *Technical Support Document for Site-Specific Selenium Aquatic Life Criteria for Lower Murphy Creek*, non-detect data were included in the derivation of the proposed criteria, with ½ of the reporting limit of 5.0 µg/L or 2.5 µg/L used to represent data below the reporting limit.

EPA: Reporting limits. Lastly, if future water column data is collected, the EPA recommends using an analytical method that has a reporting limit lower than 5 µg/L in order to get a more accurate assessment of the actual concentration of selenium in the water for those locations where measurements were less than 5 µg/L.

Department Response: WDEQ-WQD will evaluate reporting limits if additional data is collected in Murphy Creek.

EPA: Designated use support. As the EPA has previously communicated, we are concerned that the proposal does not include a demonstration that the site-specific criteria will protect the designated use. Based on WDEQ’s responses to our 2016 comments (Response to Scoping Comments, Section 4.0) and conversation with WDEQ, there are three problems related to this lack of demonstration:

- a. There are no biological survey data collected from Murphy Creek but the documents describe anecdotal observations of invertebrates and minnows.
- b. WDEQ does not have an established method to assess the “aquatic life other than fish” designated use.
- c. Observations of fish in Murphy Creek suggest that the current designated use (i.e., aquatic life other than fish) is not appropriate and that an aquatic life use including protection of fish may be an existing use that warrants designation and protection.

If available, please provide any additional data or information describing the aquatic life present in Murphy Creek and an assessment of that community. The past UAA notes the presence of invertebrates and minnows in Murphy Creek but does not note the quality of that community to demonstrate that the aquatic life is being protected at current selenium concentrations.

The EPA recommends evaluating the appropriateness of the current designated use for this water body. While the current designated use is for aquatic life other than fish, the report notes that “minnows were noted in the central to lower portion of the stream.” As fish are observed in parts of this water body it is likely more appropriate for the designated use on this water body to be for aquatic life, including fish. If possible, also please provide a map where minnows have been observed in this water body. If WDEQ chooses to pursue a use change, then it may want to consider also including fish tissue elements as part of the site-specific criterion for selenium. The EPA’s national recommendations are a criterion element of 15.1 mg/kg dry weight for egg-ovary tissue and 8.5 mg/kg dry weight for whole body tissue or 11.3 mg/kg dry weight for muscle tissue. Additional information can be found in the 2021 Revision to: Aquatic Life Ambient Water Quality Criterion for Selenium Freshwater 2016.12

Department Response: As described in the April 2024 *Technical Support Document for Site-Specific Selenium Aquatic Life Criteria for Lower Murphy Creek*, WWC Engineering noted the presence of invertebrates and minnows at numerous sites on Murphy Creek. WDEQ-WQD is unaware of additional biological data collected on Murphy Creek that could be used to demonstrate that current selenium concentrations support aquatic life in Murphy Creek. WDEQ-WQD understands that EPA believes this information is essential for EPA to approve the proposed site-specific criteria. After consultation with the Powder River Conservation District, WDEQ-WQD is proposing to remove the proposed site-specific aquatic life selenium criteria for Lower Murphy Creek. WDEQ-WQD will continue to work with the Powder River Conservation District and other stakeholders to identify a path forward for Lower Murphy Creek.

WDEQ-WQD has not done an evaluation as to whether it would be appropriate to modify the designated uses of Murphy Creek. As such, WDEQ-WQD is not recommending changes to the designated uses applicable to Murphy Creek at this time. WDEQ-WQD will consider potential revisions in a subsequent triennial review.

EPA: Duration and terminology. Table F in the Lower Murphy Creek site-specific criteria proposal identifies a 5-year duration for the acute and chronic criteria. Footnote 2 to Table 7 in the draft proposed WQS states that “attainment of the chronic and acute criteria will be based on the 85th and 95th percentile, respectively, of data from the most recent 5-year period.” At Section 16(k), Wyoming’s WQS state “[i]n all Surface Waters of the State designated for aquatic life, pollution shall not result in the one-hour average acute or four-day average chronic values in Table 7 to be exceeded more than once every three years.”

The EPA is concerned that the duration for criteria described as “acute” and “chronic” are inappropriate. Because the intent of these criteria is to maintain an existing condition and because the proposed criteria are not based on toxicity testing for acute and chronic effects, the EPA recommends that Wyoming consider eliminating use of the terms “acute” and “chronic.” This change would address our concerns about the 5-year duration as too long for

“acute” and chronic” criteria. For example, the text at Footnote (i)(2) to Table 7 could read: Lower Murphy Creek from the confluence with an unnamed tributary, longitude - 106.739669, latitude 43.562588, downstream approximately 16.9 miles to the confluence with the South Fork Powder River in the Powder River watershed, has ~~a chronic-site-specific~~ dissolved selenium values of 11 µg/L as an 85th percentile and ~~an acute dissolved selenium value of~~ 16 µg/L as a 95th percentile. Attainment of the ~~chronic and acute~~ criteria will be based on ~~the 85th and 95th percentile, respectively, of~~ data from the most recent 5-year period.

A second option would be allowing the default durations for aquatic life criteria in Table 7 (Section 16(k)) to apply to footnote (i)(2) which is the site-specific criteria for Lower Murphy Creek. A third option is using the water column duration for the EPA’s recommended 304(a) selenium criterion, which is a 30-day averaging period for the chronic criterion. For the acute criterion, an even shorter time period should be used since acute impacts can occur in a very short time period.

Department Response: As described previously, WDEQ-WQD is proposing to remove the site-specific aquatic life selenium criteria for Lower Murphy Creek from the proposed revisions to Chapter 1. As such, additional changes to terminology associated with the proposed criteria are not necessary at this time. Should WDEQ-WQD propose percentile-based criteria at some point in the future, WDEQ-WQD will consider using terminology other than “chronic” and “acute.”

Appendix A. Public Notices Regarding Comment Period That Ended June 13, 2024.

A.1. Casper Star Tribune Proof of Publication.

*** Proof of Publication ***

Casper Star-Tribune
P.O. Box 80, Casper, WY 82602-0080, ph 307-266-0500

AFFIDAVIT OF PUBLICATION

STATE OF INDIANA)
COUNTY OF LAKE)

I, Robin Nelson being
duly sworn says that I am the Legal Clerk of Casper Star-Tribune, a
division of Lee Publications, Inc. A newspaper published in CASPER,
NATRONA COUNTY, WYOMING, who declares that the attached
Notice was published in said newspaper on the following dates:

4/11/24

DEQ Water Quality Division
Gina Thompson/Cat Hardway
200 W. 17TH ST. FL 4TH
CHEYENNE WY 82002

ORDER NUMBER 92154

[Signature]
SIGNATURE

Sworn and subscribed to before me this 11 day of

April 2024

Christina Palma



Section: Legal Notices

Category: 940 Public Meetings

PUBLISHED ON: 04/11/2024

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The Wyoming Department of Environmental Quality Water and Waste Advisory Board Meeting

The Wyoming Water and Waste Advisory Board (WWAB) will meet on June 13, 2024, at 9:00 a.m. virtually via Zoom and in person at the Department of Environmental Quality Casper Field Office Conference Room, 444 West Collins Dr., Suite 1400 Casper, WY 82601, to consider revisions to Water Quality Rules, Chapter 1, Wyoming Surface Water Quality Standards; and Chapter 2, Permit Regulations for Discharges to Wyoming Surface Waters. The proposed Chapter 1 revisions (1) fulfill the federal requirements at 40 CFR § 131.20, (2) restructure and align requirements with state and federal law, regulations, and guidance; (3) revise designated uses and remove the designated use classification system; and (4) provide minor updates to specific water quality criteria. The proposed Chapter 2 revisions (1) update references to the designated use classification system to reflect proposed revisions to Chapter 1; and (2) incorporate provisions related to fish toxicants, aquatic pesticides, and short-term sediment disturbance that the Water Quality Division proposes to move from Chapter 1 to Chapter 2. Interested parties may contact Gina Thompson at gina.thompson@wyo.gov (307) 777-7343 for information on how to join the meeting via telephone or Zoom. Individuals may contact Lindsay Patterson at (307) 777-7079 for questions on the Water Quality Rules revisions. Additional details are located at <http://deq.wyoming.gov/shed/wwab/> under the "Upcoming Meeting" tab or may be inspected at the mailing address below. Beginning 8:00 a.m. April 11, 2024, and before 5:00 p.m. on June 13, 2024, written comments may be submitted via mail to WDEQ/WQD, 200 West 17th St, Ste. 200, Cheyenne, WY, 82002; via fax to (307) 635-1784; or submitted through and accepted electronically at <https://wyo.wyo.gov/shed/comments/>. Para español, visite deq.wyoming.gov. Americans with Disabilities Act: special assistance or alternative formats will be made available upon request for individuals with disabilities. Please contact Gina Thompson at the contact information above at least three (3) weeks advance notice prior to the meeting date for such requests.
April 11, 2024
Legal No: 92154

A.2. WDEQ Listserv Notice.



Lindsay Patterson <lindsay.patterson@wyo.gov>

The Wyoming Department of Environmental Quality Water and Waste Advisory Board Meeting

1 message

Wyoming Department of Environmental Quality <WYODEQ@public.govdelivery.com>

Thu, Apr 11, 2024 at 8:03 AM

Reply-To: WYODEQ@public.govdelivery.com

To: lindsay.patterson@wyo.gov

Wyoming Department of Environmental Quality | [view as a webpage](#)



Public Notice: The Wyoming Water and Waste Advisory Board

The Wyoming Water and Waste Advisory Board (WWAB) will meet on June 13, 2024, at 9:00 a.m. virtually via Zoom and in person at the Department of Environmental Quality Casper Field Office Conference Room, [444 West Collins Dr., Suite 1400 Casper, WY 82601](#), to consider revisions to Water Quality Rules, Chapter 1, Wyoming Surface Water Quality Standards; and Chapter 2, Permit Regulations for Discharges to Wyoming Surface Waters. The proposed Chapter 1 revisions (1) fulfill the federal requirements at 40 CFR § 131.20, (2) restructure and align requirements with state and federal law, regulations, and guidance; (3) revise designated uses and remove the designated use classification system; and (4) provide minor updates to specific water quality criteria. The proposed Chapter 2 revisions (1) update references to the designated use classification system to reflect proposed revisions to Chapter 1; and (2) incorporate provisions related to fish toxicants, aquatic pesticides, and short-term sediment disturbance that the Water Quality Division proposes to move from Chapter 1 to Chapter 2. Interested parties may contact Gina Thompson at gina.thompson@wyo.gov or (307) 777-7343 for information on how to join the meeting via telephone or Zoom. Individuals may contact Lindsay Patterson at (307) 777- 7079 for questions on the Water Quality Rules revisions. Additional details are located at <http://deq.wyoming.gov/shwd/wwab/> under the "Upcoming Meeting" tab or may be inspected at the mailing address below. Beginning 8:00 a.m. April 11, 2024, and before 5:00 p.m. on June 13, 2024, written comments may be submitted via mail to WDEQ/WQD, [200 West 17th St, Ste. 200, Cheyenne, WY, 82002](#); via fax to (307) 635-1784; or submitted through and accepted electronically at <https://wq.wyomingdeq.commentinput.com/comment/search>.

Para español, visite deq.wyoming.gov. Americans with Disabilities Act: special assistance or alternative formats will be made available upon request for individuals with disabilities. Please contact Gina Thompson at the contact information above at least three (3) weeks advance notice prior to the meeting date for such requests.

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Appendix B. Written Comments Received During the Comment Period That Ended June 13, 2024.

B.1. Environmental Protection Agency



Ref: 8WD-WQS

SENT VIA EMAIL and SUBMITTED VIA WEBSITE

Lindsay Patterson, Water Quality Standards Program Manager
Wyoming Department of Environmental Quality
Lindsay.patterson@wyo.gov

Re: Proposed Changes to Wyoming's Water Quality Standards, Chapter 1

Dear Ms. Patterson:

This letter provides the U.S. Environmental Protection Agency Region 8 Water Quality Section's (EPA's) comments on Wyoming's Chapter 1, proposed water quality standards (WQS) revisions for the public comment period extending from April 11 to June 13, 2024. The Wyoming Department of Environmental Quality (WDEQ or the Department) held an informational meeting regarding these changes on April 24, 2024, and Wyoming's Water and Waste Advisory Board (WWAB) has scheduled a meeting regarding the proposed revisions for June 13, 2024.

The EPA commends WDEQ's efforts to improve the usability and clarity of Wyoming's WQS. We also commend and support WDEQ's progress toward meeting the triennial review requirement at 40 CFR § 131.20(a). We appreciate WDEQ's efforts to resolve outstanding WQS items that the EPA had not acted on previously and its revisions in response to several of our July 31, 2023 comments on a pre-public notice draft of the WQS.

The EPA intends our comments to help WDEQ achieve consistency with the requirements of the Clean Water Act (CWA) and its implementing regulations at 40 CFR Part 131. Our comments are preliminary and do not reflect the EPA's determination of approval or disapproval under CWA Section 303(c) or our final feedback. It is the EPA's understanding that WDEQ intends to review comments from the EPA, the public and the WWAB and consider additional revisions before going to the Environmental Quality Council for rulemaking. The EPA intends to review any future revisions.

Once WDEQ has finalized its proposed changes, the EPA reminds WDEQ to develop written explanations of why it is not adopting any of the EPA's nationally recommended CWA Section

304(a) criteria that have become available since its last triennial. Per 40 CFR § 131.20, these explanations are necessary for WQS submission to the EPA.

We hope these comments are helpful as you continue to consider revisions to Wyoming's WQS. Please contact Maggie Pierce of my staff at 303-312-6550 or pierce.maggie@epa.gov with any questions or if you would like to discuss these comments.

Sincerely,

STEPHANIE
DEJONG

Digitally signed by
STEPHANIE DEJONG
Date: 2024.06.13 16:30:04
-06'00'

Stephanie Dejong, Manager
Clean Water Branch

Enclosure

cc: David Waterstreet, Watershed Section Supervisor, WDEQ
Jennifer Zygmunt, Water Quality Administrator, WDEQ

EPA Comments:
Wyoming's Draft Water Quality Standards Revisions April 2024 version
for June 13, 2024 Water and Waste Advisory Board Meeting

I. Comments on Chapter 1

1. Definition of "natural" (Section 2). At Section 2(b)(xxvii), WDEQ is proposing to revise the term "natural" from "...that condition which would exist without the measurable influence of man's activities" to "...the condition that would exist with minimal or no anthropogenic influence." The EPA recommends deleting "minimal" as it is a subjective phrase that is difficult to implement and does not truly represent a natural, unaltered condition. This recommendation is consistent with EPA expectations and policy that "natural background is defined as background concentration due *only* to non-anthropogenic sources, i.e., non-manmade sources."^{1,2}
2. Colorado River Salinity Standards (Sections 7 and 28). Section 7 points to Section 28 as incorporating *Water Quality Standards for Salinity, Colorado River System* by reference. The text refers to the WQS "in effect as of April 1, 2024." To avoid confusion, we recommend referencing the [document on the website](#), which is dated October 2023. The Section 28(ii) text could read "Water Quality Standards for Salinity Colorado River System dated October 2023, available at: <http://www.coloradoriversalinity.org>." WDEQ could also consider similarly updating the dates for other items incorporated by reference at Section 28 to the actual version date instead of "in effect as of April 1, 2024."
3. Flow and Water Level Conditions (Section 8).
 - a. Section 8(a). Section 8(a) newly identifies "low water levels" as an exception to when numeric water quality standards apply. The current language (at Section 11(a)) only identifies low flow conditions as when numeric standards do not apply.
 - i. We understand an aspect of WDEQ's intent is that numeric standards do not apply when extreme low water levels occur. However, the flow statistics (which we understand are intended to apply to water levels as well) identified in Table 1 have recurrence intervals of 10, 3 or 5 years and, in the case of the harmonic mean flows, are ongoing long-term averages. These recurrence intervals, especially those of 3 and 5 years, represent a regular, expected condition. Additionally, the acceptable exceedance frequencies that apply to the aquatic life numeric standards (generally allow for exceedances once every three years, on average, Section 16), accommodate the low flow or water level scenarios described at Section 8(a) as an exception to when numeric water quality

¹ <https://www.epa.gov/sites/default/files/2014-08/documents/naturalbackground-memo.pdf>

² <https://www.epa.gov/sites/default/files/2015-02/documents/natural-conditions-framework-2015.pdf>

standards apply. In the case of human health criteria, implementation of the numeric criteria as 30-day average allows for variability around that average that could also accommodate the low flow or water level scenarios excepted at Section 8(a). Applying these flow-based exceptions on top of the acceptable exceedance frequencies could allow for exceedances to occur more frequently than what is acceptable and protective of the designated use.

- ii. 40 CFR § 131.6(c) requires WQS submissions to the EPA to include “[w]ater quality criteria sufficient to protect the designated uses.”
- iii. 40 CFR § 131.11(a)(1) requires that “States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.”
- iv. Additionally, CWA Section 303(c)(2)(B),³ 40 CFR § 131.11(a)(2) and 40 CFR § 131.11(b)(2) require numeric criteria for “toxics” or “priority pollutants” which could interfere with designated uses where 304(a) numeric criteria are available.^{4,5}
- v. The EPA is concerned that neither the existing provision nor the proposed revision is consistent with the CWA and its implementing regulations. We would like to discuss the proposed revision with WDEQ to make sure we fully understand how the current provision is implemented and the intent for revision. For example, does WDEQ implement this requirement for assessment of waters pursuant to CWA Section 303(d)? Please provide any other information on how these exceptions will protect designated uses and why WDEQ is proposing to add this language.

- b. Section 8(d). New language at Section 8(d) identifies both low flows and water level as a basis for developing water quality based effluent limits (WQBELs) in permits. The EPA supports the addition of this language establishing a linkage between low flows and WQBELs and the specification of statistical metrics for low flows. The intent behind, and utility of, identifying specific metrics for low

³ Clean Water Act Section 303(c)(2)(B) requires “Whenever a State reviews water quality standards...such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) [Section 307] of this title for which criteria have been published under section 1314(a) [Section 304(a)] of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants.”

⁴ As discussed in section 3.13 of the WQS Handbook, the EPA has translated the 65 compounds and families of compounds listed under CWA Section 307(a)(1) into a list of 126 priority pollutants. CWA Section 303(c)(2)(B) explicitly requires that states adopt numeric criteria for such pollutants where EPA has issued criteria guidance and the discharge or presence of such pollutants in the affected waters could reasonably be expected to interfere with the designated uses adopted by the state or authorized tribe.

⁵ 40 CFR 423, Appendix A

water levels in addition to metrics for low flows is less clear. As specified at proposed Section 10(c)(iii), permitting of discharges to lakes and reservoirs is primarily accomplished through use of a mixing zone and is limited based on factors that do not necessarily depend on dilution. Proposed Section 10(c)(iii) states: "For lakes and reservoirs, the dilution allowance is limited to no more than five percent of the lake surface area at low water levels or a 200-foot radius at low water levels, whichever is more limiting."

- i. Does WDEQ currently rely on low water levels for developing WQBELs for direct discharges to lakes and reservoirs? If so, how does it identify those low water levels?
- ii. Will the addition of low water level metrics change or improve WQBEL permitting to lakes and reservoirs?

c. Table 1.

- i. Table 1 describes low flow metrics for implementing criteria; however, it does not describe how low water levels will be determined. We recommend clarifying how low water levels will be identified.
- ii. Footnotes a-e to Table 1: The footnotes refer to low flow metrics as water levels. The low flow metrics are not water levels but flows. We recommend deleting the phrase "water level" from the table's title and footnoted definitions or clarifying the intent of these metrics.
- iii. Additionally, we suggest rephrasing the probability-based flows as the "...lowest X-day flow that occurs, on average, once every Y years" versus the "lowest X-day average flow that occurs every Y years."

4. Dilution allowances -- Complete Mixing (Section 9). WDEQ is proposing to bring the language from its *Mixing Zones and Dilution Allowances Implementation Policy* into its WQS, creating two new sections: Section 9, Dilution Allowances -- Complete Mixing Scenarios and Section 10, Mixing Zones and Dilution Allowances -- Incomplete Mixing Scenarios.

- a. At current Section 9, Wyoming's WQS appear to prohibit the use of dilution allowances for acute whole effluent toxicity (WET) values for both complete and incomplete mixing scenarios. The text reads:

Except for acute whole effluent toxicity (WET) values and Sections 14, 15, 16, 17, 28 and 29(b) of these regulations, compliance with water quality standards shall be determined after allowing reasonable time for mixing. Except for the zone of initial dilution, which is the initial 10% of the mixing zone, the mixing zone shall not contain pollutant concentrations that exceed the aquatic life acute values (see Appendix B). In addition, there shall be a zone of passage around the mixing zone which shall not contain pollutant concentrations that exceed the aquatic life chronic values (see Appendix B). Under no circumstance may a mixing zone be established which would allow human health criteria (see Appendix B) to be exceeded within 500 yards of a

drinking water supply intake or result in acute lethality to aquatic life. The procedures used to implement this section are described in the Mixing Zones and Dilution Allowances Implementation Policy.

Section 3 of Wyoming's current Implementation Policy also seems to reflect this prohibition by noting that "an appropriate dilution allowance may be provided in calculating chemical-specific discharge limitations." WET test limits are not chemical-specific discharge limitations. WDEQ has carried over the current prohibition on the use of mixing zones for meeting acute WET test limits into new Section 10 for incomplete mixing scenarios but not into new Section 9 for complete mixing scenarios. The EPA's [*Technical Support Document for Water Quality-based Toxics Control*](#)⁸ states, "It is important to remember that the assumption of complete mixing is not a conservative assumption for toxic discharges; an assumption of minimal mixing is the conservative approach (p. 72)."

The EPA recommends that WDEQ add a statement to new Section 9 that dilution allowances cannot be used for acute WET testing limits. This addition would 1) maintain Wyoming WQS' current level of protectiveness, 2) ensure that discharges do not cause acute toxicity to aquatic life and 3) be consistent with EPA recommendations to make conservative mixing assumptions for toxic discharges.

5. Mixing Zones and Dilution Allowances – Incomplete Mixing (Section 10).

- a. The EPA recommends limiting this section's reference to "mixing zones" only and deleting uses of the term "dilution allowance." A mixing zone is the appropriate tool to use when developing water quality-based effluent limits (WQBELs) in incomplete mixing situations. A dilution allowance is typically applied in flowing waters when near instantaneous and complete mixing occurs. Dilution allowances do not account for the sizing, mixing mechanics, and other considerations of an incomplete mixing scenario. The mixing zone method would account for these considerations and also provide for any dilution available to meet WQBELs at the edge of the mixing zone. Use of the term "dilution allowances" in the section's title and subsections 10(c)(ii) and (iii) is inconsistent with EPA recommendations; these uses of the term are defining regulatory requirements for a "mixing zone" not a "dilution allowance."
 - i. Chapter 5 of the WQS Handbook states: *A dilution allowance typically is expressed as the flow or portion of the flow of a river or stream and is typically applied in flowing waters where rapid and complete mixing occurs. A mixing zone is typically applied in any waterbody type in which incomplete mixing occurs.*
 - ii. The executive summary of the *EPA Region 8 Mixing Zones and Dilution Policy* states: *Under EPA Clean Water Act (CWA) regulations, States and Indian Tribes may designate a mixing zone or provide a dilution allowance when setting water quality-based permit limits for point source discharges,*

⁸ <https://www3.epa.gov/npdes/pubs/qwm0264.pdf>

provided that an appropriate authorizing policy is included in the state or tribal water quality standards. In either case, relief is provided to the permittee by allowing the discharge to mix with the receiving waterbody before attainment with water quality criteria is required. Within a mixing zone, for example, certain water quality criteria otherwise applicable to the waterbody may be exceeded. Where a discharge mixes with the receiving waterbody very rapidly, a mixing zone analysis need not be completed, and a dilution allowance based on the critical low flow of the receiving water may be provided.

- b. For clarity and to establish a linkage with Section 8, WDEQ could consider adding language within Section 10 similar to that at Section 9(a). Such language could read: "The low flow and associated mixing zone of the receiving water are determined using the methods in Section 8 of this Chapter."
 - c. Section 10(c) has a typo, referring to the "initial zone of dilution" instead of the "zone of initial dilution" as defined in Section 2.
 - d. The EPA recommends adding a second sentence at Section 10(g)(vi) that reads: "Effluent limits for acute WET must be met end-of-pipe." Adding this sentence will clearly communicate that a zone of initial dilution is not allowed. It is also consistent with the current implementation policy, which states at Section 4(d): "In incomplete mixing situations, permit limitations to implement acute whole effluent toxicity (WET) criteria shall be based on meeting such criteria at the end-of-pipe (i.e., without an allowance for dilution). For chemical-specific acute aquatic life criteria, discharge limitations will be based upon meeting such criteria at the edge of the zone of initial dilution."
 - e. As recommended in the *EPA Region 8 Mixing Zones and Dilution Policy*, the EPA recommends adding a prohibition on mixing zones for substances with low acute to chronic ratios. New text at Section 10(j) could read: "The mixing zone may be limited or denied for pollutants that exhibit low acute to chronic ratios (i.e., where acute effects may occur at concentrations "close" to those that have been demonstrated to result in chronic effects)."
 - f. Please refer to Section II of these comments for red underline-strikeout text capturing the EPA's suggested revisions to Section 10. We have provided these for clarity and at WDEQ's request.
6. **Modifying Designated Uses (Section 12).** This section incorporates a new reference to Section 5, Credible Data. The text indicates that modification to designated uses will be consistent with the requirements of Section 5, Credible Data. As described in the EPA's

approval⁷ of the credible data requirement, the credible data provision cannot be used as a basis to overcome the rebuttable presumption that aquatic life and recreation (i.e., CWA section 101(a)(2) uses) are attainable. The presumption can only be overcome where it is affirmatively demonstrated, through a use attainability analysis (UAA) consistent with 40 CFR § 131.10(g), that such uses are not attainable.

7. Antidegradation (Section 13)

- a. Section 13(a)(ii). At Section 13(a)(ii), the proposal would reduce the universe of waters subject to Tier 2 requirements. Under Wyoming's current antidegradation rule (Section 8(a)), Tier 2 requirements apply to all waterbodies that are not Class 1 "if existing water quality is better than the standards contained in these regulations." The proposed rule states, "Where the quality is better than the criteria included in this Chapter to protect the applicable aquatic life, fish consumption, recreation, and terrestrial wildlife uses, the Department shall maintain that quality unless the Department finds, after full opportunity for intergovernmental coordination and public participation, that the lowering of water quality is necessary to accommodate important economic or social development in the area where the water is located."
 - i. This change in scope is acceptable and consistent with the EPA WQS rule, which is specific to water quality levels that are better than necessary "to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water" (40 CFR § 131.12(a)(2)). However, the EPA notes that States and authorized Tribes have the discretion to extend Tier 2 protections to protect water quality that is better than necessary to protect designated uses such as water supply.
 - ii. We recognize, and the Department should make clear to the public, that this proposed rule change would remove the antidegradation protections for water quality levels that are better than the criteria to support drinking water or "fish consumption and drinking water" uses. The practical difference could be important, for example, for parameters where criteria have been adopted to protect drinking water or "fish consumption and drinking water" uses, but none have been adopted to protect aquatic life, fish consumption, recreation, and terrestrial wildlife uses (e.g., radioactive materials, nitrate, certain pesticides such as alachlor, atrazine, and 2,4-D, total trihalomethanes, etc.). For such parameters, the proposal would remove the antidegradation protections provided by the current rule. In general, the proposed rule change would diminish the Department's regulatory authority to protect water bodies that are source waters for public drinking water systems.

- b. Section 13(a)(ii)(C). The antidegradation requirements for high quality waters in

⁷ January 25, 2002 letter from Jack W. McGraw, EPA Region 8, to Wendy Hutchinson, Wyoming Environmental Quality Council, referencing a February 8, 1999 letter from Max Dodson, EPA Region 8, to Dennis Hemmer, WDEQ.

Chapter 1 would establish that before allowing a lowering of water quality, the Department shall ensure the requirements of Subparagraphs (A) through (D) are met. Subparagraph (C) requires that “the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources of pollution have been achieved” (bold added).

- i. This language differs somewhat from the EPA rule which requires that “the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control” (bold added; 40 CFR § 131.12(a)(2)).
- ii. The key difference is that the Wyoming rule includes the phrase “have been achieved” whereas the EPA rule requires that “the state shall assure that there shall be achieved.”
- iii. In an EPA Region 8 letter dated March 1, 1994 (bottom of page 2),⁸ we explained that compliance schedules or other plans to implement controls are sufficient assurance to meet the requirement at 40 CFR § 131.12(a)(2) for new or expanded discharges. The memo goes on to state that “required controls on existing regulated point and nonpoint sources need not be finally achieved prior to allowing degradation provided that assurance of future compliance can be demonstrated and the public has an opportunity to review and comment on the State’s conclusion.”
- iv. We suggest that the Department consider changes to Subparagraph (C) so that it is consistent with the EPA rule. For example, consider changing the language to: “The Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.”

9. Water Quality for Protection of Aquatic Life Uses (Section 16)

- a. Exceedance frequency for pH, temperature and dissolved oxygen (DO) (Sections 16(f)-(h)). The draft WQS identify a one-in-three year exceedance frequency for the DO, pH and temperature aquatic life criteria. The *Supplementary Guidance to the Statement of Reasons* cites the EPA WQS handbook’s rationale that this exceedance frequency allows the time for ecosystem recovery. This exceedance frequency and rationale are specific to the EPA’s toxics criteria developed based upon the 1985 guidelines. Wyoming has adopted the EPA’s criteria recommendations for DO and pH into its WQS. Although the EPA’s criteria documents do not explicitly recommend an exceedance frequency, “the EPA does not typically apply this construct to criteria for conventional water quality parameters like dissolved oxygen due to inherent

⁸ March 2, 1994 letter from Dale Vodehnal, EPA Region 8, to State or Tribal Colleague, Subject: Transmittal of EPA-Headquarters Guidance Memorandum Regarding Antidegradation and Non-Point Sources.

differences between these parameters and toxic pollutants” (88 Fed. Reg. 88315, 88327-88328 (Dec. 21, 2023) ⁹).

- i. Does WDEQ have information supporting application of the one-in-three year exceedance frequency for pH, temperature and DO?
 - ii. How does the one-in-three year exceedance frequency work with the DO criteria implemented as instantaneous minima to be achieved at all times?
 - iii. Additionally, the EPA understands WDEQ intends to revise its temperature criteria to be more protective and encourages WDEQ to also consider seasonality and chronic endpoints.
- b. Section 16(c). In Section 16(c), Wyoming’s proposed draft WQS state: “For those pollutants without numeric criteria in this Section, maximum allowable concentrations for protection of aquatic life shall be determined in its sole discretion, by the Department, using the biological monitoring procedures outlined in the following procedures or other scientifically defensible methods...” (bold added).
- i. The EPA notes that the reference to “sole discretion” at Section 16(c) does not change the EPA’s CWA authority granted to the Agency by Congress.
 - ii. Please explain what is meant by maximum allowable concentrations and how that will ensure protection of the aquatic life use.
 - iii. Will methods and procedures other than biologically monitoring procedures be considered for pollutants without numeric criteria?
 - iv. How and when will multiple lines of evidence be considered when interpreting narrative criteria?
- c. pH (Section 16(f)). Section 15(h) includes pH criteria of 6.5-9.0 for all surface waters of the state and does not identify an acceptable exceedance frequency, which means that there is not one. Section 16(f) identifies pH criteria of 6.5-9.0 specific to aquatic life uses with an acceptable exceedance frequency of one in three years. How do the pH criteria at 16(f) for the aquatic life use only work with the pH criteria at Section 15(h) which apply to all surface waters of the state? Although the magnitudes of the criteria are the same (6.5-9.0), the criteria for the aquatic life use at 16(f) include an allowable exceedance frequency of one in three years. One option for WDEQ to consider is deleting the criteria at 16(f) to eliminate confusion and to protect waters with an aquatic life use equally to those without one.
- d. Dissolved oxygen (Section 16(h), Table 3, footnote (a)). It is our understanding that WDEQ intends the new footnote a to allow for DO to be lower than the applicable criteria in the hypolimnion *when* the DO and temperature criteria are met in a

⁹ <https://www.govinfo.gov/content/pkg/FR-2023-12-21/pdf/2023-27758.pdf>

location with adequate habitat at the time the hypolimnetic DO excursion occurs. We recommend WDEQ revise the language to clarify that hypolimnetic excursions of the DO criteria can occur *when* DO and temperature are both met in a location with adequate habitat. WDEQ could revise footnote a to read: "In the lower portion of a lake or reservoir, dissolved oxygen may be less than the applicable value provided that, when those excursions occur, there is adequate habitat for aquatic life where both the applicable biologically-based temperature requirements and dissolved oxygen criteria are met."

- e. **Aluminum fraction** (Section 16(k), Table 7). In the criteria table at Section 16(k), the aluminum criteria are the EPA's 1988 nationally recommended aquatic life criteria for aluminum. WDEQ identifies the dissolved fraction for these criteria. However, since 1999, the EPA has recommended the total recoverable fraction for these criteria because it better accounts for, and limits, any physical effects of aluminum flocculates or particles to aquatic life. If aluminum criteria are based on dissolved concentrations, toxicity will be underestimated, because aluminum hydroxide precipitates that contribute to toxicity would not be measured. Although WDEQ is not updating these criteria, the EPA recommends implementing these aluminum criteria as the total recoverable fraction.
- f. **Turbidity**. In Wyoming's current WQS, Section 23 applies numeric turbidity criteria of a 10 NTU increase to the current coldwater fisheries and drinking water uses (Classes 1, 2AB, 2A and 2B) and a 15 NTU increase to warm water or nongame fisheries. The *Supplementary Guidance to Statement of Principal Reasons* explains that Wyoming is replacing these numeric criteria with narrative criteria because the current 10 and 15 NTU criteria were not scientifically derived and Wyoming will continue to implement the substance of its Turbidity Implementation Policy (i.e., turbidity waiver program) by moving it to Chapter 2 for oversight by the WYPDES program (pp. 42-44). The drinking water use in Wyoming's draft WQS includes a narrative turbidity criterion at Section 17(a)(iii); however, it does not appear that the proposed aquatic life criteria include a narrative specific to turbidity.
 - i. The EPA understands from WDEQ that it considers the general narrative criteria (at proposed Section 15) to encompass narrative turbidity criteria for the aquatic life uses. We recommend, however, that WDEQ include a narrative specific to turbidity for the proposed coldwater aquatic life and warmwater aquatic life designated uses (equivalent to the current Class 1, 2AB, 2A and 2B cold water fisheries and warm water or nongame fisheries uses) to avoid the implication that turbidity criteria specific to the aquatic life use no longer apply.
 - ii. Wyoming's assessment methodology¹⁰ for turbidity references the current 10 and 15 NTU thresholds and states that "Due to the variable

¹⁰ Wyoming's Methods for Determining Surface Water Quality Condition, December 21, 2020. Available at https://drive.google.com/file/d/1P_5jApWlbm78e-oU9c5lVnF0KTgrMqG/view

nature of turbidity data, WDEQ requires that credible data and a weight of evidence approach be used to make designated use support determinations with turbidity data (p. 7).” The *Supplementary Guidance to Principal Statement of Reasons* explains this statement: “In other words, evaluation of turbidity data also requires consideration of biological and physical data, as relevant, rather than just consideration of turbidity data (p. 58).” Can WDEQ provide any more detail or an example of how it will assess the narrative turbidity criteria?

- g. Ammonia. The *Supplementary Guidance to Statement of Principal Reasons* explains that numeric ammonia criteria apply to the coldwater and warmwater aquatic life uses and then goes on to state:

Also consistent with the previous version of Chapter 1, narrative, but not numeric ammonia criteria, are applicable to other aquatic life uses. Narrative ammonia criteria are applicable to the new modified aquatic life use because waters designated for modified aquatic life may have cold water fish, warm water fish, or no fish. Thus, neither the cold water nor the warm water criteria are appropriate (p. 51).

To achieve consistency with 40 CFR § 131.11,¹¹ the EPA recommends Wyoming update its numeric ammonia criteria to reflect the EPA’s 2013 recommendations and apply numeric criteria to all aquatic life designated uses, including those intended to protect organisms other than fish. As reflected in the EPA’s 2013 recommended ammonia criteria for the protection of aquatic life, ammonia is toxic to aquatic invertebrates. Wyoming’s ammonia criteria are based upon the EPA’s 1999 recommended criteria, which do not protect the more sensitive freshwater invertebrate species such as unionid mussels and gill-breathing snails. The 1999 recommended aquatic life criteria for ammonia were based on the most sensitive endpoints known at the time: the acute criterion was based on salmonid fish toxicity information, and the chronic criterion was based on bluegill sunfish early life stage toxicity. In 2003, the EPA became aware of new toxicity studies indicating the relative sensitivity of freshwater mussels to ammonia and began to update the 1999 criteria to reflect this new information. In April 2013, EPA finalized the updated ammonia criteria that are applicable nationally, taking into account the latest toxicity information for freshwater species, including unionid mussels and gill-breathing snails. The 2013 criteria supersede EPA’s previously recommended 1999 criteria. WDEQ has not updated its ammonia criteria to reflect the EPA’s current 2013 recommendation.

¹¹ 40 CFR § 131.11(b) requires: “In establishing criteria, States should: (1) Establish numerical values based on: (i) 304(a) Guidance; or (ii) 304(a) Guidance modified to reflect site-specific conditions; or (iii) Other scientifically defensible methods; (2) Establish narrative criteria or criteria based on biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.”

10. Water Quality for the Protection of Recreation Uses (Section 22). Wyoming's draft WQS delete the single-sample maxima *Escherichia coli* (*E. coli*) criteria for the full body contact recreation use (which are equivalent to the current primary contact recreation use) and moves them to Section 22. These criteria are currently at Section 27(c) and read:

Single-sample Maximum Concentrations. During the summer recreation season, on all waters designated for primary contact recreation, the following single-sample maximum concentrations of E. coli bacteria shall apply:

*High use swimming areas - 235 organisms per 100 milliliters
Moderate full body contact - 298 organisms per 100 milliliters
Lightly used full body contact - 410 organisms per 100 milliliters
Infrequently used full body contact - 576 organisms per 100 milliliters*

Single-sample maximum values may be used to post recreational use advisories in public recreation areas and to derive single-sample maximum effluent limitations on point source discharges (emphasis added). An exceedance of the single-sample maxima shall not be cause for listing a water body on the State 303(d) list or development of a TMDL or watershed plan. The appropriate recreational use category (i through iv, above) shall be determined by the administrator as needed, on a case by case basis. In making such a determination, the administrator may consider such site-specific circumstances as type and frequency of use, time of year, public access, proximity to populated areas and local interests.

The EPA approved these criteria on September 29, 2008. The EPA's action letter states:

In Section 27(c), numeric single-sample maximum (SSM) criteria were adopted for protection of primary contact recreation based on frequency of use (i.e., high, moderate, light or infrequent use). The 2004 Beach Rule includes a discussion regarding the appropriate use of SSM criteria and states that EPA expects the SSM values to be used for making beach notification and closure decisions, but that use of the SSM for other purposes of the Act (e.g., CWA Section 303(d) lists) is a matter of state discretion. The 1986 bacteria criteria document includes a table of four SSM values that are appropriate for different levels of beach usage: "designated bathing beach," "moderate use for bathing," "light use for bathing," and "infrequent use for bathing." The criteria document describes "designated bathing beach," but does not describe the other levels of use. The frequency of use categories in Section 27(c) are consistent with EPA's recommendations and their proposed application, based on frequency of use, is within the State's risk management discretion.

The EPA concludes that, with the exception of the disapproved revisions discussed in Section V, the revisions to Section 27(a), 27(b), and 27(c) are consistent with CWA Section 303(c) and the implementing federal water quality standards regulation (40 CFR Section 131.11). Accordingly, these revisions are approved without condition.

⁴ See discussion in the Beach Act Final Rule, 69 FR 67224-67225, November 16, 2004.

Although the language adopted by Wyoming and approved by the EPA specifies that the single sample maxima will not be used for identifying impaired waters pursuant to CWA Section 303(d) or for developing TMDLs, it suggests that these values will be used for deriving permit limits, applying them as WQS. Additionally, in 2012, subsequent to the 1986 recreational criteria and the 2004 Beach Rule, the EPA issued updated recreational criteria with two criteria elements for fecal indicator bacteria: a geometric mean and a statistical threshold value (STV) the 90th percentile. The EPA recommends adopting both these criteria elements to ensure protection of the primary contact recreation use. Deletion of the single sample maxima without adoption of the STV value for the proposed full body contact use appears inconsistent with 40 CFR § 131.11(a)(1), which requires, "States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use."

In WDEQ's *Response to Scoping Comments* it responds to the EPA's recommendation in our July 31, 2023 letter to adopt STVs to protect the recreational use (pp. 38-39). Neither the *Response to Scoping Comments* nor the *Supplementary Guidance to Statement of Principal Reasons* include a scientific rationale for why the STV is not necessary to protect waters in Wyoming. The EPA requests that WDEQ provide any additional rationale and, specifically, a scientific rationale for why the STV is not necessary to protect the proposed "full body contact" (and currently "primary contact") recreational designated use in Wyoming.

The EPA recommends that Wyoming adopt the STV recommended in our 2012 national recommended water quality criteria for the "full body contact" use. For the fecal indicator bacteria *E. coli*, this value is 410 cfu/100 mL implemented as a 90th percentile.

Section II. Suggested Changes for Section 10 (in red underline-strikeout)

Section 10. Mixing Zones ~~and Dilution Allowances~~ - Incomplete Mixing Scenarios. In developing water quality-based effluent limitations for scenarios where a permitted point source discharge does not mix at a near instantaneous or complete rate, the Department may authorize the use of a mixing zone ~~and dilution allowance~~ on a case by case basis provided its rationale is documented in the permit and is consistent with the requirements of this Section.

(a) Assimilative capacity is available at low flow or low water level of the receiving water determined using the methods in Section 8 of this Chapter.

(b) The low flow and associated mixing zone of the receiving water are determined using the methods in Section 8 of this Chapter.

(bc) For discharges that only occur periodically, the low flow or low water level is the lowest flow or water level expected to occur during the period of the discharge.

(cd) The mixing zone, ~~and initial-zone of initial dilution, and dilution-allowance~~ considers the site-specific characteristics of the point source discharge and the receiving water and are no larger than necessary, consistent with Paragraphs (i) through (iii) of this Subsection.

(i) The zone of initial dilution does not exceed 10% of the mixing zone and is sized to prevent lethality to resident, drifting, or swimming organisms.

(ii) For streams and rivers, the ~~dilution-allowance~~ mixing zone is limited to no more than one-half of the narrowest wetted cross-sectional area or a length 10 times the narrowest wetted width, whichever is more limiting.

(iii) For lakes and reservoirs, the ~~dilution-allowance~~ mixing zone is limited to no more than five percent of the lake surface area at low water levels or a 200-foot radius at low water levels, whichever is more limiting.

(de) The mixing zone ~~and dilution-allowance~~ considers the potential for the toxicity of certain pollutants to increase after mixing.

(ef) The size and configuration of the mixing zone does not impair the existing and designated uses of the waterbody as whole.

(fg) The mixing zone is protective of the aquatic community, including but not limited to Paragraphs (i) through (vi) of this Subsection.

(i) There is no lethality to the aquatic community.

(ii) Except for the zone of initial dilution, the mixing zone shall not contain pollutant concentrations that exceed acute aquatic life values.

(iii) There is a zone of passage around the mixing zone where pollutant concentrations do not exceed chronic aquatic life values.

(iv) The mixing zone does not result in unacceptable adverse impacts to important habitats or species such as fish spawning, nursery areas, or threatened or endangered species.

(v) The mixing zone considers the potential for aquatic life to be attracted to the effluent plume.

(vi) The mixing zone cannot be used to comply with acute whole effluent toxicity requirements. Effluent limits for acute WET must be met end-of-pipe.

(sh) The mixing zone does not create a significant health risk to humans, including but not limited to:

- (i) Potential human exposure to pollutants resulting from drinking water, recreational activities, or consumption of fish;
- (ii) Drinking water values are not exceeded within 500 yards of a drinking water supply intake; and
- (iii) The mixing zone does not result in the bioaccumulation of pollutants in aquatic communities or terrestrial wildlife that would exceed levels protective of aquatic life, fish consumption, or terrestrial wildlife.

(hj) The mixing zone considers the toxicity, persistence, and effect of the constituents discharged, including as necessary to avoid acutely toxic concentrations outside the zone of initial dilution.

(4j) The mixing zone considers the cumulative effects of multiple discharges and other potential mixing zones.

(jk) The mixing zone is protective of the narrative criteria in Section 15 of this Chapter.

(l) The mixing zone may be limited or denied for pollutants that exhibit low acute to chronic ratios (i.e., where acute effects may occur at concentrations "close" to those that have been demonstrated to result in chronic effects).

Section III. Comments on Surface Water Designations

The EPA appreciates WDEQ's resolution of outstanding designated use revisions by reassigning the limited aquatic life use, which is equivalent to the previously assigned Class 3 aquatic life use and for waters without fish (Supplementary Guidance to the Statement of Reasons, pp. 80-81, Table 7). The EPA did not approve the Class 4 assignment to these waters because UAAs that sufficiently demonstrated that the aquatic life use is not attainable were not completed.

CWA Section 101(a)(2) and the CWA regulations at 40 CFR § 131.10 establish a rebuttable presumption that aquatic life, fish consumption and recreational uses should be designated and protected *unless* data and information exist affirmatively demonstrating, through a UAA, that those designated uses cannot be attained. Although these waters were designated Class 3 prior to the downgrade to Class 4, these uses will not include a fish consumption use (and the associated criteria). Additionally, numeric aquatic life criteria for DO, temperature, chloride, ammonia do not apply.

Without data or information in the form of a UAA to demonstrate that fish do not occur in these waters, the EPA recommends that WDEQ apply either the fish consumption use and a coldwater or warmwater and nongame fish use to these waters. The EPA also recommends WDEQ explain how it will apply its narrative criteria to protect aquatic life in these waters from impacts to DO, temperature, chloride and ammonia.

Section IV. Comments on Lower Murphy Creek site-specific selenium criteria

The EPA has previously provided comments on the draft selenium criteria for Murphy Creek. We appreciate WDEQ's consideration of, and responses to, our comments. These comments consider that new information.

1. **Anthropogenic selenium contributions.** A sand and gravel mining operation is located at the upper end of the reach for which the site-specific criteria are proposed (Location ET1590 on Figure 1). Table D shows that runoff concentrations of selenium at MC, near the sand and gravel operation, are much higher than those in MC-2, which is further downstream and farther from the sand and gravel operation.

- a. Are there conditions under which the sand and gravel operation facility discharges? If so, when?
- b. Have any data been collected to document whether there are elevated concentrations of selenium downstream of the sand and gravel mining operation, including during a storm event (as was documented for the bentonite mines)?
- c. Is the stormwater land-applied within the watershed? If so, where? Are there data characterizing the quality of the stormwater that is land-applied?

2. **Designated use support.** As the EPA has previously communicated, we are concerned that the proposal does not include a demonstration that the site-specific criteria will protect the designated use. Based on WDEQ's responses to our 2016 comments (*Response to Scoping Comments*, Section 4.0) and conversation with WDEQ, there are three problems related to this lack of demonstration:

- a. There are no biological survey data collected from Murphy Creek but the documents describe anecdotal observations of invertebrates and minnows.
- b. WDEQ does not have an established method to assess the "aquatic life other than fish" designated use.
- c. Observations of fish in Murphy Creek suggest that the current designated use (i.e., aquatic life other than fish) is not appropriate and that an aquatic life use including protection of fish may be an existing use that warrants designation and protection.

If available, please provide any additional data or information describing the aquatic life present in Murphy Creek and an assessment of that community. The past UAA notes the presence of invertebrates and minnows in Murphy Creek but does not note the quality of that

community to demonstrate that the aquatic life is being protected at current selenium concentrations.

The EPA recommends evaluating the appropriateness of the current designated use for this water body. While the current designated use is for aquatic life other than fish, the report notes that “minnows were noted in the central to lower portion of the stream.” As fish are observed in parts of this water body it is likely more appropriate for the designated use on this water body to be for aquatic life, including fish. If possible, also please provide a map where minnows have been observed in this water body. If WDEQ chooses to pursue a use change, then it may want to consider also including fish tissue elements as part of the site-specific criterion for selenium. The EPA’s national recommendations are a criterion element of 15.1 mg/kg dry weight for egg-ovary tissue and 8.5 mg/kg dry weight for whole body tissue or 11.3 mg/kg dry weight for muscle tissue. Additional information can be found in the *2021 Revision to: Aquatic Life Ambient Water Quality Criterion for Selenium Freshwater 2016*.²²

3. Data. The proposal states, “Samples not collected at MC or MC-2 were excluded from analysis due to suspected collection from standing water and general unrepresentativeness. Further, samples collected upstream of MC...were below the detection limit or the stream channel was dry.”

- a. What data were excluded? Can WDEQ provide, or point to, these data? How does including these data affect the proposed criteria values?
- b. Are these stations that were excluded within the reach identified for site-specific criteria? Was aquatic life present in these pools of standing water? If so, those values may be relevant to assuring that aquatic life is protected during dry periods where limited pools of water are present rather than flowing water.
- c. Non-detects are important to consider and would influence the value identified as the 85th percentile. Were non-detect data generally included in derivation of the proposed criteria?

5. Duration and terminology. Table F in the Lower Murphy Creek site-specific criteria proposal identifies a 5-year duration for the acute and chronic criteria. Footnote 2 to Table 7 in the draft proposed WQS states that “attainment of the chronic and acute criteria will be based on the 85th and 95th percentile, respectively, of data from the most recent 5-year period.” At Section 16(k), Wyoming’s WQS state “[i]n all Surface Waters of the State designated for aquatic life, pollution shall not result in the one-hour average acute or four-day average chronic values in Table 7 to be exceeded more than once every three years.”

The EPA is concerned that the duration for criteria described as “acute” and “chronic” are inappropriate. Because the intent of these criteria is to maintain an existing condition and because the proposed criteria are not based on toxicity testing for acute and chronic effects, the EPA recommends that Wyoming consider eliminating use of the terms “acute” and

²² <https://www.epa.gov/system/files/documents/2021-08/selenium-freshwater2016-2021-revision.pdf>

“chronic.” This change would address our concerns about the 5-year duration as too long for “acute” and chronic” criteria. For example, the text at Footnote (i)(2) to Table 7 could read:

Lower Murphy Creek from the confluence with an unnamed tributary, longitude - 106.739669, latitude 43.562588, downstream approximately 16.9 miles to the confluence with the South Fork Powder River in the Powder River watershed, has ~~a chronic-site-specific~~ dissolved selenium values of 11 µg/L as an 85th percentile and ~~an acute dissolved selenium value of 16 µg/L~~ as a 95th percentile. Attainment of the ~~chronic and acute~~ criteria will be based on ~~the 85th and 95th percentile, respectively, of~~ data from the most recent 5-year period.

A second option would be allowing the default durations for aquatic life criteria in Table 7 (Section 16(k)) to apply to footnote (i)(2) which is the site-specific criteria for Lower Murphy Creek. A third option is using the water column duration for the EPA’s recommended 304(a) selenium criterion, which is a 30-day averaging period for the chronic criterion. For the acute criterion, an even shorter time period should be used since acute impacts can occur in a very short time period.

6. Reporting limits. Lastly, if future water column data is collected, the EPA recommends using an analytical method that has a reporting limit lower than 5 µg/L in order to get a more accurate assessment of the actual concentration of selenium in the water for those locations where measurements were less than 5 µg/L.

B.1. Wyoming Outdoor Council



June 13, 2024

Wyoming Department of Environmental Quality
Water Quality Division
200 West 17th St, Ste. 200,
Cheyenne, WY, 82002

Comments electronically submitted via:
<https://aq.wyomingdeg.commentinput.com/?id=KVf9rB8ag>

Re: Comments on proposed revisions to Water Quality Rules Chapter 1, Wyoming
Surface Water Quality Standards

Dear Water Quality Division,

Thank you for the opportunity to review and comment on the Department of Environmental Quality's proposed revisions to Water Quality Rules Chapter 1 Wyoming Surface Water Quality Standards. The Wyoming Outdoor Council is Wyoming's oldest independent conservation group, with members across the state. Our mission is to *protect Wyoming's environment and quality of life for current and future generations*, which includes ensuring that our waterways throughout the state are maintained to support our Wyoming communities, and abundant fish and wildlife species. Thus, we hope you understand the importance of this document not only to our mission, but the Wyomingites invested in a healthy environment.

Generally, we appreciate the Department's approach to clarify existing rules through consolidation and removing redundancies, while maintaining consistency with relevant state and federal statutes such as the Clean Water Act. We have some clarifying questions and concerns about the proposed standards.

Our primary concern is the potential removal of the public comment opportunity pertaining to the Department's process for granting discharge specific variances. Within the existing Chapter 1 standards' Section 37(a), Discharger Specific Variances (pg. 1-25), it states:

(a) Following public notice and opportunity for comment, including at least one public hearing with a minimum of 45-day notice, the administrator may grant a permittee a variance to a designated use and water quality criteria for ammonia and/or nutrients (e.g., total nitrogen, total phosphorus).

Upon reviewing the corresponding section in the revised Chapter 1 standards, Section 26(a), Discharger Specific Variances states:

(a) The Department may adopt a time-limited designated use and water quality criteria for ammonia or nutrients (e.g., total nitrogen, total phosphorus) through revision of this Chapter, either at its discretion, or upon receipt of a petition in accordance with the Department's Rules of Practice and Procedure, Chapter 3, Section 3.

While the 30-day opportunity for public comment during the Department's regular re-evaluation for discharger specific variance found in Section 26(f)(ii), there is no mention or retention of the 45-day public comment period on the front end of the process for granting discharger specific variance. We question why public review has been removed in the revised rules and the justification for why this change was not included in the Statement of Principle Reasons for Adoption. We were unable to understand whether or not this was done to bring rules consistent with the Department's Rules of Practice and Procedure, Chapter 3, as stated, or just an intentional removal of opportunity for public comment. Regardless, we urge the department to restore the 45-day public comment period as stated in Section 37(a) of the current Chapter 1 standards.

Additionally, under Section 8(d) Flow and Water Level Conditions, it states:


(d) For the purpose of developing water quality-based effluent limits, the Department shall determine low flow or low water level using one of the methods in Table 1 or other scientifically defensible methods.

In other instances where the Department can consider "other scientifically defensible methods", (e.g. Section 16(c) and Section 4(a)(ii), it is stated "at its sole discretion, by the Department," the ability to choose such an option. In the case of Section 8, is it still the sole discretion of the Department to choose other scientifically defensible methods or does the permittee have discretion or input to make that recommendation? We suggest the Department clarifies this within the language of Section 8 of the revised standards.

Beyond these standards, we encourage the department to consider the long-term landscape level stressors such as climate change, species decline, and the alterations of ecosystem services which play a crucial role in naturally, supporting clean water and healthy riparian ecosystems. These complex natural systems, as they are impacted, are essential in determining future changes to Surface Water Quality Standards. Further, we need to look at microplastics and PFAS, both their impacts on human health, but also the concentrations we have and their interaction with aquatic and riparian habitats. Comprehensive, forward thinking and comprehensive policy and water quality standards are the best chance people and wildlife have in maintaining access to high quality, healthy waters, for current and future generations.

Thank you for your time and consideration of our comments and the opportunity to weigh in on the revisions to Water Quality Rules Chapter 1, Wyoming Surface Water Quality Standards.

Sincerely,



Alec Underwood
Program Director
Wyoming Outdoor Council

Cc

Director Todd Parfitt, WQD
Administrator Jennifer Zygmunt, WQD

Appendix C. Transcript of Water and Waste Advisory Board Meeting, Casper, WY, June 13, 2024.

WYOMING WATER AND WASTE ADVISORY BOARD

RE: Water Quality Division,

**Upcoming Revisions to WQR Chapter 1; and Solid and Hazardous Waste Division
Technical Support Memorandum: Restricted Residential Use Scenario**

TRANSCRIPT OF MEETING PROCEEDINGS

Pursuant to notice duly given to all parties, this matter came on for meeting on the 13th day of June, 2024, at the hour of 9:00 a.m., at the Department of Environmental Quality Casper Field Office Conference Room, 444 West Collins Dr., Suite 1400 Casper, WY, before the Wyoming Water and Waste Advisory Board, Mr. James Cochran and Mr. Brian Deurloo in attendance; Ms. Lorie Cahn, Chairman, presiding, Mr. Luke Esch, and Ms. Alysia Goldman, Attorney for the Board, in attendance virtually; Ms. Jennifer Zygmunt, Water Quality Administrator; Mr. Jason Thomas, our WYPDES Section Manager; Ms. Lindsay Patterson, Watershed Protection Surface Water Quality Standards Coordinator; Ms. Gina Thompson, Water Quality Division; Ms. Iris Kurz, Water Quality Division; and Ms. Elizabeth Harris, Water Quality Attorney, in attendance.

Lorie Cahn

Okay. We'll move on to the next part of our meeting, which is the Water Quality Division rule-making and I'll turn it over to Administrator Zygmunt.

Jennifer Zygmunt

Great. Thank you, Madam Chair. So, first for folks on the phone or who are attending virtually who may not know me. My name is Jennifer Zygmunt. I am the Water Quality Division Administrator. We are very pleased to be here today to present our proposed revisions to Chapter One: Surface Water Quality Standards to the Board.

As you all know, this does follow several years of work, some pretty extensive outreach for this rulemaking package, and past briefings to the Board. So, let me introduce my team who are coming up to the table here. So first, we have Lindsay Patterson, who's our standards program manager. I know you all know Lindsay well. Also, Gina Thompson, who you know well, our policy and planning analyst. We have Jason Thomas, our WYPDES Section Manager, online and Jason is available to answer questions about Chapter Two that has some revisions that we've made concurrent with Chapter One.

I'd also like to introduce Iris Kurz. She is one of our UW interns through the Haub School who is working with us this summer on several projects, but she'll be helping us with Chapter One as well.

June 13, 2024 Water and Waste Advisory Board Meeting

1

David Waterstreet was going to be here today. He's our Watershed Section Manager. He did have a family emergency come up and was not able to make it, but he does send his regards.

And then finally, we have Elizabeth Harris with your Attorney General's office online, as well.

So I'll give a few opening remarks and then turn it over to Lindsay for the bulk of the presentation. But just a brief recap of the events that have preceded this meeting. So as you know, we did extensive outreach starting in 2018 and the facilitated stakeholder workgroup in 2020 and 2021. After that we worked to complete our internal draft and it went through several internal reviews along with several Attorney General reviews. We gave EPA Region 8 an opportunity to do a preliminary review of the rules since they have an approval step, and we greatly appreciate them taking the time to do that in formal review and providing us with comments. And so the proposed rule incorporates feedback from all those steps: the outreach, internal and AG reviews, and preliminary feedback from EPA. As I mentioned, concurrently we've made some very limited revisions to Chapter Two, which is our Point Source Discharge Regulations. Those revisions—I just want to emphasize, since we've had several questions about this—the revisions to Chapter Two only represent revisions that we needed to make to move things from Chapter One to Chapter Two or to be consistent in terms of terminology between Chapter One and Chapter Two, and we have not done a broader evaluation of Chapter Two—that is coming at some point in the future. We do know that we'll need to do quite a bit of stakeholder outreach with that rule as well. But right now, what folks are seeing with Chapter Two are only related to changes made to Chapter One. We released the rules for public comment on April 11th. Per standard practice, we published it in the newspaper and digitally via our LISTSERV system and the website. In this case, in order to make sure it was transparent to interested parties, we also put together a press release that several statewide newspapers picked up on, which was nice to see. During the public notice period, we've completed additional outreach. Lindsay gave a webinar to the original stakeholder group to bring them up to speed with the proposed revisions. She gave an April 30th webinar to the public that was well attended. That is recorded and is available on the website.

We gave presentations to interested parties as needed, and we also did have some legislative interest in this rulemaking package and presented to the Select Water Committee in early May. The comment period is still open. It will close at 5:00 PM today. We wanted to leave that open through the meeting. It's been open for just over 60 days. We are accepting comments in writing through our electronic comment portal, and if anybody has questions about how to access that portal just send one of us an email, and Gina can send you that information. And then, as Madam Chair indicated, we are accepting comments verbally at today's meeting. So we'll reserve some time for that.

June 13, 2024 Water and Waste Advisory Board Meeting

2

As of this morning, we have not received any public comments. We do expect to receive comments though, and again, likely we'll have verbal comments today. So, Gina will walk us through the process when we get to that point on the agenda. And any comments that we receive, we will send to the Board. Again, we do look forward to everybody's feedback. This is one of our foundational rules, and we really want to hear what people think about the revisions that we are proposing. Mostly as a reminder for folks on the phone, we are still early in DEQ's rulemaking process. This is still informal rulemaking, and our first step—once we have a draft—is to bring it to the Board to advise and consult with you all on the rule. After we complete that step, I'll make a recommendation to the Director to proceed with formal rulemaking before we take it to the EQC. If the EQC promulgates the rule to go to the Legislative Management Council and the governor. And then finally, as I mentioned, this is a Clean Water Act Program, per se, and so EPA does approve the standards at the end of the process. We know that there's a lot of material associated with this rulemaking and that revisions were extensive. As a reminder, a lot of the revisions were clean-up for improved organization, clarity, and consistency. And really, I think we've arrived at a better rule that's more understandable and readable. Lindsay has done a great job putting together information and the statement of principal reasons and the guidance material to help walk people through the revisions and a rationale for those revisions. And again, all of our materials are posted on the website. If anybody online is having a hard time finding that, please send us a note and we will point you in the right direction.

In terms of our goal for today, our plan is, you know, our ideal goal for today is to go through the entire Rule with the Board and get your feedback on the Rule using the crosswalk that we have in Appendix A of the *Statement of Principle Reasons*. Ideally we'd be able to review the entire rule with you today so that we can get your feedback. And then incorporate your feedback and any public comments that we get by 5:00 PM today into a revised draft that we would present to you at a future meeting in order for us to have another public comment period. I think it unlikely that would be third quarter, I think fourth quarter is more likely. We do want to move Chapters One and Two forward together since they do go hand in hand, so we'd be looking for recommendations on both rules at the same time. If not this meeting, then at a future meeting. As Madam Chair indicated, we'll plan to go today until about 2:00 PM. We'll take a break for lunch and then again depending on interest and providing verbal comments at the meeting today, we'll make sure that we allow plenty of time for comments before we wrap up. And again, Gina will walk commenters through the process when we get there. As a reminder for people on the phone, we cannot accept comments through chat unless during the public comment period, do you have technical difficulties and need to do that. So feel free to put in, you know, clarifying questions or if you're having IT issues, put that in the chat. Gina is monitoring that and we'll help out as we can. And then, Madam Chair, I'll leave it to your discretion if people have questions that they put into the chat, if and when you want us to answer those.

June 13, 2024 Water and Waste Advisory Board Meeting

3

So again, we've got a lot to cover today. Lindsay's prepared to walk us through the rule. Given the amount of discussion and questions that I think we'll have today, again with what we're trying to do with the transcript, and the recording, and this new AI world that we're living in—I would ask Board members that if you have a formal recommendation that you'd like to make in terms of a revision to the rule, if you can preface that by stating "Madam Chair, I recommend," make your recommendation. That will help us search through the transcript for formal recommendations that we need to consider revisions for, versus just questions and discussions that I'm certain that we'll be working through today. So unless there are any questions for me, I'll turn it over to Lindsay to start digging into the rule.

Luke Esch

Jennifer, this is Luke. So you're not looking for a recommendation from the Board today to move this rule package forward?

Jennifer Zygmunt

I think it unlikely. I think we can get through the whole Rule with the proposed approach, but since we left the public comment period open through 5:00 PM today, I want to make sure that the Board has the opportunity to consider all public comment received. Again, we haven't received anything to date, but we know that entities are working on comment letters. And so I do anticipate that we'll receive formal comments by 5:00 PM today. So in order for the Board to formally or fully vet public comments, we would like to look at that feedback, make sure you guys have access to the feedback, and then make revisions to the rule as needed based on public comment and your feedback and then come back to you at a future meeting, likely fourth quarter. So I don't anticipate that we would be looking to proceed at the end of the day.

Luke Esch

Okay.

Lorie Cahn

Yeah, this is Lorie. I would be very uncomfortable if we were to entertain any kind of motion to recommend moving this forward before the close of the public comment period. So I don't intend for the Board, or I hope the Board doesn't move to go forward, let's say, with this at this meeting. So just wanted to make that clear, I agree with Jennifer. It's really not appropriate, I don't think, to go forward at this point. Thanks.

Luke Esch

Well, I just mean we've been hearing about this rule for a long time, and you know I've asked a lot of folks if they have any concerns or about the rules as they're being rolled out and you know, I'm hearing crickets, so. But I understand the concern about closing the rule or moving the rule package forward prior to the public comment period being closed so we

June 13, 2024 Water and Waste Advisory Board Meeting

could consider all those other comments that are going to be submitted. So yeah, I'm fine with that. I just, I guess I was confused. Thank you.

Lorie Cahn

Yeah, I would. This is Lorie again. I would appreciate, Luke, I think the rules for the Board and we can check with our AG on this. I think she's on the phone. I think if you have communications with people about this rule, I think you need to share that, what you're hearing, with everybody on the Board and the DEQ, I believe, but I'll turn it over to the AG's office, just to kind of clarify that, so thank you.

Jennifer Zygmunt

Do we have the Board's Attorney?

Gina Thompson

Oh yeah, Alysia is on.

Alysia Goldman

Okay. Yes, Luke, if you are receiving comments on that, please do share it with the rest of the Board.

Luke Esch

Yeah. And like I mentioned, I haven't heard anything. I've asked folks around, you know, I mean, I represent agriculture and I've inquired to the Wyoming Stock Growers Association if they had, you know, heard about this rule and they said they hadn't heard much. So that's really the only communication. And I don't think it's inappropriate, since I represent agriculture, to reach out to the agricultural community.

Jennifer Zygmunt

Yeah. And I, you know, to be frank, we anticipated quite a few comments on the rule again just due to the extensive revisions, but I think the education that Lindsay has done, the presentations that we've given to various interest groups, we've talked with the Stock Growers Association, Association of Conservation Districts, so we really tried to be available for those questions. So again we want to make sure the public has a full opportunity to comment on the rule, but if folks are okay with the revisions and we've been able to proactively answer questions, too, then I think that's the ideal goal. So again, we want to make sure that there's, you know, ample time for public comment with the extensive revisions that we've made, but if we've been able to address concerns thus far, then I think that's what we would have hoped to see.

June 13, 2024 Water and Waste Advisory Board Meeting

5

Lorie Cahn

And I just, this is Lorie again, I just want to thank DEQ for the extensive outreach that you guys have done. I really think—I'm really impressed with the outreach and the extent of it and the number of people that you've reached and really appreciate it. I think that will help us hopefully in December, or whenever in the fourth quarter, move this forward but thanks.

Jennifer Zygmunt

Great. Thank you.

Jennifer Zygmunt

Okay. Lindsay, you want to take it away?

Lindsay Patterson

Yes. Thank you. Lindsay Patterson. Thank you, Administrator Zygmunt and Madam Chair, Members of the Board. It's good to see you again. Yes, we have been hearing a lot about these rules, but now we finally get to see them, which is fantastic. So, as Jennifer, as Administrator Zygmunt mentioned, we're planning to walk through the statement of principal reasons. There's a crosswalk that's been provided in there. So you're welcome to turn to that or you can just take a look. Let's see. So that starts on page A-1. And so essentially, the crosswalk basically aligns the proposed Rule with the previous Rule, and so I will essentially tell you what we did in each of the sections. And then if you haven't looked, there is a supplementary guidance to the *Statement of Principal Reasons* which goes into a lot of additional detail about why we made the changes that we made. So if there are questions that come up, we'll likely refer to that document as well. So starting at the top, the proposed rule, Section 1, named "Authority", is the same as the previous Rule. There was revisions to the references to the Wyoming Statutes. We removed provisions that duplicate or were redundant to the Statute. We added a provision to clarify that Chapter One is not intended to grant authority to the EPA or the Army Corps of Engineers beyond the authority provided in the Clean Water Act. Does anybody have any questions? Great.

So Section 2 is "Definitions" in the proposed rule; the same as the previous rule, so we did retain the definitions from the Wyoming Statutes that are used in the rule. We just removed, or we retain the terms, we just removed the definitions so as to not duplicate the definitions in the Rule that were also in the Statute. But we did hear concerns from a number of entities that they wouldn't know that that was a defined term in the rule, and so, we thought that this was an appropriate approach, basically not duplicating but making sure that folks were aware that the terms are defined elsewhere. We also added additional terms that are used in the Chapter that are defined in the Statute. We remove terms and definitions that are no longer used in the Chapter. We remove terms and definitions that are only abbreviations that don't have a unique meaning in the Chapter or are described or

June 13, 2024 Water and Waste Advisory Board Meeting

6

defined elsewhere in the Rule. We added definitions for new terms that are used in the Chapter, these are listed. If anybody has questions, please feel free to stop me. We revised definitions to improve clarity—

Lorie Cahn

Excuse me, Lindsay, this is Lorie. I'm just wondering if you want, do you want to go through this appendix and then have us as a Board go through chapter by chapter, or do you want us to bring up comments as you go through each chapter, or each section. Sorry, excuse me.

Jennifer Zygmunt

I think, Madam Chair, our preferable approach would be to, as Lindsay gives you a summary of the changes made in each section, that we stop and then answer questions and take comments from the Board on that section.

Lorie Cahn

That sounds good. Thank you.

Jennifer Zygmunt

So I'll just clarify, do we need to back up to Section 1? Any questions or comments on Section 1: "Authority"?

Lorie Cahn

Oh, I'm sorry I misunderstood. I thought you wanted Lindsay to go through the whole presentation and then take our comments after her presentation.

Jennifer Zygmunt

No, I think what we'd like to do is give an overview of each section, and then stop and ask are there questions, feedback, revisions on the section as we go.

Lorie Cahn

Okay, then let's start with Section 1. Does anybody on the Board have any questions on Section 1? And I'm going to go ahead and move it on—well, okay, just on Section 1, I don't.

Brian Deurloo

No, this is Brian. I appreciate the clarification around limiting the, I don't know, the scope of reach with the US EPA and the Army Corps of Engineers. I think that was a good catch, but I have no comments other than that.

Lorie Cahn

June 13, 2024 Water and Waste Advisory Board Meeting

7

Okay. Lindsay, are you still on Section 2, or are we ready for comments from the Board on Section 2?

Lindsay Patterson

I am still on Section 2.

Lorie Cahn

Okay. Thank you.

Lindsay Patterson

Yes, we added definitions for new terms that are used in the Chapter, and we revised definitions to improve clarity and consistency for a number of terms. With that, that is Section 2.

Lorie Cahn

Okay, this is Lorie. Does anybody on the Board have any questions or comments on Section 2? Okay, I have a few things. I'm going to go through the clean version first and on page 1-3 at the top of the page. It's under "(x) 'Conventional drinking water treatment'". It says "means, coagulation, flocculation, sedimentation, filtration and disinfection," and I'm wondering if "and" is appropriate there, or if "or" is appropriate. I know you're trying to get away from "and/or", but this might be an example where "and/or" might be appropriate. So does every conventional drinking water treatment include every one of these one, two, three, four, five things? Thank you.

Jennifer Zygmunt

Madam Chair, I do think we intend "or" there, meaning that a drinking water treatment system may have one or more of those things, but I don't think we intend to indicate that they need all.

Lorie Cahn

Okay, Thank you.

Jennifer Zygmunt

Looking at Lindsay to see if she has any further information on that.

Lindsay Patterson

See what we...I'm referring to the supplementary guidance. And then that's a new definition that we added. And my impression from the rationale is that it is intended to be an "and". Based on the definition, you know we're looking at Colorado's Water Quality Standards that defines, you know, conventional drinking water treatment. We're looking at National

June 13, 2024 Water and Waste Advisory Board Meeting

8

Primary Drinking Water, you know, Regulations that define conventional filtration and then disinfection. And so, this is what would happen, right, at a public water supply for compliance with the Safe Drinking Water Act.

Jennifer Zygmunt

So, Madam Chair, we'll take another look at that. And I don't think we want to use "and/or", but we'll take a look at the basis for that change and come back with either sticking with "and" and a reason why, or changing it to "or", so we'll take a closer look at that.

Lorie Cahn

Okay, great. Thank you. And then below that under "(xv)", 15, "Ephemeral", it talks about a single precipitation or snowmelt event, but I'm thinking that should be events, parentheses-"s"-parentheses so that we—

Lorie Cahn

Okay, "ephemeral" means a water body or portion of a water body that has water only in direct response to a single precipitation or snow melt event in the immediate watershed, and where the water bottom is always above the prevailing water table, but I think it would also be, I guess I'm asking, if it's also "events". It's not just a single precipitation event could cause this, or snow melt, but multiple ones could also cause...If one doesn't do it, a single one doesn't do it, it might need a few to create an ephemeral stream. Does that make any sense what I'm asking?

Jennifer Zygmunt

Yeah, I think we understand your comment—Lindsay?

Lindsay Patterson

I think, I'm trying to think of what would be...So multiple rainstorm events would have sufficient quantity of water to make a stream run. I think we can look at it, I think I think we can look at it and see. It makes—

Lorie Cahn

Yeah, I'm not sure the word "single" makes sense. Maybe it would be "in direct response to precipitation or snow melt event", parentheses-"s"-parentheses so that it can be, it's not necessarily single. That might, to me that would make it...It could be single, it could be multiple events.

Lindsay Patterson

Yeah, and I'm referring now to the previous version of the Rule, just for context. So, "A stream which flows only in direct response to a single precipitation event in the immediate

June 13, 2024 Water and Waste Advisory Board Meeting

9

watershed or in response to a single snowmelt event,” and so the concept was present in the previous version of the definition, but we will take a look at that and see if it should be updated.

Jennifer Zygmunt

Yeah, I think we're on the same page with the intent of how we define "ephemeral stream", which is that it's flowing in response to those events. And we can look into further whether it's needed to clarify "single" or take your proposed edits, Madam Chair, of revising it to say in direct response to a precipitation or snow melt event, parentheses-"s".

Lorie Cahn

Yeah, and then, I'm confused by the next part of that saying the "channel bottom that is always above the prevailing water table". And I guess as I envision it, in that, the water table could rise and create an ephemeral event and then fall again. So, I'm a little confused by that part of it. The "always", you know, it's where a channel bottom is typically above or is usually above the prevailing water table, but in the event there are events where the water table could rise and we could have an ephemeral stream, and then the water table can drop and it dries up. So, I'm confused about that part, as well.

Lindsay Patterson

Madam Chair, I think what you're describing is an "intermittent" system, so if the water table actually does rise so that there's water in a particular water body because the water table is above the bottom, it would essentially be an intermittent system. The concept of "ephemeral" is that those water bodies are only there in response to precipitation events.

Lorie Cahn

Okay, thank you for clarifying that. I see a little note to myself that, once I got to reading near intermittent, I said, "Oh, this is okay," but I just didn't see that when we were talking. So yes, I agree. I'll retract that second part of that comment, so...

Lorie Cahn

On page 1-4, on 23, "(xxiii)" on "Hydrophytic vegetation". I'm confused about the index values "less than three". Where...So, it's on line 157 because we say a facultative species, an FAC, equals 3, and then we say a facultative upland equals 4, and upland species equals 5; but then we say "a frequency analysis of all species within the community yields a prevalence index value of less than 3, where OBL equals one". But I think it's also meant to be "equal to three"—"or equal to three", so it's really "three or less" rather than "less than three" because "three" has to be in there because it's the facultative species. Does that make sense what I'm saying?

Lindsay Patterson

June 13, 2024 Water and Waste Advisory Board Meeting

10

Yes, that does make sense. Okay.

Lorie Cahn

So rather than “less than three”, I think it should say “three or less”. Or we can say, “Less than or equal to three,” but I think it would be more clear just to say “three or less.” More simple, but I don’t care which way you do it.

Lindsay Patterson

Okay.

Lorie Cahn

And then, I do have a number of editorial comments, but I’m going to ask that—in the past, Gina and I have just had a phone call where I’ve given her my editorial comments, and so I’d be happy to do that and not waste every—not waste, but not take up the time at this meeting to go over those. So Gina, if that’s okay with you, we’ll have a phone call at some point, at your convenience, to go over my editorials.

Gina Thompson

Yes, Board Member Cahn, I can schedule that with you when we return to the office. We’ll take those edits from you.

Lorie Cahn

Okay, great. Okay, that does it for my comments on Section 2. Thank you. I’ll turn it back over to Lindsay.

Lindsay Patterson

Thank you, Madam Chair. Moving on to Section 3. So in the proposed rule, Section 3 is titled “Purpose”. This incorporates provisions from Section 5 of the previous Chapter that was titled “Standards Enforcement”. So we included, specifically, the Department’s authority for implementing the Standards, which was absent in the previous version of the Rule. We revised terminology related to establishment of effluent limits for discharges requiring permits and identification of nonpoint sources, best management practices to address nonpoint sources of pollution. We had a provision to clarify that the Department shall use the standards to administer the Environmental Quality Act very generally, which was absent from the previous version of the Chapter. We removed references to various implementation documents that were being formally incorporated by reference, we removed provisions that duplicated the Statute, and then—to align with federal requirements—we added a specific compliance schedule authorizing provision. The previous version of the rule mentioned compliance schedules, but not in the same manner

June 13, 2024 Water and Waste Advisory Board Meeting

11

that it needed to in order to comply with the federal regulations. That is Section 3. Anybody have any questions about Section 3?

Lorie Cahn

Does anybody on the Board have questions on Section 3, or comments? And I don't have any, so I don't hear any from the Board. So we can move on to Section 4.

Lindsay Patterson

Thank you. Section 4, "Testing Procedures", that incorporates Section 10 of the previous version of the Chapter of the same name. We limited references to specific analytical methods in the federal regulations and incorporated the federal regulations by reference, so it's much more limited in scope than the previous version of the Chapter. Removed differences to analytical methods the Department determined shouldn't be incorporated by reference. Then we're limiting the scope of the former incorporations, or the former references. They weren't actually incorporated by reference. We removed references to the Environmental Protection Agency, since the Department has authority to determine appropriate analytical methods for implementing the Standards, and then we removed a recommendation to consult with the Department since this is not a rule. Does anyone have any questions about Section 4?

Lorie Cahn

I don't. Does anybody on the Board?

Brian Deurloo

No, this is Brian.

Luke Esch

No questions.

Lindsay Patterson

Okay. So, Section 5 is "Credible Data", which was previously Section 35, of the same name. We reorganized this section, removed redundancies. We included the term "historic data" that was previously included in a definition that has since been removed from the Chapter because it was defined in the statute. We replaced the term "weight of evidence" with "multiple-lines-of-evidence". We removed discussion of use attainability analysis requirements that's discussed elsewhere in the Rule. We clarified the description of "scientifically valid data" to align with current practice related to data, and then we removed a requirement that persons who collect data have to have or work under the supervision of a person who has field experience in developing a monitoring plan and a quality assurance project plan. The provisions still require that the data be collected

June 13, 2024 Water and Waste Advisory Board Meeting

12

consistent with a monitoring plan that's been accepted by the Department, and that we also have a quality assurance project plan. It's just that the entities who are collecting the data don't have to have developed those plans themselves, and that's consistent with current practice. Does anybody have questions about Section 5?

Lorie Cahn

I don't. I just have editorials that I'll give to Gina.

Brian Deurloo

Madam Chair, this is Brian. I have a question, as I was looking through some of this data where we're changing, or kind of realigning designated uses and so forth, and you might have touched on this when we were in Cody at our last meeting, I think it was. Are you going to have them sending people to every water body in the state, as we're kind of realigning this and saying, "Hey, go look at that stream up by Kemmerer, and should we designate that as 2D?" or what have you, or what kind of protocol are you doing as you're readjusting this rule?

Lindsay Patterson

So, the actual on-the-ground water quality standards don't change as a result of the rule. It's just basically removing the label. And so, what the revisions to the rule do do is provide additional flexibility in the event that, you know, a permittee or, you know, some other entity was interested in modifying the uses, they would be able to work with us to evaluate which uses were assigned to the water body. But practically the same uses and the same criteria still will apply to all of the water bodies in the state. So, it's a lot of paperwork changes for not much on-the-ground changes.

Brian Deurloo

Got it. Okay. Thank you.

Lorie Cahn

I'd like to ask a question about this "credible data," and so, an example would be if there's on, let's say Forest Service property, where there's a nearby lease for agriculture for grazing cattle, and the rancher's not keeping the cattle on the property—on the leased part of the property, and allowing the cattle to go to a lake, so the lake has deteriorated and water quality. It's not very...It used to be a swimming hole and now no longer is a place that people want to swim because there's cattle on it that aren't supposed to be there. So what happens in a situation like that where the water quality has been deteriorated, but it was, used to be that—you understand my question?

Lindsay Patterson

June 13, 2024 Water and Waste Advisory Board Meeting

13

I do, Madam Chair, I understand your question. And so, when we evaluate which uses should be assigned for individual water bodies, we're evaluating what is attainable for that water body typically, you know, we also evaluate what the existing uses are. But if we, through that evaluation, determine that the water quality, you know, is potentially attainable for the water quality to be better than what it is by implementing a best management practice, such as having livestock watering off of that water body, then we would say full body contact recreation is still attainable on that water body because it's something that can actually be addressed through a mechanism, you know, that we have a say in which is effluent limitations for permit—for discharges that require permits, or for nonpoint sources that you can address through a best management practice.

Lorie Cahn

And if the permittee with the grazing lease is not keeping their watering troughs full of water and kind of being an absentee landlord, I guess would be the best approach, then what happens in that situation?

Lindsay Patterson

I think, often, the Forest Service would work with the leasees to address any potential, you know, inconsistencies with the terms of the lease.

Lorie Cahn

Okay.

Lindsay Patterson

Yeah. And then we would work collaboratively with the Forest Service, if that was really identified as the potential source of the water quality issue.

Lorie Cahn

Okay, alright, thank you. Yeah.

Jennifer Zygmunt

Yeah, Madam Chair, I'll just add to that. I think we have a pretty good success rate of working with our agricultural community through our Nonpoint Source Program and through our partnerships with agricultural associations and then state and federal land managers. So, as Lindsay walked you through, you know, we would work to implement best management practices, we've got technical and financial assistance programs to help with that, and we work closely with the Forest Service in agreement for implementation of the Nonpoint Source Program to meet our objectives and to meet Forest Service's objectives. So, I think we have a strong track record of working with the Ag. community on those types of issues.

June 13, 2024 Water and Waste Advisory Board Meeting

14

Lorie Cahn

Okay. Thank you.

Brian Deurloo

Madam Chair, this is Brian again. I hesitated to ask about this, but I'm going to, as long as we're here in Section 5 again. At the bottom, I think you make it a good description of what you view as our specialized training, like any of this, any of the sampling needs to be done under the supervision of somebody who's specialized. Is there something that, do you think, that's room for interpretation? Have you ever been—has anybody pushed back on that with any of these consulting firms around the state or consultancies? Have you ever had any problem that you don't think that somebody's going out there and they're properly qualified to take water samples? And had to push back and say "Well, I think I am because I went to this one class in Oklahoma two weeks ago." Well, we don't think you are—we had the same argument about registered engineers and geologists a couple of years ago, so if you could speak around that and a specialized person for a moment, please.

Lindsay Patterson

Up to you.

Jennifer Zygmunt

Good work. I'll fill in.

Lindsay Patterson

Sure. Yes, we have had challenges in the past about people saying that they were qualified to collect data. We have a QAQC officer at the agency who works very closely on reviewing each of the sampling analysis plans that get developed to collect water quality data that would meet these requirements, and so part of that process is for those individuals to identify their qualifications in the SAP—and then also there's an audit process that the QAQC officer could potentially implement, if they thought it was necessary. And so a combination of those two things are the ways that we address issues where, you know, maybe another entity has brought up concerns about the qualifications of an individual who's collecting water quality data. But there's a fairly, I would say, robust evaluation to make sure that people are actually qualified to collect the data.

Brian Deurloo

Okay.

Jennifer Zygmunt

June 13, 2024 Water and Waste Advisory Board Meeting

15

But I will clarify, it is not a certification program. We don't issue certifications, but as Lindsay walked you through, we have that robust QAQC process to evaluate those qualifications when somebody submits a sampling and analysis plan.

Brian Deurloo

Right on, thank you.

Jennifer Zygmunt

Yep.

Brian Deurloo

That's all for me, Madam Chair.

Lorie Cahn

Okay, does anybody else on the Board have any questions on Section 5? Hearing none, let's move on, Lindsay.

Lindsay Patterson

Moving on to Section 6, this is our retitled section "Recommendations to the State Engineer". It was previously Section 6 as well, titled "Interstate Compacts, Court Decrees and Water Rights". So, the primary change that we made to this section was that we clarified that the Department will, upon request from the state engineer, make recommendations regarding proposed new diversions that could result in violations. The previous version of the rule essentially said that the Department would do this regardless of whether we had a request from the State Engineer. So we think that this revision better aligns with the stipulations in the Environmental Quality Act about the agency, about DEQ not to interfere with the allocation of water rights. Any questions about Section 6?

Lorie Cahn

I have none. We can move on.

Lindsay Patterson

Okay. Section 7: "Water Quality Standards for Salinity in the Colorado River System", Previously Section 31, titled "Colorado Basin Salinity". The current version of the Chapter has a reference to Water Quality Rules, Chapter Six. Chapter Six was deleted in a previous rule revision process, and so what we've done within the proposed Chapter One is incorporated the Water Quality Standards for Salinity of the Colorado River Basin by reference, so that's included in Section 28. And that incorporation by reference is necessary so that EPA can approve these Water Quality Standards that get adopted by

each of the States that participate in the Colorado River Basin Salinity Control Program.
Any questions about Section 7?

Brian Deurloo

I have none, Madam Chair. It's Brian.

Lorie Cahn

This is Lorie. I have none, we can move on. Thank you.

Lindsay Patterson

Great. Section 8 is "Flow and Water Level Conditions". Previously, Section 11 titled "Flow Conditions". So one of the main revisions to this section was that we added water levels to clarify that the provisions are also applicable to non-flowing waters since it was silent about non-flowing waters. So this would be a reservoir, in most cases, where water levels fluctuate and you would want to take into consideration low flows of a potential receiving water or water body that would have wide fluctuations. We clarified that the water quality standards may also not be met in mixing zones. This previously was incorporated into the mixing zone section, but we wanted to add additional clarification in this section, as well, because those are the times that water quality standards may be exceeded. During low flow, low water levels, or potentially in mixing zones. We removed the unnecessary references to other documents that were in there, that were informally incorporated by reference. We removed reference to the EPA since the Department establishes requirements related to flow and water level conditions. We clarified some methods for identifying low flow and low water levels are to be used for deriving water-quality-based effluent limits. This wasn't specified in the previous version of the Rule and did create some confusion about how you would use those various methods. And then we updated the methods that can be used to derive low flow and water level for developing water-quality-based effluent limits. So there's a number of different ways of calculating low flow or low water level based on EPA's recommendations that align with the particular water quality criteria that you are deriving the effluent limit from. Does anybody have any questions about Section 8?

Lorie Cahn

No questions from me.

Brian Deurloo

No questions from me, this is Brian.

June 13, 2024 Water and Waste Advisory Board Meeting

17

Lindsay Patterson

All right, Section 9 is "Dilution Allowances – Complete Mixing Scenarios". This wasn't a component of the previous version of the Chapter, but was in an implementation policy that was referenced in the Chapter, so the implementation policy is *Mixing Zones and Dilution Allowances*. So essentially we created two separate sections, one's this Section 9, that essentially just move that information from that *Mixing Zone and Dilution Allowances Policy* related to the complete mixing zone scenarios into the rule. Does anybody have any questions about Section 9?

Lorie Cahn

No, none.

Brian Deurloo

Just a clarification, Madam Chair, this is Brian. Effluent diffuser, is that... What's an effluent diffuser? Is that on the outlet pipe, you have something that breaks up the water, the power of—

Lindsay Patterson

Yes.

Brian Deurloo

Okay.

Lindsay Patterson

Yeah, then that allows the permittee in some cases to take advantage of more dilution in the receiving water, than have it be all localized.

Brian Deurloo

Oh. Right. Okay.

Lindsay Patterson

Yep.

Brian Deurloo

Thank you. I have no questions, Madam Chair.

Lindsay Patterson

Okay, Section 10 is the previous Section 9 which talks about mixing zones and we just clarified that this mixing zone section is associated with incomplete mixing scenarios as opposed to the Section 9 in the proposed rule, which is the complete mixing scenario. So

June 13, 2024 Water and Waste Advisory Board Meeting

18

similar to the previous section, we incorporated some provisions of the mixing zone and dilution allowances implementation policy into the rule so that the policy can be dissolved. And then we removed some of the specific methods for deriving mixing zones, since any defensible method can be used. Anybody have any questions about Section 10?

Lorie Cahn

I have none.

Jennifer Zygmunt

And Madam Chair, we're at about 10:30 and we're getting to a section, "Designated Uses", where you might have questions. Can I recommend that maybe we take a quick 10 minute health break? I think there's some folks in the room here that could use it.

Lorie Cahn

That sounds good. Thanks.

Jennifer Zygmunt

Okay, so we'll reconvene about 10:36. Thank you.

Lorie Cahn

Okay, let's reconvene. Thank you.

Jennifer Zygmunt

Okay, as I believe we are on Section 11.

Lindsay Patterson

This is Lindsay Patterson, resuming. Section 11 is titled "Designated Uses". That's in the proposed rule that incorporates provisions from Section 3, "Water Uses" of the previous version of the Chapter; Section 4, "Surface Water Classes and Uses"; and Appendix A, which is titled "Wyoming Surface Water Classification". So, the primary revision we made to these sections was to remove the bundled classification system for assigning designated uses. Talked a lot about that. We described a requirement to designate existing uses, highest attainable uses, and protect downstream surface waters. That's consistent with the federal regulations. We moved the discussion of how designated uses are assigned to particular surface waters, including which uses are assigned to wetlands, to another document, *Wyoming Surface Water Designations*, that was previously titled *Wyoming Surface Water Classification List*. And the Wyoming REC Designated Uses Web Map, so that is not changed in name. Both of those have updated versions that can be referred to and both of these are incorporated by reference in Section 28 of the Chapter. Let's see, we alphabetized and reworded the designated use descriptions for consistency.

June 13, 2024 Water and Waste Advisory Board Meeting

19

We consolidated aquatic life uses so that each surface water will only have one aquatic life use, rather than up to three, as is the current version. We added a modified aquatic life use, an effluent-dependent aquatic life use, and an effluent-dependent fish consumption use. The modified aquatic life use is a completely new use. The effluent-dependent aquatic life uses are new uses, but not new concepts. Since we have currently classes 2D and 3D for effluent-dependent waters. We separated the agricultural use into an irrigation and a livestock use. We clarify that drinking water, the designated use, is intended to support human consumption of the water after treatment. That wasn't clear in the previous version. We changed the name of the "primary contact recreation" use to "full body contact water recreation", and the "secondary contact recreation" use to "limited body contact water recreation". We revised the rec designated use descriptions so they have additional detail on the types of water contact associated with those recreational uses, and then we renamed "wildlife" as "terrestrial wildlife". What questions do people have about Section 11?

Lorie Cahn

I have none.

Brian Deurloo

Madam Chair, this is Brian Deurloo. I have a clarification on Section 11. The romanette "(iv) Effluent-dependent fish consumption". I know what you're trying to say here, but it doesn't sound very clear. I think what you're trying to say is: Water that— Treated water that— You're just talking about treated water... Like, say, discharge from a power plant or something like that, that is keeping the fish alive because of all the waters going through there and that we can consume those fish, correct? But the way it's worded is— I'm not going to wordsmith it for you, but take it back to your office and say, "Maybe we should reword this because it's a little bit confusing," but basically I would say it's designated for effluent-dependent fish consumption, are those where surface water quality shall support the life of fish so humans can consume them or something like that? It's just, I feel it's poorly worded and I would offer you a chance to do something about it.

Jennifer Zygmunt

Right, maybe support the presence of fish for human—used for human consumption or something like that.

Brian Deurloo

Yeah. Support the life of fish so humans may consume them or something.

Jennifer Zygmunt

Okay.

June 13, 2024 Water and Waste Advisory Board Meeting

20

Brian Deurloo

Please. That's all I have, Madam Chair.

Lorie Cahn

Yeah, Brian, that's a good comment. I think potentially it could say "support the presence of fish for consumption". You know, are we talking about only human consumption or are we talking about bears consuming it or—

Brian Deurloo

Yeah, eagles.

Lorie Cahn

Yeah, so maybe it would just be fish for consumption.

Jennifer Zygmunt

I believe, and I'll look at Lindsay here as I answer this question. I believe fish consumption, insofar as we have it as a designated use, would be for human consumption, and that our terrestrial wildlife use would incorporate consideration of any water quality related impacts on terrestrial wildlife. So I just want to make that clear, I understand the point absolutely that more than just humans consume fish, but I think for purposes of fish consumption as a designated use, just want it to be clear that we are talking about human consumption. That's where we look at detailed factors about how much fish do certain populations eat within a year, what are the potential health risks. So comment understood, but I think I want to keep the fish consumption clear that it's related to human consumption, okay?

Brian Deurloo

That's fine, but I still think it's unclear as to supporting fish life.

Jennifer Zygmunt

Okay. Yeah. We can take a look at that one.

Lindsay Patterson

Yes, the intention of the use is to ensure that the water quality of the effluent is of sufficient quality to be able to support human consumption of any fish that reside there. So you would take the human component as the primary endpoint to make sure that it wouldn't cause cancer if you're consuming the fish over your lifetime.

Brian Deurloo

Yes, I understand. Okay. Thanks.

June 13, 2024 Water and Waste Advisory Board Meeting

21

Luke Esch

Is this—Madam Chair, this is Luke. Is this for an artificial fish hatchery? Would that be an example of something like that, where it was dependent on the effluent?

Lindsay Patterson

The example would be where an industrial discharger—maybe it's coalbed methane, maybe it's oil and gas—and they're discharging to an ephemeral water body where there is an aquatic life present, but there is an aquatic life use that's created, potentially as much as having a fishery, and if we were to designate a water body as effluent-dependent, we would assign it the effluent-dependent aquatic life use. And then if there were fish there, we would also want to ensure that it got this designated use of effluent-dependent fish consumption in the event that we wanted to modify the water quality criteria, if it potentially wasn't of the same quality as the other fish consumption use. So it allows more flexibility in those instances where the effluent maybe isn't of the same quality as our other fish consumption use, but typically it's going to be on an ephemeral water body where there is not a use present unless there's the discharge of wastewater.

Luke Esch

So the follow up question, Madam Chair, so this would be an instance where, if it was coalbed methane, this would get an effluent-dependent designation, rather than a fish consumption, which would take into account that effluent is the sole source of the life of the fish, so the discharger is not going to be penalized for the fact that fish start popping up.

Lindsay Patterson

That is correct.

Luke Esch

Okay. Thank you.

Lorie Cahn

This is Lorie. I don't hear any other comments on Section 11, then we should move on to Section 12. Thank you.

Lindsay Patterson

Section 12 is titled "Modifications to Designated Uses". This incorporates provisions from Section 4, Section 33, Section 34, and Appendix A of the current version of the Chapter. The primary revisions that we made were to align the process to petition the Department to modify the uses through revision of Chapter One with state and federal requirements. So this essentially points people to Chapter 3 of our rules and practices procedure where they

June 13, 2024 Water and Waste Advisory Board Meeting

22

can petition the Department for a rule revision, or the Council. They can petition the Department or the Council. And then the federal requirements have to go through the rulemaking process or be an equivalent rulemaking process for all revisions to water quality standards. We included a reference to Section 11 regarding the need to designate the highest attainable use, existing uses, and protect downstream waters. That's consistent with the federal regulations. We included a reference to Section 5 regarding credible data. The credible data requirements are applicable both to situations where we're determining attainment of the uses, or we are also assigning designated uses. We also align the requirements to modify uses with the Clean Water Act. So now currently under the rule, a use attainability analysis is required anytime we do a modification to a designated use, either to raise the classification to something with maybe more stringent water quality criteria or to lower the designated use to something that has less stringent water quality criteria but that is more stringent than the federal requirements. So what the rule says now is that use attainability analysis is required when we modify a Clean Water Act Section 101(a)(2) use. Which are essentially the aquatic life, recreation, fish consumption, or terrestrial wildlife in our system. And then this is just on waters that are subject to the jurisdiction of the Clean Water Act when the change will result in a less stringent water quality criteria. And then for non-Clean Water Act 101(a)(2) uses, so those are drinking water industry, irrigation livestock, scenic value or modifications to any uses that aren't subject to the jurisdiction of the Clean Water Act. They won't require use attainability analysis any longer—they require what's called the "use and value demonstration". And so that's something that essentially would be a demonstration of how that water body is being used, and that's what the federal regulations describe as the requirement for those non-101(a)(2) designated uses. Does anybody have any questions about Section 12?

Brian Deurloo

I do not, Madam Chair. This is Brian.

Lorie Cahn

Okay, I am hearing none, and I don't have any. Let's move on.

Lindsay Patterson

Section 13 of the proposed rule, titled "Antidegradation".

Lindsay Patterson

This incorporates provisions from Section 4, Section 7, Section 8 and a handful of provisions from the *Antidegradation Implementation Policy* there. Essentially, we outlined three different tiers of antidegradation protections. These are currently what's in the rule and then also what's in the implementation policy, just more explicit in the proposed rule what these three different tiers of protections are. We also clarified which Surface Waters

June 13, 2024 Water and Waste Advisory Board Meeting

23

of the State are assigned to each antidegradation tier, and then we clarified our existing use protections: essentially, that those apply to all Surface Waters of the State. We align the high quality water protections with the Clean Water Act requirements, meaning that we're applying them to those same Clean Water Act Section 101(a)(2) uses that I mentioned previously: aquatic life, recreation, fish consumption and terrestrial wildlife. And then we also clarify that you need to conduct an alternatives analysis to demonstrate that there aren't other other reasonable alternatives when you would like to introduce a new or increased discharge to one of these water bodies that are high quality water. Essentially that is where the water quality is better than the water quality criteria that apply to that surface water. We changed the name of Class 1 Waters to "Outstanding Aquatic Resource Waters". That's a term that's currently used in the *Implementation Policy*. We revised the existing quality protections for Outstanding Aquatic Resource Waters, essentially changed the term "point sources" to "regulated activities" to make sure that we were not incorporating the definition of "point sources" from the Environmental Quality Act since what we regulate, in some cases, doesn't include all point sources and might include other things that aren't considered point sources. We clarified the Department will not authorize existing regulated activities to increase the load or concentration of pollution discharge. Right now, the rule just says "quantity" and so we thought that was an important clarification. We removed provisions related to temporary increases in turbidity, since that is captured in the rule language of allowing discharges. We also clarify there's allowed new short term discharges of up to one year, where the Administrator and Director have determined that the discharge is necessary to address emergency situations. We've discussed this previously, that additional flexibility for some permitted facilities would be beneficial; that the facilities would still be required to meet the no degradation requirements associated with the Outstanding Aquatic Resource Waters, but that having a complete prohibition was too restrictive. We also clarified that the Department should limit, to the extent practical, degradation from new or existing dams that are constructed on Outstanding Aquatic Resource Waters or tributaries. And then we clarified, the Department shall identify nonpoint sources of pollution and best management practices to address nonpoint sources of pollution to those Outstanding Aquatic Resource Waters, or tributaries to Outstanding Aquatic Resource Waters. And then we replaced references to the *Antidegradation Implementation Policy* with the requirement to develop antidegradation methods, that we'll provide an opportunity for a 30 day public comment period, and then we'll make the methods available to the public. This revision is consistent with the federal requirements that states have antidegradation methods, that they don't need to be in the rule or incorporated into the rule by reference, and that we have to provide an opportunity for public comment and make them available. Does anybody have questions about Section 13?

Lorie Cahn

I don't have any. I hear none from the Board, so please go ahead.

June 13, 2024 Water and Waste Advisory Board Meeting

24

Lindsay Patterson

We also created a Section 14 which is specific to Outstanding Aquatic Resource Waters. The current Chapter does have a section related to Class 1 Waters, and we wanted to make this section specific to identify the Outstanding Aquatic Resource Waters previously titled Class 1 Waters, and then also identify what the process is for entities to nominate a water body or petition the Department to propose designation of an Outstanding Aquatic Resource Water.

Lindsay Patterson

So that's using the same process as I noted in the revision of designated uses. It needs to be made through the rulemaking process. Entities can use the process outlined in the Department's Rules of Practice and Procedure, Chapter 3, which discusses petitioning the Department or the Council. We also added a designation date for each Outstanding Aquatic Resource Water. This is, essentially, the water quality of those water bodies needs to be maintained at that quality at the time of designation, and that wasn't included in the previous version of the rules, and so required us to go back into previous rules and figure out what the date was. So that will be an important clarification for those waters moving forward. Does anybody have any questions about Section 14? Hi, this is Lorie. I have a comment on line 742 which is—Whoops, wait a minute. Are we..? Sorry.

Jennifer Zygmunt

That's one section ahead, so.

Lorie Cahn

Yeah, sorry, I'm one ahead here. I'm in Section 15—not Section 14—so I don't have anything on Section 14.

Brian Deurloo

I did, Madam Chair, this is Brian. I have one question. So, at the very end of Section 14 you list all these things that you were looking for to see how, in evaluation of a petition, the Department shall consider water quality and—it's at the very end—it says the other values of present and future benefit to people. Is it only people or do we care about the quality for animals too, as you're working with the Wyoming Game and Fish Department and to the natural resources of the state? And it may be that's what the DEQ mandate is, it's purely protecting the resources for the people. Or is it, do we say for the benefit and—this might sound a little woo-woo, especially coming from the industry guy—but do we want to say future benefit to people and animals, or just to people, or what's your opinion on that?

June 13, 2024 Water and Waste Advisory Board Meeting

25

Jennifer Zygmunt

Yeah, thanks for the question. And you know I, you know, our mission for the DEQ as an agency is to protect public health and the environment, so we have a broad mission and that we are looking at both human health, human impacts and ecological impacts that would consider impacts to the environment, fish, wildlife. I believe this language, and I'll have Lindsay clarify, is the existing language that we've had for designation of a Class One or now an Outstanding Aquatic Resource Water. And I think the intent is we look at everything. I would point back to you know, the other items in that series that we have to consider: ecological values, botanical, zoological values, fish and wildlife. So certainly, I would say if somebody petitioned for a new Class 1—I'm going to have a hard time switching terms here—Outstanding Aquatic Resource Water, we would be consulting with Game and Fish, Fish and Wildlife Service. Making that kind of designation is a pretty big decision, as it should be, so I think we would be coordinating with all partner agencies on all potential aspects given that list.

Brian Deurloo

Okay, it's probably a moot point and I'm not asking for—

Lorie Cahn

Yeah, this is Lorie. Sorry, Brian. I didn't mean to interrupt. Go ahead.

Brian Deurloo

I'm done. Thank you.

Lorie Cahn

Okay, so I think what might be confusing in this paragraph is the use of "and other values of present and future benefit to people," because... I'm wondering if it's "or" because then a lot of things in the list that Jennifer talked about—botanical, zoological, fish and wildlife—those are not necessarily values of present and future benefit to people, so would the word "or" replace "and" on line 660? Would that work?

Jennifer Zygmunt

I think I'm a little hesitant to change that, in that, again, if we are considering a petition and the Environmental Quality Council ultimately considers a Class 1 Outstanding Aquatic Resource Water designation, my interpretation is that they need to consider everything, it's not one or the other. We can't just consider fish and wildlife impacts; we have to consider all of the potential impacts. So we can consider that, but my initial reaction is that "and" is the appropriate word.

June 13, 2024 Water and Waste Advisory Board Meeting

26

Lorie Cahn

Yeah, Jennifer, I agree. So maybe the issue is the word other. So maybe it would just say "and values of present and future benefit to people" so that it's not just "other". So, if we just made it "and values of present and future benefit to people", maybe that would work. I think it's the word "other", then, that's implying that everything on that list is for benefit to people.

Jennifer Zygmunt

I see your point. Yeah, Madam Chair. My initial reaction is that we could strike "other" without any impacts to the intent of this passage. Lindsay, any comments? So, Madam Chair, I'd like to give that just a little bit more consideration, but my first reaction is, yeah, I think that is a recommendation we could incorporate.

Lorie Cahn

Okay. Great.

Luke Esch

Jennifer, this is Luke. I think it sounds fine as it is, but that's just me.

Jennifer Zygmunt

Okay. Well, we'll take that feedback and consider keeping or striking that word.

Lindsay Patterson

And for reference, the current Chapter has "and other values of present and future benefit to the people".

Lorie Cahn

But just because it's in the current doesn't necessarily mean we can't improve upon the wording to make it more clear.

Lindsay Patterson

Correct.

Lorie Cahn

Does anybody else on the Board have any other comments or questions on Section 14? Okay, hearing none, let's move on.

Lindsay Patterson

So, Section 15 is "Water Quality Criteria Applicable to All Surface Waters of the State". This incorporates a number of different sections in the current version of the Chapter, I don't

June 13, 2024 Water and Waste Advisory Board Meeting

27

need to read through all of them. So, we did make some revisions; we consolidated the numeric narrative water quality criteria that were applicable to all Surface Waters of the State. This is essentially the criteria that didn't specify particular designated uses, or were sufficiently general that they were applicable to all Surface Waters of the State. We reworded the narrative criteria for consistency. We clarified exceptions for toxic materials and wastes, meaning that the current provisions have some exceptions, but not all of the exceptions. So I think we just added some additional wiggle room there. We separated dead animals from solid waste. They're currently combined, which does create some confusion. And then we renamed "solid waste" to "waste". That's the defined term from the Environmental Quality Act. "Solid waste" isn't defined in the water quality definitions. We revised "settleable solids" to clarify that it includes excess sediment. We revised "floating and suspended solids" to "floating materials and suspended solids" to clarify that floating materials may not be solids. We revised "taste, odor and color" to just "odor and color", since taste is very specific to certain designated uses, and not something that we needed to apply protections for in all Surface Waters of the State, including ones that didn't have a drinking water use or a fish consumption use. And then we revised the odor and color criteria. Questions on Section 15.

Lorie Cahn

Does anyone on the Board have questions on 15?

Brian Deurloo

This is Brian. I do not.

Lorie Cahn

Okay, I have a comment on line 742 through 745, which is Section 15(f), "Odors and colors", and this is just more in trying to keep with our goal of making the regulations simple and easy to understand, and using plain language and active voice, and so this is just a minor comment—but instead of saying "substances that directly or indirectly, through interaction with other substances", maybe we could change "through interaction" with just "interact" to make it active voice. And then on the second part where we have "unacceptable adverse..." we have odors and then we repeated again, "unacceptable adverse alterations". I think we could get rid of the second "unacceptable adverse" that happens on line 744. So it would read: "Substances that directly or indirectly interact with other substances shall not be present in amounts that result in unacceptable adverse odors or alterations to the natural color of the water," etcetera.

Jennifer Zygmunt

Yeah. Thank you for the suggestion, Madam Chair. I think that does use better plain language and active voice, so we've got that marked down.

June 13, 2024 Water and Waste Advisory Board Meeting

28

Lorie Cahn

That's all I had on Section 15. Does anybody else on the Board have anything on Section 15? Okay. Hearing none, Lindsay, please proceed.

Lindsay Patterson

Section 16 is "Water Quality Criteria for Protection of Aquatic Life Uses". This incorporates a number of different sections and aspects of the appendices. We consolidate all of the numeric and narrative water quality criteria that are applicable to the aquatic life uses. Similar to the previous section, we reverted the narrative for consistency, we added a general narrative to protect aquatic life designated uses. We clarify that the numeric criteria for waters designated for effluent-dependent aquatic life may be modified through the process in Section 25. We described that a little bit earlier about the modifications that can be made to those effluent-dependent waters once they're designated, so that the criteria essentially takes on the quality of the effluent. Since any aquatic life that would be in the effluent would be acclimated to the water quality of the effluent. We clarified requirements for deriving water-quality-based effluent limits for point source discharges where numeric criteria are not available and included updated references. This essentially including, you know, what we call whole-effluent toxicity testing or bio-monitoring, so that's intended to capture situations where we may not have a numeric criteria for a pollutant, but it's present in the effluent and needs to be addressed. We formatted numeric criteria into tables, removed example criteria values derived from equations. I think these created some confusion for users of the Water Quality Standards, that you could actually just take the table value when it was really a value that was derived by putting in an input value, such as a hardness value. We removed the numeric turbidity criteria—that's the 10 and 15 NTU increased criteria. We move the process to allow short term increases in turbidity, including the Guernsey silt run and provisions within the *Turbidity Implementation Policy* to Water Quality Rules, Chapter 2. That's the permit regulations. And then we remove references to the *Turbidity Implementation Policy* so that that policy can be dissolved. So essentially, we're moving that waiver process into Chapter 2, where it is an exclusion to the permitting requirements and entities would be required to notify the Department that they were doing in-stream work, and then they would get verification from the agency that they didn't need a permit. For the temperature criteria, we added a one-in-three-year exceedance frequency. We revised our cold water maximum criteria from a not-to-exceed-max to a two-hour average. We were only able to do that for the cold water criteria. We weren't able to do that for the warm water criteria. We do anticipate additional changes to the temperature criteria in the future. We removed the requirement that temperature criteria must be met at all times and depths. For dissolved oxygen criteria, we clarified the one-in-three-year exceedance frequency. The dissolved oxygen criteria currently is included in multiple places in the Chapter, there's a section, there's appendices. It's included in a table. The table references the one-in-three-year

June 13, 2024 Water and Waste Advisory Board Meeting

29

exceedance frequency, so we just wanted to make that clear. We also added a provision to allow dissolved oxygen in the lower portions of lakes or reservoirs to be less than the criteria, as long as there's adequate habitat for aquatic life where both the temperature and dissolved oxygen criteria are met, essentially, that there's sufficient refugia for aquatic habitat or aquatic life within the water body. And then for our acute and chronic criteria table, we consolidated the priority and non-priority pollutants into the table. Rather than having separate tables, we essentially just put the priority pollutants in bold italics, so it was clear which of those criteria were priority pollutants. We reorganized those alphabetically. We added chemical abstract service numbers so it's easier for people using the standards to verify the parameter of interest. We also integrated the site-specific criteria that we have for a number of different pollutants into footnotes. Say selenium, for example, there's a footnote that will take you to all of the site specific modifications, rather than have to go to a separate section to find all of the site specific criteria. We added a new, site-specific selenium criteria for an approximately 17 mile segment of Murphy Creek, the tributary to the South Fork Powder River, where there's naturally elevated concentrations of selenium from springs and other discharges where the water comes into contact with geologic formations that have selenium present. We also revised a footnote for selenium that currently has a conversion factor that you can use to convert total to dissolved. That's not defensible and so needed to be removed from the standard, since really the conversion of selenium from total to dissolved is very site-specific, so you couldn't really use this universal equation conversion factor. We moved the requirements to apply aquatic pesticides and fish toxicants to Chapter 2 because these really speak to discharges to surface waters, and they're not water quality standards. And then we moved the process for modifying criteria and removed the references to support modification of the criteria. So the subsequent section talks about modifying criteria, so it's all together and then the references that discuss modifying the criteria are not something that we're incorporating by reference, and we could really use many different ways to modify criteria, provided they're scientifically defensible, you know, protective of the different uses. What questions about Section 16, but you can see from Section 16 all the other sections, things are kind of very much spread out throughout the Chapter, so.

Lorie Cahn

Does anyone on the Board have questions or comments on Section 16?

Brian Deurloo

Madam Chair, this is Brian. I have a question or a clarification that I need made, please. On Table 4, line 854, but it's at the bottom of that table. It's (a), it says "The highest four day average within a 30 day period is also not to exceed 2.5 times the chronic value." Never mind. I don't want to talk about that. I just answered my own question, but I don't know how to answer this one: at the very end of this second sentence, it basically states that the permit applicant to demonstrate that early life stages are not present in the water body. I

June 13, 2024 Water and Waste Advisory Board Meeting

30

remember taking logic class in high school and remembering that it's very difficult to prove a negative. Can you tell me how somebody would demonstrate that--what is an early life stage, first of all--and coming back to the qualified sampler that I know is worth their salt, how can I know that there's no life stages out there? If you could just help expand on so I understand it better, I'd appreciate that.

Lindsay Patterson

Yes, thank you for the question. My impression of what, say, a discharger would do would be hire a consultant to go out and collect samples. Potentially it could be a water body that's stocked, so they would want to coordinate with Game and Fish, as well, on that demonstration. And so, if it is a water body that is just a put-and-take fishery, for example, that would be a fairly easy demonstration to get information from the Game and Fish. They also could look and determine whether there was eggs, fish eggs, embryos that were present. They could look and see if there's any indication that there's spawning happening in the water body itself. And then if none of those are present, then that would be a pretty good indication that there wasn't any early life stages.

Brian Deurloo

Oh, okay. So if I were to clarify, this is... you're trying to designate... If we get back up and maybe just use a real world example, if you don't mind, a permittee wants to go out there and... I don't know. Maybe you could help fill in a blank. What would somebody be doing that is going to bring this part of the Chapter into...? Give me an example where somebody would use this. Is it when they're going to drill a well right there, or they're going to start discharging to a point? And so, what use are they trying to do and then how would they report it to you? Please, can you give that to me?

Lindsay Patterson

Yeah, I think a good example for... This is specific to our ammonia criteria. So a wastewater treatment plant, potentially, could be built on or near a water body where they have effluent, that would potentially have elevated concentrations of ammonia and so depending on that water body, it maybe is the North Platte River where we know it has a naturally reproducing trout population. And so you wouldn't be able to successfully demonstrate that there aren't really life stages present. And so the default is we're going to assume that they're there. In another situation, maybe they're discharging to an intermittent system or an ephemeral drainage or something like that, where it would be fairly easy for the permittee to basically go out and have somebody do an evaluation. They could work with Game and Fish. Is this a water body that potentially has a naturally reproducing fish population? And if they can successfully demonstrate that those early life stages aren't present, then we would use the other criteria.

June 13, 2024 Water and Waste Advisory Board Meeting

31

Brian Deurloo

Okay, that's sufficiently answered my question. Thank you. That's all for me, Madam Chair. Thank you.

Lorie Cahn

Does anyone else on the Board have anything on Section 16? Okay, I do. Lindsay, if you could pull up, please, page 1-20. You've got it right there. Okay. And then I just want to compare Table 3 to Table 4. So if you could just scroll. Yeah, a little bit more. All right, now you got to go just a little bit more on so we can see the top Table 3. There we go. Okay, so these two tables aren't really constructed the same, and I find Table 3 confusing. So on Table 3, it has "Dissolved Oxygen (mg/L)" as the heading of the first column, whereas in Table 4 it has the first row being "Total Ammonia Nitrogen (mg/L)", applicable to the entire table. And, I believe, "Dissolved Oxygen (mg/L)" should be the top row instead of at the top of the column. The first column. And I think then that would address my questions because if you then...The way it's written, if you look at "Coldwater Aquatic Life" and then the "30-Day Mean", it says "none". You don't really know. Is that no coldwater aquatic life? Is that no...It's not—I don't know that it's really clear what that means. And so, I would propose that we put "Dissolved Oxygen (mg/L)" across the top in the very first... Make a new row, one. And then I think maybe we need a little bit of a...Do we need to explain what "none" means or do we cross out the cells and write in "not applicable"? So, that's sort of two parts to my question. One is how it's the heading and the second: what does "none" mean?

Jennifer Zygmunt

Yeah, Madam Chair, I think that's a good catch. We can adjust the construction of that table, and clarify what we mean by "none" versus "not applicable".

Lorie Cahn

Can you explain it to me right now, or...?

Lindsay Patterson

Yes, "none" is there's no criteria. And to me "not applicable", meaning that, there it wouldn't be applicable, but there really isn't a criteria associated with that. So there's no "30-Day Mean" criteria for early life stages.

Lorie Cahn

Okay. Yeah, if that could just be explained, that would be great. The next question I have is on Table 7 on page 1-22. And on the right hand column, there's no entry for Aldrin for chronic criteria, it's just blank. And so, I'm not sure what that means.

June 13, 2024 Water and Waste Advisory Board Meeting

32

Lindsay Patterson

There is not a chronic criteria for Aldrin, so any blanks, there's no criteria.

Lorie Cahn

Okay, so maybe rather than blank we should say "no criteria" or "none" or something.

Brian Deurloo

Or--this is Brian--we could put it in the notes below. Let's say any values that are blank do not have a designated driver limit.

Lorie Cahn

Well, yeah. So maybe we could make a footnote, and put it in the columns that have nothing, something to explain why there's blanks and what that means.

Jennifer Zygmunt

Yeah, we can clarify that just to make sure it's understood that there's no criteria and that it wasn't an oversight.

Lorie Cahn

And then if we go to the next page, which is the top of that. If you look at number one in Cottonwood Creek, and it says "maximum chloride value of 860 mg/L", but the table uses micrograms per liter. And from here, from number one all the way down to number five, we're using milligrams per liter. And I'm just wondering if we should be using micrograms per liter just because it's the same units that's in the table. But I mean it's not that critical, it's just I realize it'll make it a little... I don't know, it just seemed like they should be the same to me, sorry. Same units.

Jennifer Zygmunt

No, comment understood, Madam Chair. We can take a look at that. Yeah, understood that there's advantages to having consistent units in the same part of a document.

Lorie Cahn

Okay. And that's all I had on Section 16. Does anybody else have anything on Section 16 in the Board? Okay, Lindsay, move on to Section 17, please.

Lindsay Patterson

Okay, Section 17 is "Water Quality Criteria for Protection of Drinking Water Use". This incorporates all the sections where there are drinking water criteria. We rewarded the narrative for consistency, similar to the previous section. We also have the general narrative to protect waters designated for drinking water, similar to the aquatic life criteria.

June 13, 2024 Water and Waste Advisory Board Meeting

33

We add a narrative criteria to protect against unacceptably high risk for acute, chronic, or carcinogenic effects in humans who consume water after treatment. So, this is to help clarify narrative criteria endpoints or implementation of the narrative criteria. We replaced the numeric turbidity criteria, the 10 and 15 NTU increased criteria, with narrative criteria that specifically protect drinking water supplies. This describes that turbidity shouldn't be at levels that it can't be readily removed during conventional drinking water treatment, causes upsets in treatment processes, or causes unacceptably high treatment costs. We formatted the numeric criteria into tables where appropriate, similar to the aquatic life criteria. We added a 30-day duration to the numeric drinking water criteria for the drinking water and fish consumption, and fish consumption only criteria. This is where we are combining some of the different uses because the criteria would be a lot of different tables and a lot of duplication if we didn't combine. We consolidated that, similar to the aquatic life criteria, the priority and non-priority pollutants into one table. The priority pollutants are in bold italics. They're alphabetized with a chemical abstract service number. The site-specific criteria are in footnotes. We revised a footnote that described that the secondary drinking water criteria only apply where drinking water is an actual use. That was a footnote that we added during a previous revision of the Water Quality Standards that was never approved by EPA. We moved the process for modifying criteria and all those references to the section on modifications to criteria. Questions about Section 17?

Brian Deurloo

Okay, I'm going to say it. This is Brian, Madam Chair. I've got one comment. I've said it probably twice already today. Double negatives, I can't stand them. Just ask my daughter. But 17(a) on line 881, narrative criteria pollution shall not result in non-support of drinking water uses. What are you trying to say? Are you trying to say that degradation of drinking water uses? What does "non-support of" mean?

Lindsay Patterson

It means that the water quality is not sufficient to support that use. So if a water body is assigned a drinking water use, the water quality should support it. The term pollution is used because that's what we regulate and so the intent is to try to clarify what we do regulate—pollution—and then also clarify that it should be supportive of the designated use, which is drinking water.

Brian Deurloo

Can we wordsmith that? Maybe where it...? I mean, I get what you're trying to say, but also if you read it, it kind of cancels each other out. Pollution shall not result in what to drinking water uses?

Lindsay Patterson

It has to support the use, so that's—we've gone around and around about how to word this, and I don't like the double negative either. Yeah, and I'm very open to suggestions.

Brian Deurloo

Okay.

Jennifer Zygmunt

So we're trying to say that there can't be pollution such that drinking water uses would not be supported anymore.

Jennifer Zygmunt

I hear you on the double negative. I'm trying to wordsmith on the fly and keep the parallel construction we have with that sentence and the other items. We'll take another look at it, see if we can avoid a double negative, but that's what we're trying to indicate.

Brian Deurloo

If you wouldn't mind, it's not a deal killer, but definitely underline it, kick it around the office.

Jennifer Zygmunt

Yeah, it makes it harder to interpret, so we'll take a look at that.

Brian Deurloo

That's all for me, Madam Chair. Thank you.

Lorie Cahn

I guess, my main question on this section and anywhere else where there's tables with concentrations: are we confident that the limits in there are... The labs with standard lab techniques of analyzing water quality, that they're capable of easily meeting these limits? You know, that the detection limits can be met without...?

Lindsay Patterson

Madam Chair, the water quality criteria have to be protective of the designated use.

Lindsay Patterson

According to the Clean Water Act, and so, unlike the Safe Drinking Water Act, Clean Water Act requirements don't take into consideration treatment capability. And so, where this does get factored in the reporting limits, it gets factored into the effluent limitations that

would be developed for a permit or in our evaluation of whether the water quality standards are attained.

Jennifer Zygmunt

And, Madam Chair, if your question is about lab capabilities, that's something that we can bounce off of our lab supervisor to better answer your question, but I'm not aware of anything on these lists that we would have routine problems with a lab being able to detect to the detection limits—and typically where we see those problems, are more for emerging contaminants PFAS, as an example, as Ben talked about earlier, there is some question with the very low safe Drinking Water Act limits. The very few labs that can analyze for PFAS, can reliably detect to those levels and samplers can sample without contamination concerns. We tend to see those concerns more for emerging contaminants. I think everything on this list would have been vetted for a longer time with appropriate lab analytical methods, so I'm not aware of any concerns with being able to analyze these constituents. But we can take that question back to our lab supervisor for further insight into that.

Lorie Cahn

Okay. Yes, Administrator Zygmunt, you did understand my question correctly, you worded it better than I did. I was asking just about the detection limits and whether they were achievable by the labs—and I didn't see anything on the table that raised a red flag with me, but I would appreciate just a quick check with your lab manager just to make sure that these are readily attainable. There's nothing that I'm concerned about on there, but if you could do that check, that would be great and that's all that I had other than editorials on this Section 17.

Jennifer Zygmunt

Okay. Yeah, we can do that.

Brian Deurloo

Not it.

Jennifer Zygmunt

I now have three phones.

Jennifer Zygmunt

Uh, this one's being left with somebody in Casper today. So I apologize, Madam Chair.

Lindsay Patterson

Section 18 is "Water Quality Criteria for Protection of Fish Consumption Use". This incorporates fish consumption criteria from multiple sections and Appendix B.

Lindsay Patterson

Similar to the others, it's consolidated in numeric and narrative criteria. We reworded the narratives, we have a general narrative. We have a narrative that's specific to unacceptably high risk for acute, chronic, or carcinogenic effects in humans that consume fish. In this section, end up referencing the numeric criteria that's in Section 17. Again, that table includes both drinking water and fish consumption criteria. We clarified that the numeric criteria applicable to the effluent-dependent fish consumption use can be modified using that process in Section 25. Any questions about Section 18?

Lorie Cahn

This is Lorie. I have none. Does anyone on the Board?

Brian Deurloo

I do not, this is Brian.

Lorie Cahn

Can you please proceed?

Lindsay Patterson

Section 19 is "Water Quality Criteria For The Protection Of Industrial Use And Industry Use"; was previously Section 19 "Industrial Water Supply". This was previously a narrative. It is still a narrative. It was just revised for consistency with the other narrative criteria that are specific to each of the uses. And then there's a general narrative to protect waters designated for industry. Any questions about Section 19?

Lorie Cahn

Brian's probably concerned about double negatives here, correct?

Lindsay Patterson

For sure.

Brian Deurloo

I'm keeping my—I'm biting my lower lip, but...Look at this, we say this in narrative criteria Section 19, it says "pollution shall not result in the non-support of industry use" yet in "ii" says "unacceptable adverse effects to raw water treatment". Would it be okay if we said

June 13, 2024 Water and Waste Advisory Board Meeting

37

“unacceptable adverse impacts to industrial uses”? Aren’t you trying to say the same thing?

Jennifer Zygmunt

So with the—

Brian Deurloo

So instead of saying “non-support of industrial uses”, you say “the unacceptable adverse impact on industrial uses”?

Jennifer Zygmunt

Yeah, I appreciate the question, Brian. I understand what you’re asking. I think I’m hesitant to let go of “non-support” or something that we can come up with there, because that then sets the foundation that if the use isn’t being supported then we have what is called a water quality impairment as on the 303(d) List. So I think we want to be clear that the criteria are protective of that use being supported, and I don’t know if I’d be comfortable just opening it up to unacceptable impacts to industry in general.

Brian Deurloo

I’ll drop it. I’m gonna drop—it’s not that big a deal, obviously. Yeah.

Jennifer Zygmunt

Okay, but comment and intent understood.

Brian Deurloo

Okay. Thanks.

Jennifer Zygmunt

And we’ll keep that as big picture feedback.

Brian Deurloo

Yep, I feel a little silly, keep bringing it up.

Jennifer Zygmunt

And we’ll look at the double negative there.

Brian Deurloo

Nothing else for me, Madam Chair. Thanks.

June 13, 2024 Water and Waste Advisory Board Meeting

38

Lindsay Patterson

Section 20 is "Water Quality Criteria For The Protection Of Irrigation Use". So if you remember the agricultural use, previously, is separated into irrigation and livestock. And so there's two sections which basically tier from the previous Section, 20 agricultural water supply. So we revised the narrative, basically just pulled the aspects of that narrative criteria specific to irrigation and then added a general narrative to protect waters designated for irrigation. Should be. Any questions about the irrigation use narrative criteria?

Lorie Cahn

Please proceed.

Lindsay Patterson

Section 21. Similar, but for livestock. The narrative criteria pulls aspects of the previous agricultural section. There's a general narrative to protect waters designated for livestock. Any questions about the livestock use criteria?

Brian Deurloo

Nothing for me, Madam Chair.

Lindsay Patterson

Section 22 is "Water Quality Criteria For Protection Of Recreation Uses" the previous version, or the current version of the Chapter, includes the *E. coli* Bacteria, Section 27. Didn't have recreation, but the *E. coli* criteria is essentially our only water quality criteria that's specific to recreation, so the proposed revisions include a narrative criteria similar to all of the sections that we've been discussing. And then we're proposing to remove these four single sample maxima that were used only for purposes of developing water-quality-based effluent limits for point sources and for posting recreational use advisories. The current *E. coli* criteria has a geometric mean, and that's primarily what the permitting program has been using to protect surface waters from excessive amounts of *E. coli* from point source discharges. And then we have a recreational use. Guidance waterborne pathogen public notification system that we use to work with operators who are collecting data where it's appropriate to notify the public that there may be an elevated health risk from waterborne pathogens. So we don't need that to be part of the Water Quality Standards because it's not a water quality standard. Any questions about Section 22?

Brian Deurloo

No.

June 13, 2024 Water and Waste Advisory Board Meeting

39

Lorie Cahn

I have none. Okay.

Lindsay Patterson

Section 23. "Water Quality Criteria for the Protection of the Scenic Value Use". So we have a scenic value use in the current version of the Chapter. It doesn't have its own criteria section. So for consistency, we essentially created sections for each of the different designated uses, and then we consolidated the narrative criteria that were in the Chapter that were applicable to the scenic value use. We have a general narrative to protect waters designated for scenic value that are in the proposed revisions. Any questions about Section 23?

Lorie Cahn

I just have a wording comment on line 999. I would move "wastes" up to after "settleable solids", so that there's only one "and" as opposed to "floating materials and suspended solids, and wastes". So it would read "colors, taste, settleable solids, 'comma', wastes 'comma'" Nope, no, it's still floating. Yeah, "floating materials and suspended solids". But I'm not going to die on my sword on that one. But I just thought it would read easier.

Jennifer Zygmunt

No, Madam Chair. I think that's a good suggestion and we will incorporate that.

Luke Esch

Madam Chair, this is Luke. Hey, Jennifer, can you give me a little bit of background? Do we have areas that are designated as scenic use already? Who makes that determination? And how does that work?

Jennifer Zygmunt

Yeah. Thank you for the question. So all waters have the scenic use by default. We currently do not have any impairments for scenic use, but that scenic use was established, I think, very early on in Chapter One rulemaking. So all waters have a scenic use, but it is not a use that we've done any assessments for.

Luke Esch

Is there a plan to do assessments for scenic use?

Lindsay Patterson

June 13, 2024 Water and Waste Advisory Board Meeting

40

I think we did discuss this quite a bit with our stakeholder group about whether it was appropriate to continue to retain the scenic value use, given how subjective it is and the fact that we haven't actually determined attainment of the scenic value use. But it was decided that we should leave it for now, given all the other changes in the rule. But I think there is an interest in potentially moving away from having that use, but I do think it might raise some concerns for some stakeholders. And I do know some states have interpreted their aesthetic use or their scenic use related to trash and developed total maximum daily loads for trash that may be in surface waters. We have not, but some states have.

Jennifer Zygmunt

Yeah. Thanks, Lindsay. So it is a good question. And Lindsay reminded me that is something that the stakeholder group talked about and it is a use that's at the states discretion and we could take it out, we could develop assessment methods to evaluate scenic use. I will tell you it's not high on our priority to do that. But we are open to input about whether or not we keep the scenic value use in, as Lindsay indicated, I think it's worth discussing. We didn't feel like it was a change that we needed to consider at this point, but if there is interest from the Board or the public, we could revisit that discussion.

Luke Esch

Thanks, Jennifer. I guess if we're not using it, it seems like one of those things that we probably should get rid of it, lest it be used as a vehicle for I guess pursuing litigation or certain I guess agendas against the state for you know the values that may... They're very subjective, and if you find something very subjective and you can't put science to it or numbers to it, then it seems like that could just draw the state into the litigation and would be problematic. So that's my two cents.

Jennifer Zygmunt

Understood. And yeah, thank you for that comment Luke. And that is something that we can take back and discuss internally.

Lorie Cahn

Any other comments or questions from the Board on Section 23? Hearing none, let's move on.

Lindsay Patterson

Section 24 is a similar section, but for the protection of the terrestrial wildlife use. If you remember, this is renamed from our wildlife use, we just didn't have a separate section that talked about specific protections for the wildlife use. So similar to the others, it's consolidated the narrative criteria and then we have the general narrative to protect waters designated for terrestrial wildlife. Any questions?

June 13, 2024 Water and Waste Advisory Board Meeting

41

Lorie Cahn

This is Lorie. I have just kind of a general question about why this was broken out into all these little sections that are essentially structured the same, where they have "narrative criteria" and "the non-support of..." and then "unacceptable adverse impacts to...". Is there a reason to have them all broken out separately in separate sections rather than kind of...Would it be too confusing to have them all combined? Or anyways, just that was my question, I don't have a strong feeling about it. I'm just wondering why you chose to do it this way.

Lindsay Patterson

Yeah, it was done this way so that each designated use has specific water quality criteria associated with it. In some instances it's only narrative. In the instance of aquatic life, and drinking water, fish consumption; there are actual numeric thresholds associated with it, which doesn't lend itself to combining all of the criteria into one section. Because you know that we're sort of limited, otherwise you get quite far down into the—I don't know what the term is—the different numbering. It does make it challenging to read, I think, if we were to combine all of the designated uses criteria together.

Jennifer Zygmunt

And recognizing the interest of consolidation, I think it would be our preference to keep this structure for the reasons Lindsay just talked about in that it's easier for users to refer to specific sections for use, and granted, like you said, the narrative criteria and the non-support statements are similar. But if, over time, there was interest in developing other criteria just for industrial use or for the recreation use, then I think it makes it more intuitive to clearly state those criteria for each use. So in our opinion, it's more reader friendly, more user friendly.

Lorie Cahn

Okay. Thank you for that. Appreciate it.

Lindsay Patterson

Section 25 discusses "Modifications to Water Quality Criteria". This incorporates a number of different provisions from different sections that all speak to how to modify water quality criteria. We included federal requirements that the water quality criteria protect existing uses, designated uses, and the highest attainable use. We aligned the modifications to water quality criteria based on the "substantial and widespread economic and social impact" with federal regulations. The current version of the Chapter essentially says we can't base modifications to water quality criteria on that factor, but that's not a limitation that's currently in the federal regulations. And then we align the requirements for conducting a use attainability analysis with the federal regulations. So similar to how we

June 13, 2024 Water and Waste Advisory Board Meeting

42

discussed the modifications to designated uses, the federal regulations speak to requiring up this UA analysis only for aquatic life, recreation, fish consumption, and terrestrial wildlife uses on waters that are subject to the jurisdiction of the Clean Water Act. And then we align the approval process with the federal regulations, meaning that the previous version—or the current version—of the Chapter essentially says the water quality criteria needs to be adopted right through revision of the Chapter. And then EPA has 60 days to approve it or 90 days to disapprove. However, the federal regulations say that EPA needs to approve Water Quality Standards for them to be effective for Clean Water Act purposes, so the proposed revisions are consistent with those requirements. And then, I mentioned previously, there's a number of references for deriving site-specific criteria. Those were removed since we can use any method as long as the criteria are scientifically defensible. Does anybody have questions about Section 25?

Lorie Cahn

Questions from the Board.

Brian Deurloo

None for me, Madam Chair, this is Brian.

Lorie Cahn

Okay. I just have two minor things on page 1-32 at the top there, on line...What 1019? I think the "be" was inadvertently left in: should say "water quality criteria shall protect downstream" rather than "shall be protect".

Lindsay Patterson

Yes, thank you. Okay.

Lorie Cahn

Where it says requirements "SubParagraphs (A) through (D)," I think we're missing an "of" or an "in". "Requirements of," or "requirements in SubParagraphs (A) through (D)". So I think there's a word missing there.

Lindsay Patterson

Yeah. Thank you.

Lorie Cahn

That's all that I had on Section 25.

Lindsay Patterson

Section 26 is "Discharger Specific Variances". This was Section 37 in the previous version of the rule of the same name, so we just reorganized and reworded the provisions for consistency with federal regulations, and then we—similar to the process for modifying designated uses and petitioning the Department for designation of an Outstanding Aquatic Resource Water—all of the discharges specific variances essentially need to be made through revision of the Chapter using that process in the rules of practice and procedure, Chapter 3. And then the evaluation process, the reevaluation of a discharger specific variance and the termination process has been aligned with the Wyoming statutes and the federal regulations. Any questions about discharge or specific variances?

Lorie Cahn

I have none. Anyone else on the Board?

Brian Deurloo

Madam Chair, this is Brian. The only comment I might make is looking at line 1130. The depart—I've never seen it worded this way: "The Department shall publicly notice the reevaluation and provide an opportunity for public comment for a minimum of 30 days". Is your public notice 30 days as well? Or no, it's oh, no, it's a public notice, never mind.

Jennifer Zygmunt

I think the intent there, Brian, is that yeah, it would be a 30 day public notice period during which we would accept public comment.

Brian Deurloo

Okay, that's fine. That's fine. Yeah.

Jennifer Zygmunt

Okay.

Brian Deurloo

No comment. Thank you.

Lorie Cahn

Okay, please proceed, Lindsay.

Lindsay Patterson

Section 27 is retitled "Mitigation Requirements for Wetlands Not Subject to the Jurisdiction of the Clean Water Act". This was previously Section 12, titled "Protection of Wetlands". The change in the name was to clarify that it's not generally protection of wetlands, since

June 13, 2024 Water and Waste Advisory Board Meeting

44

we have designated uses, and therefore water quality criteria assigned to wetlands that are covered in the Wyoming surface water designations. Essentially, that adjacent wetlands get the same designated uses as the waters to which they're adjacent. And then isolated wetlands, they are assigned designated uses by default, so a limited aquatic life use—and then a number of other uses—so the change in the title was quite important, since the previous title was pretty confusing. And then we also just wanted to add—we added a clause to recognize that in certain instances that destruction, damage, or impairment of wetlands may be authorized or exempted. That wasn't included in the current version of those provisions. And so it's quite important since there are exceptions to both Clean Water Act-protected wetlands and for waters that are not subject to the jurisdiction of the Clean Water Act, which is applicable here. Any questions about Section 27?

02:40:04 **Lorie Cahn**

Does anyone on the Board have a question?

Luke Esch

Madam Chair, I have a question. This is Luke. Jennifer, how often is this? I mean, and this is not necessarily the language of the rule, I don't have a problem with that. But how often is this section utilized, really?

Jennifer Zygmunt

You know, yeah. Good question. We don't often see impacts to wetlands that are non-WOTUS, that would qualify for mitigation, meaning that there's more than an acre of impacts to wetlands. So from a permitting perspective, and as we advise project proponents on permits that may be required through us, we do not often see this. More often we see a wetland that is a WOTUS, that would require a 404 permit and a 401 certification. But I would say it's pretty rare that we would see a non-WOTUS wetland. Where we'd require mitigation through a permitting program.

Luke Esch

Are you still receiving notice if there's an intent to drain a non-WOTUS wetland?

Jennifer Zygmunt

I have not seen a notice to that effect during the time that I've been an administrator. I don't have further history than that, but I'd be happy to look into that further.

Luke Esch

Oh no need. Jennifer, I know you're busy enough as it is. Thanks. I was just curious, thank you.

June 13, 2024 Water and Waste Advisory Board Meeting

45

Lorie Cahn

I have a comment on line 1160. I know in the literature you sent us to read about changes you made, you tried to eliminate the use of "man-made", and there's "man-made" again. So can we just say artificial wetlands or? I mean, I know human made wetlands is an awkward thing to say, but I'm just looking for something to get rid of "man-made". Get rid of "man".

Lindsay Patterson

Madam Chair, this is a term that's included in the statute.

Lorie Cahn

Okay.

Lindsay Patterson

So that's the one exception.

Lorie Cahn

Okay. All right. And if there's no other questions from the Board, move on to Section 28.

Lindsay Patterson

Yep, Section 28 is the "Incorporation By Reference" section. That is a new section.

Lindsay Patterson

And then that was created for consistency with the Administrative Procedures Act, which talks about the requirements for incorporating materials by reference. Any questions about Section 28?

Lorie Cahn

None for me. Anyone on the Board?

Brian Deurloo

None from me.

Lorie Cahn

Okay. Well, hearing none, does this seem like a good time to break for lunch? And I guess I'll ask how long people need for lunch.

Jennifer Zygmont

Madam Chair, I'll leave it to your discretion. I will note that we do have one member of the public in the room, Ken Hamilton, with the Farm Bureau Federation. He may just have

June 13, 2024 Water and Waste Advisory Board Meeting

46

some questions about Chapter One. If you're amenable, we could give him some time to ask those questions. And then he can better determine if he'd like to submit comments and just allow him to continue on with his day.

Lorie Cahn

Excellent suggestion, I think that would be great. Mr. Hamilton, if you'd like to introduce yourself and let us know if you have any questions or comments.

Ken Hamilton

Thank you, Madam Chair. Ken Hamilton. I represent the Wyoming Farm Bureau federation. Couple of comments. I do appreciate the effort DEQ went through to try and accommodate this whole process. I've talked with Jennifer a little bit, and it's a little bit like eating the elephant because there's a lot of information here. and when you review the Chapter One water quality regulations, you really don't pick that up until you start to go into a lot of the documents that was provided earlier. So there's a couple of questions I have, and I think one of them just kind of goes back to the last item you talked about and that's the "incorporation by reference". When you incorporate these by reference, and there's a change in the reference...Does that then necessitate an entire rule making process by the body, and if so, how often is that going to be? Because I know these things are rather difficult and it seems like—Not that some of the folks on the Water and Waste Advisory Board don't get paid a lot, but if they're in here a lot trying to take care of this, it would be something that I think would just, I think the general public would like to know a little bit about that. Another question that I have—and this goes back to one of the supporting documents where they talk about some of the things that, and they used the term—There shouldn't be any changes in the way DEQ does this, or minimal changes I think, is the wording. So you know, at what point...It seems like that's kind of one of those terms that, if you suddenly discover that there are some important changes that we didn't recognize, who makes that determination, and is that something that a user would perhaps bring forward and say, "Okay, I think that this is more than just a minimal change", so that was one question that I had as well. The other one, and I'm looking at the incorporation in the last section. I know in one of those sections they incorporate Game and Fish database, and that process has always had a little bit of a concern for me because we're incorporating another agency's database into this document. So my question would be, if I were affected by Game and Fish's classification, the stream body is a fishery of some kind and I don't feel that that is accurate information...Is that...Then are you required to go through the revisions to DEQ's water quality stuff, or are you supposed to arm wrestle with Game and Fish? Because I know in some instances, Game and Fish will classify a stream as a certain kind of a fishery, but it may vary from down here where it runs into the next river, maybe up upstream or whatever. So the accuracy of that database could potentially come into question, and I was a little unclear as to how that information would be addressed if someone did have concern about that. So I think those were the major

June 13, 2024 Water and Waste Advisory Board Meeting

comments, or questions that I had, Madam Chair. I'm happy to, you know, answer any questions the rest of the Board might have on that.

Lorie Cahn

I would like DEQ just to quickly, I think they can answer your questions right now, so I appreciate them doing that. Thank you, Mr. Hamilton.

Lindsay Patterson

So the first question was related to incorporation by reference, and the intent with the incorporation by reference is to have it be as narrow as possible, so we're not incorporating reams and reams of federal regulations in this instance, or, you know, the entire Clean Water Act. But it does mean that if there's a change to, for example, the Colorado River Basin salinity control standards, we would need to go through a rulemaking and then adopt the most recent version of that. We are required under the Clean Water Act to review our Water Quality Standards every three years, so we would anticipate doing a review and then determining which aspects of the rule would need to be updated, including the incorporation by reference. And then in terms of...

Lorie Cahn

Excuse me, could I just add that that's why the language says "in effect as of April 1st, 2024". So if something changed on April 2nd, 2024, that would not apply until we go through and do another rule making. So I just wanted to....So it's not a continually moving target. There's we, the regulated public knows what they have to meet that was in effect as of April 1st. And so I just wanted to clarify that.

Jennifer Zygmunt

Yeah. And I'll just emphasize what Lindsay pointed out, which we don't have to undertake new rulemaking immediately if one of the references changes, we would--unless there was some urgent reason we would lump that in with the next triennial review. So I don't think that the incorporation by reference will cause us to do more rulemaking than we would normally do, but it's a good question and it is something that we talked about and considered as we moved to incorporation by reference.

Lorie Cahn

Yeah. And I did not mean to imply that any different rulemaking would need to occur in less than the three years, necessarily. So I didn't mean to...I didn't hope I didn't imply that cause that's not what I meant. So thank you.

June 13, 2024 Water and Waste Advisory Board Meeting

48

Lindsay Patterson

And the second question had to do with aspects of the supplementary materials where we were describing, you know, the potential impacts of the proposed revisions or the anticipated impacts. And so we took, you know, our best professional judgment to determine which aspects of the proposed revisions would have an impact and where we would potentially see them. Most of the impacts we're anticipating is to our assessment program because the assessment program has a document or assessment method that essentially translates the Water Quality Standards into determining whether uses are supported or not, and so they aligned very closely with the Water Quality Standards. And then we did think in some instances there might be minor changes to some effluent limits as a result of some of the changes that we're making, potentially as a result of the new methods that are included for calculating low flows. And if there is something that we're missing, we certainly would appreciate feedback on that during, you know, the comment period so that we can better understand and evaluate potential impacts that users of the standards may have identified that we may have overlooked, but we are generally anticipating most of the impacts will be to our assessment program. Not necessarily how we're determining attainment, but just the documentation that they have because, again, it so closely aligned to the current Water Quality Standards.

Jennifer Zygmunt

And to add to the potential changes to effluent limits again with this proposed revision, we have made very minor changes to the actual criteria that would then be translated into effluent limits through the permitting program. And in fact, I think we've done some good work in identifying where in alignment with federal and state requirements we can have some more flexibility in how we determine the appropriate effluent limits by using the standards. So again, as long as you indicated we would see minimal impacts to the regulated community, in particular who receive WYPDES permits with effluent limits. But as always, if somebody...Interested parties have the right to petition the Department for further rulemaking if there is an interest, and if they see impacts from a rule that we aren't anticipating right now.

Lindsay Patterson

And then the third question had to do with the Wyoming Game and Fish database. So that is a great question. We, our current designations for most of the Surface Waters of the State, are based on a Game and Fish database from June of 2000. So the standards don't incorporate that database by...Updates to that database don't automatically result in an update to the Water Quality Standards. So essentially everything that's in place now is what we will go with, and then if there are interests in modifying the designated uses of individual surface waters, we would work with the entity that wanted to petition the Department, we would consult with Game and Fish. We have experience modifying those

June 13, 2024 Water and Waste Advisory Board Meeting

49

uses, so hopefully that clarifies that the database does...Our use designations don't automatically get updated as Game and Fish updates their information, but at the time those designations were made, it was a 2001 revision of the Water Quality Standards. That was the best information that they had available at that time to assign the cold water fisheries uses, warm water fisheries uses, and then the non-game fish uses to Surface Waters of the State. Any follow up questions on that?

Ken Hamilton

I'm good, thanks, Madam Chairman.

Lorie Cahn

Before we break for lunch, I would just like to offer, I notice there's a few people on remote--on Zoom. If there's anybody that wants to make a public comment now on Chapter One, just please either unmute yourself and say yes I do, or raise your hand in the chat and there will still be opportunity for public comment at 2:00, so if you don't want to say something now, you're welcome to talk about Chapter One at 2:00. So, just please unmute if there's anybody there that wants to say anything.

Jennifer Zygmunt

Madam Chair, while you're seeing if anybody raises their hand, I don't think that 2:00 is set in stone. So, you know, it's your discretion if you want to wait until 2:00 to take comments. Or we could reconvene after lunch and see if there's any commenters at that time.

Lorie Cahn

That's fine. We can. We can do that too. I just think because at the beginning of the meeting, I mentioned 2:00. I want to make sure that at 2:00, in case there's somebody who's only going to sign on at 2:00, that they've got an opportunity. Okay, well, since I don't hear anybody making public comments in line to do that, I think we should break for lunch. Jennifer, how long does everybody need? How much time?

Jennifer Zygmunt

For those of us in the room, I know there's several locations nearby, so I'm sure we could do maybe an hour and a 15 minutes, just for a little buffer, and reconvene at 1:30.

Lorie Cahn

Okay, that sounds good. We'll reconvene at 1:30.

Jennifer Zygmunt

Okay.

June 13, 2024 Water and Waste Advisory Board Meeting

50

Lorie Cahn

Meeting adjourned. For now. Thank you.

(Meeting adjourned for lunch)

Lorie Cahn

We'll reconvene the meaning of the second quarter Water and Waste Advisory Board. Go ahead.

Jennifer Zygmunt

So, Madam Chair, that concluded our presentation on Chapter One. We do have, in the Board members' packets, a strike-and-underlined version of Chapter Two that I think is pretty self-explanatory in terms of what changes were made to Chapter Two in response to Chapter One. I don't know that we need to go through that in detail. In summary, I can highlight the sections where we have made changes. Lines 113 through 174-ish, on pages 2-3 and 2-4, is where we've moved the short term turbidity increases and the fish toxicant applications from Chapter One to Chapter Two. Again, the AG's input was that these are not standards, these are discharges under a permitting program—so that's the reason for the move. Lines 1245 through 1281 is where we've similarly incorporated pesticide applications: taken it from Chapter One, moved it to Chapter Two. Lines 1965 through 1966 on Page 2-48 is where we've removed a reference to Chapter Six for the Colorado River Salinity Control Forum Standards. As Lindsay mentioned, Chapter Six has been repealed and we've referred to a different reference for those standards. So again, just a correction to the right reference there, and then throughout the rule, we've changed the reference to a Class 1 Water to Outstanding Aquatic Resource Waters. So that's the highlight of Chapter Two—and again only changes related to changes to Chapter One.

Lorie Cahn

Okay, I propose that then, if you're ready, we'll go through section by section and see if the Board has any comments or questions. Does that work for you?

Jennifer Zygmunt

Madam Chair, we could, if that's your preference, but again, there's not broader changes throughout this because it is a pretty lengthy rule. But if you'd like to go visit those sections individually, we can.

Lorie Cahn

I would like to visit them individually. So for Chapter Two, Section 1 does anybody on the Board have any comments?

June 13, 2024 Water and Waste Advisory Board Meeting

51

Jennifer Zygmunt

And, Madam Chair, I would limit it to only sections where we've made revisions. You know, at this time we don't want to take feedback on any non-revised sections of Chapter Two just because we've not done a broader stakeholder outreach effort on that rule. We would certainly like the Board's feedback on any changes that we've made, but it would not be our intent to take other changes to Chapter Two at this time. We know that is a rule that needs to be updated and it will be a longer-term project to undertake that.

Lorie Cahn

Okay, so if we find editorials and things like that, do you want me to work? I have editorials on those sections, you want me to work with Gina on those or not even at this point?

Jennifer Zygmunt

Not at this time, Madam Chair. Again, we know that Chapter Two needs quite a bit of revisions. We would prefer just in the interest of making it clear to the public what we're doing, and not raising concerns from the many stakeholders who will be very interested in Chapter Two revisions, that we don't make other edits than what we're proposing to accommodate the Chapter One revisions at this time.

Lorie Cahn

So when this does go forward, as a package of One and Two, before that happens, us as a Board, the Board and the public will have an opportunity to comment on the sections that haven't been changed?

Jennifer Zygmunt

No, Madam Chair again, we're trying to limit the scope of revisions to Chapter Two to only those changes that we need to make to take things from Chapter One to Chapter Two and correct references that we've corrected in Chapter One, such as the reference to Chapter 6. Otherwise, again, we just don't want to make further changes to Chapter Two without having been able to consult with, say, the Petroleum Association of Wyoming, Wyoming Mining Association or nonprofit organization. So, we are planning an effort to update this rule, but we would like to start with outreach before making broader revisions—but we need to make the changes that we proposed so that we don't have a gap in coverage between what we've taken out of Chapter One and until we do the broader evaluation to Chapter Two.

Lorie Cahn

Okay, but my question is, once you've done that outreach, this Board will have an opportunity to look at the entire Chapter Two, not just the changes?

June 13, 2024 Water and Waste Advisory Board Meeting

52

Jennifer Zygmunt

Absolutely right. Take a broader evaluation of Chapter Two. It will be the normal process where we consult with you on the whole rule, absolutely.

Lorie Cahn

Okay. Then I can hold off on my editorial comments. So, the first place that we have changes would be in Section 2, so I'll ask the Board if anybody has any comments or questions on Section 2.

Jim Cochran

Madam Chair, this is Jim Cochran. I didn't look at Chapter Two with the intention of making comments today, so I don't have any.

Lorie Cahn

Okay.

Luke Esch

Madam Chair, this is Luke. Just overall, I don't have any comments on Chapter Two. I did review it, but I don't have any comments on any of those sections. It seemed pretty clear that what they did in Chapter Two was only as a result of Chapter One, so I don't have any comments on Chapter Two.

Lorie Cahn

Okay, well, I didn't... Brian, did you have anything you wanted to say on Section 2?

Brian Deurloo

No, ma'am.

Lorie Cahn

Okay, so I did review the entire thing, not just the changed sections. So, I do have some questions I think would be helpful to bring up now that you can think about, since you're going to be looking at all of Section 2 so I don't have to make them again or make—it might be stuff you might want to address. So, is that okay with you, Jennifer, if I bring up a few comments or questions I have on Chapter Two?

Jennifer Zygmunt

Certainly, Madam Chair. That's your discretion. If you'd like to give us some high level feedback on the Chapter, I'd be happy to consider that when we do move forward. But I'm certainly not prepared to give any kind of response or thoughts on what we might do moving forward.

June 13, 2024 Water and Waste Advisory Board Meeting

53

Lorie Cahn

Okay. Fair enough. I guess kind of a general comment for me and I'm glad to hear that you haven't, that you are planning on revising it because I don't feel that it reads as clearly as Chapter One, and in particular, some particular sections seem very heavy with "lawyer lingo," kind of legalese. So, just as you're reviewing it, I would ask that you kind of look for ways to simplify the language. I think there's places where it's pretty heavy. And then, so I have a question on 2-8, on line 320, which is why—and maybe it's just ignorance on my part—why all references to the *Code of Federal Regulations* are July 1st, 2004?

Gina Thompson

Madam Chairman, it's 2004 because that was the last time that the Chapter was significantly revised.

Lorie Cahn

Okay, great. Thanks. Just that wasn't...I didn't understand that so...

Gina Thompson

We've had minor revisions since then, but because this is... It's a chunky rule. It's pretty big. We've always limited the scope on those little minor things that we needed to do, and we haven't done a thorough review of any incorporated material.

Lorie Cahn

Okay.

Brian Deurloo

Madam Chair, let me ask a question, please. When was the last time Chapter Two was reviewed by this Board?

Gina Thompson

I'm thinking it was 2015 when we incorporated the chapter formerly known as Chapter Six as Appendix O, as part of an effort to streamline the number of chapters we had in our inventory. But I believe that was the last time that we handled this one.

Brian Deurloo

So nine years ago. Yeah. And you'll say, well, I've been listening the whole time, but did I hear that we're reopening it for review in the third or fourth quarter of this year, or not?

Jennifer Zygmunt

No, we don't have a time frame. We are...Jason Thomas—I don't know if he's back online as the WYPDES section manager—he and I have been talking about an approach to update

June 13, 2024 Water and Waste Advisory Board Meeting

54

Chapter Two. We're going to need to start with ample outreach before we have a draft to present to the Board, and I think we've learned a lot from the outreach we did for Chapter One, that I think would inform how we move forward with Chapter Two, but changes will impact a number of stakeholders; primarily industry folks who get discharge permits through us, whether that's a stormwater discharge, permit coverage or an individual discharge permit. So it is one that we need to talk thoroughly with our stakeholders about industrial permittees, as well as our nonprofit organizations to get input. And this is another rule that's a federal primacy program, so we'll have conversations with EPA as well.

Brian Deurloo

Okay. Thank you.

Lorie Cahn

So, Jennifer, do you anticipate that when we see this at our fourth quarter meeting, when we see One and Two, that you'll be asking us to recommend sending them forward to EQC as a package? One and Two together?

Jennifer Zygmunt

Yes. So, our recommendation will be that we move Chapters One and Two forward to formal rulemaking in the EQC together. Now, I know I said fourth quarter at the beginning of the meeting. I think that's kind of to be determined based on whether we receive any comments during the meeting today, and the extent of comments that we receive before the 5:00 PM deadline today. If there's enough time for us to review those comments, and for us to put together a response to those comments, and have a public notice before the third quarter meeting; that's a possibility. That might be too tight of a turnaround time, so I would say either third quarter or fourth quarter is when we'd come back with a revised draft for Chapter One, based on feedback we received and then yes, we would want to move the two rules forward together.

Lorie Cahn

Okay, so essentially... Chapter Two, you're going to go before we are asked to move this forward. You're going to be going back out to the public and asking for comments, and the stakeholders as well, asking for...

Luke Esch

Madam Chair, I think it's just going to be the limited portion of Chapter Two to incorporate these changes to Chapter One. Chapter Two outreach is going to be probably a year going on, so there's no way that old Chapter Two revisions are going to be in this fourth quarter or third quarter recommendation to the EQC. This Chapter Two is so huge, I think it's probably the most significant Chapter Water Quality has, so there's going to be a lot of outreach. I

June 13, 2024 Water and Waste Advisory Board Meeting

55

would imagine it's going to make this outreach, that has been very thorough on this chapter, pale—I mean, it's going to pale in comparison. This is just, I think the Chapter Two outreach is just going to be so much more.

Lorie Cahn

Okay.

Luke Esch

So, the limited...Just these changes that we discussed on Chapter Two, those are the ones that are going to be going before the EQC—the wholesale Chapter Two is going to be down the road.

Lorie Cahn

Okay, alright.

Luke Esch

And Jennifer, Madam Chair, if I may. Jennifer, what is the next rule package that you foresee bringing to us?

Jennifer Zygmunt

Yeah, great question. So, we are working on preliminary revisions to Chapter 28, which is our "Commercial Oil Field Waste Disposal Facility" rule. It has not been that long since the Board has seen that rule, so it's still pretty applicable. But in applying that rule over the last four years, we've noticed some things that we think need cleaned up. We have some steps with public notices that I think we could streamline. So Gina and Keenan and staff are working on proposed revisions on that rule. They should be pretty limited. We do need to do some outreach with PAW and the other stakeholders, but we would anticipate bringing that before the Board potentially by fourth quarter as well.

Jim Cochran

Does that include injection wells?

Jennifer Zygmunt

No, that does not include injection wells. Some of the other rules packages that we are again in the very preliminary steps of working on would be updates to Chapter 27, which is our "Underground Injection Control: Class One and Five Wells". There again, that's another federal primacy program where we're going to need to do some pretty substantial outreach to the stakeholders and the permittees, but we are working on some proposed revisions to that rule. Along with Chapter Four, our "Spills, Reporting and Response" rule. We've had some staff turnover recently, and once we get our new Spills Coordinator onboard, I plan

June 13, 2024 Water and Waste Advisory Board Meeting

56

to start working with them on Chapter Four and bring that before the Board, tentatively sometime within the next year. So Luke, to answer your question, those are the rules that we're contemplating revisions to right now. So again, the broader effort to update Chapter Two; Chapter Four, Spills; Chapter 27, Underground Injection Control; Chapter 28, COWDFs.

Luke Esch

Okay. Thank you.

Brian Deurloo

Madam Chair, it's almost 2:00. Didn't know if you wanted to stick to the timeline of breaking for public comment at 2:00.

Lorie Cahn

I do. I just have just a question I want to ask.

Lorie Cahn

Jennifer, so for—just as an example on page 2-11 in Section, this is in Section...This is the definitions I believe...Section 3: Definitions. We have, in the top partial paragraph, we have that problem with the facultative species being in the problem of being "less than three," when we need to include three. So, if we were to find some errors like that, I would think you would want to change those before you send this forward because you're going to be making those changes in Chapter One, and so you probably want to know where they occur in Chapter Two to make those changes. Am I correct?

Jennifer Zygmunt

Madam Chair. Yeah, if there's things that we've changed in Chapter One that we need to update Chapter Two to match, I'm open to things that maybe we didn't catch. So, potentially updating some definitions would apply. Then we would accept those comments.

Lorie Cahn

Okay. So, I'll make that comment on line 417, it should read: "The community yields of prevalence index value of 3.0 or less, where OBL = 1, etcetera".

Jennifer Zygmunt

Okay. Thank you.

June 13, 2024 Water and Waste Advisory Board Meeting

57

Lorie Cahn

Okay. And then I think I'll just keep going until 2:00 and then we'll open it up. Oh, it is 2:00. Okay, I will pause now with our comments and just ask if any member of the public would like to make public comments on Chapter One and the changes in Chapter Two. Seeing none, then I would like to continue.

Brian Deurloo

That was easy.

Lorie Cahn

And Board members, please feel free to interrupt if I'm skipping over something you have a comment on. So, the next changes are starting on page 2-30 and 2-31, and I don't have any comments or questions.

Brian Deurloo

I do not either, Madam Chair. It's Brian.

Lindsay Patterson

Okay.

Lorie Cahn

The next thing I see is line 1965 on page 2-48, and I don't have any comments on that strikeout.

Luke Esch

Madam Chair, I have no further comments on Chapter Two. Perhaps you can just go, unless Brian, you guys have anything else—perhaps we can just focus on your comments that you have.

Brian Deurloo

Yeah.

Lorie Cahn

Okay.

Brian Deurloo

This is Brian. I agree with Luke.

Lorie Cahn

June 13, 2024 Water and Waste Advisory Board Meeting

58

Okay. On page 2-58, line 2382. I don't believe that that sentence is actually a sentence, so something needs to be fixed there. "Individual permit application requirements for industrial activities."

Jennifer Zygmunt

So, Madam Chair comment noted. However, those kinds of revisions are not ones that I will propose making at this time. Again, just to keep it limited to Chapter One-associated revisions.

Lorie Cahn

Okay. I guess I just hate to have us go forward with the rule that hasn't been reviewed in its entirety, but it's...

Luke Esch

I think I would agree with Jennifer and, just in terms of the narrow scope of Chapter Two, just in terms if we start branching out beyond what they proposed, then that opens the entire Chapter up prior to having the thorough stakeholder outreach. And I think that's a bigger undertaking than what's been proposed by DEQ at this point.

Lorie Cahn

Well, my understanding from the AG's office in the past was that if something is put on the table for review, anybody can make a comment on any portion of that rule, not just the changed sections of that rule. So conceivably, when this goes out, if it goes out for another review, if it does public comment, then somebody could make a comment to anything on this whole chapter. That's my understanding.

Luke Esch

Sure, Madam Chair, absolutely they can, but DEQ can certainly respond by saying that the scope of this review of Chapter Two is limited to the changes that were made in Chapter One. If we start making stuff besides what they've kind of initially proposed, I think that kind of opens Pandora's box a little bit, and then we'll get input from all over the place before the DEQ's had a chance to run this through the stakeholder groups that they've kind of put together. Which, I think they've done a great job. I think it's really comforting to me to be at this point where there's nobody in the audience there. I mean, that's kind of comforting. The fact that everybody's concerns have been resolved prior to this point just really does show the great work that DEQ's done up to now.

Lorie Cahn

Right. Okay. Well, and I would have preferred for Jennifer to be answering that question, but I'm sure she agrees with you. The question was really of Jennifer and not other Board members, so...

Jennifer Zygmunt

Board member Esch gave a good response, and my response, if we receive comments on the remainder of Chapter Two, my response would be what I just told you, which is: we need to make these specific edits to accommodate Chapter One. We've got timelines we need to meet for Chapter One. We don't want to hold up the good work there for the probably multi-year effort that we're going to need to undertake for Chapter Two. So Luke is correct, anybody can comment on any part of the rule, but we also need to do further consultation with the attorneys on this rule before we start making broader changes. They reviewed the Chapter One changes, we have not gone through the process with their attorneys for any broader changes.

Lorie Cahn

Okay. All right. Let me just quickly see if there's any other things that I want to bring up at this point. And I apologize that I did not understand that we weren't supposed to review this entire package because I spent a lot, as you can imagine, I spent a lot of time reviewing, but it'll come in handy when it comes back to us, so. Just on page G-14, on line 5848, it uses the word "tons per gallons", and if that's correct, then that's fine, but it's the estimated total amount of total manure, litter, and processed wastewater generated by the CAFO in the previous 12 months, in tons per gallons. So I guess that's...Is that the tons of manure per gallons of wastewater?

Jennifer Zygmunt

Madam Chair, again, I'm not prepared to talk in detail about Chapter Two. I'll flag that section, and we'll look at it again. That would get outside of the scope of changes that I'm willing to propose at this time.

Lorie Cahn

Okay. All right. Fair enough. No, I just, that was just a question that...If that's correct then that's fine. I didn't know if it was "tons or gallons", or if it's "tons per gallons". I just didn't understand.

Jennifer Zygmunt

Sure.

June 13, 2024 Water and Waste Advisory Board Meeting

60

Brian Deurloo

Yeah, Madam Chair. That's an odd...I've never heard that unit before. Tons per gallon. It seems like a lot. If you got one ton of manure in a gallon of waste, you got a problem. It's like hogshead per furlong.

Jennifer Zygmunt

We'll take a look at it.

Lorie Cahn

And then on page J-2, line 6389, it says we're including an abandoned mine which is being "reminded", and I don't think we're being reminded about a mine. I think it's being "re-mined", so you might want to correct the spelling of that.

Jennifer Zygmunt

Again, Madam Chair, I understand your goal, and we understand there are many typos within this Chapter—but I will not be proposing any edits that aren't related to Chapter One at this time. But I will mark those for when we do get to the broader evaluation of this rule.

Lorie Cahn

Well then I, I mean, I just hate to put out, to recommend going forward or put out a rule that has known typos in it, but that's...There's a lot of them. But if that's the way you want to do it, that's your business. I still would like to just go... Well, I guess there's no point in me going through my comments so...

Jennifer Zygmunt

You know, Madam Chair, I would just keep those comments for when we do open up the broader Chapter again. You know, this rule needs a lot of attention, but we have to approach it in the right manner. Again, we don't want to start making edits, even if they're minor, without having gone through the right steps—both internal review, Attorney General review, and then our outreach and stakeholders. So I certainly appreciate what you're saying; I've seen typos in the Rule, too, that we do need to correct, but we will get there. We just need to do it through the right process.

Lorie Cahn

Okay. But just to make sure I understand it will go forward to us at the next time we see it as a Board after you've incorporated comments that you may get by 5:00 today from the public and in comments that we've made on Chapter One, and then the typos will go forward to EQC on Chapter Two if they're not in the sections that apply to Chapter One.

June 13, 2024 Water and Waste Advisory Board Meeting

61

Jennifer Zygmunt

That is correct. I'm only going to make changes to Chapter Two related to Chapter One.

Lorie Cahn

Okay.

Brian Deurloo

Madam Chair, am I correct in assuming when you take this to the EQC it is, guidance is going to be provided to them that's "don't pay attention to the rest of Chapter Two. It's only the sections that are changing because of Section One." They're going to be under the same set of rules that we are, and Marjorie can deal with it then.

Jennifer Zygmunt

But yes, Madam Chair, at the next meeting, we will have a strike-and-underlined version of the Clean Chapter—of Chapter—I'm sorry. Let me just try that again. So for the current version of Chapter One that you have in your packet that we reviewed today, we will bring forward to you—at the next meeting—a strike-and-underlined version that would show any changes made based on your feedback today, plus any changes that we make based on comments we received by 5:00 PM today.

Jennifer Zygmunt

And we plan to bring that to you either at the third quarter or fourth quarter meeting, and at that point we would propose a recommendation to move forward.

Lorie Cahn

Okay, then I don't have any other comments on—I do have lots of other comments, but I'm not gonna bring them up at this time so...I think it would be appropriate at this point to go off the record, adjourn the meeting, but then I'd like everybody to stay on...the Board and with DEQ so we can just go ahead and schedule the next meeting dates and location. So it's...

Luke Esch

Madam Chair, before we go off the record...Just wanted to comment to DEQ, that I think they've done a great job on the outreach for the Chapter One. I was anticipating a lot more comments today. It's only regrettable that the comment period is still open because I really wish we could have just sent this thing forward. I think you've done your work on it. I think it's ready for the EQC. You know, in my mind there's a saying, this meeting should have been an email. And I think that's applicable in this case because they've done a really good job on getting everything ready so...Unfortunately, we don't have the public comment

June 13, 2024 Water and Waste Advisory Board Meeting

62

closed yet, so I don't think...I'd like to, but I don't think you can do that. So I appreciate your time and effort with this.

Jennifer Zygmunt

Understood, Luke. And thank you for the feedback there, and I think we were expecting commenters today. Part of the reason that we left it open through today is that we had committed to a longer public notice for this rule due to the length or the substance of the revisions, and by the time that we had a draft ready in order to accommodate that longer public notice, we wouldn't have been able to close it in advance of the meeting so that Lindsay could have put together a response to comments—but absolutely understood. Sometimes we just don't know what to expect in terms of feedback, so we will look forward to seeing what we get by 5:00 PM today and whether that prompts any further revision.

Lorie Cahn

No, and Luke, I'm glad you brought this up because I think, I could probably speak for the entire Board, but I'm sure that everybody feels that you've really done a really good job of keeping us informed and keeping the public, you know, working with stakeholders and working with outreach groups and focus groups. And you know, we've had a lot of meetings where you've brought us up to speed with that all along the way. And so we really appreciate all the work that you guys have done, too and hopefully you won't get a lot of comments at the end of the day and we can see it on our third quarter meeting. So we'll just see what we get and deal with it then. But anyways, thank you very much for all your efforts. It's a well done job.

Jennifer Zygmunt

Thank you.

Brian Deurloo

Good job.

Lorie Cahn

Any more Board comments before I adjourn the meeting? Okay, so let's go off the record and just stay on just to talk about the next meeting location and scheduling.

(Meeting proceedings recessed)

Transcribed by Iris Kurz and Gina Thompson, Water Quality Division

June 13, 2024 Water and Waste Advisory Board Meeting

63