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REGION 8

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MAR 04 2005

Mr. Leo Holzbauer, Chair
South Dakota Board of Water Management
Joe Foss Building
523 E. Capitol
Pierre, South Dakota 57501-3181

Subject: EPA's Approval of Revisions to South Dakota's
Water Quality Standards

Dear Mr. Holzbauer:

The U.S. Environmental Protection Agency, Region 8 (EPA) has completed its review of the revisions to South Dakota's water quality standards, Administrative Rules of South Dakota Chapters 74:51:01, surface water quality standards, 74:51:02, uses assigned to lakes, and 74:51:03, uses assigned to streams. These revisions were adopted by the Board of Water Management (Board) on July 7, 2004 and approved by the Legislative Interim Rules Committee on August 3, 2004. The revised water quality standards were submitted to EPA for review with a letter dated November 30, 2004 from Steven M. Pirner, Secretary of the Department of Environment and Natural Resources (DENR). The submittal package included: (1) a statement from the Attorney General's Office certifying that the revisions were duly made pursuant to State law; 2) use attainability analyses supporting changes to use designations for a number of waterbodies; 3) a statement of basis; and 4) a response to public comment. Receipt of these new and revised water quality standards on December 7, 2004 initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA) and the implementing federal water quality standards regulation at 40 CFR Part 131. EPA has completed its review, and this letter is to notify you of our action.

The new and revised water quality standards include a number of important amendments. These include: adoption of EPA's revised criteria recommendations for ammonia; an amendment that will allow for more timely and straightforward upgrades to designated uses assigned to streams and lakes; revisions to the toxic pollutant criteria consistent with EPA's current criteria recommendations; and revisions to the designated uses assigned to a number of waterbodies, upgrading the aquatic life use designations. The Board and the DENR are commended for making these important revisions to South Dakota's water quality standards.



Agency Review

The Clean Water Act, Section 303(c)(2), requires States and authorized Indian Tribes to submit new or revised water quality standards to EPA for review. EPA is to review and approve or disapprove the submitted standards. Pursuant to CWA Section 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency is to notify the State or authorized Tribe and specify the changes to meet such requirements. If such changes are not adopted by the State or authorized Tribe within ninety days after the date of notification, EPA is to promptly propose and promulgate such standard pursuant to CWA Section 303(c)(4). EPA's goal has been, and will continue to be, to work closely with States and authorized Tribes throughout the State or Tribal standards revision process as a means to avoid the need for a disapproval action, and where disapproval is unavoidable within the statutory deadlines, to explore with the State or authorized Tribe an acceptable resolution that will make federal promulgation unnecessary.

Today's Action

I am pleased to inform you that today EPA is approving revisions to South Dakota's water quality standards, Administrative Rules of South Dakota Chapters 74:51:01, 74:51:02, and 74:51:03 adopted by the Board on July 7, 2004. EPA has concluded that the revisions are consistent with the requirements of the Clean Water Act and EPA's implementing regulation at 40 CFR Part 131. Accordingly, these revisions are approved. A more complete discussion of the basis for EPA's approval action is presented in an enclosed rationale document.

EPA's approval of revisions to South Dakota's water quality standards does not apply to waterbodies that are within Indian country, as defined in 18 U.S.C. Section 1151. This letter is not intended as an action to approve water quality standards applying to waters within Indian country. EPA, or eligible Indian tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian country.

Endangered Species Act Requirements

It is important to note that EPA's approval of revisions to South Dakota's water quality standards is considered a federal action which may be subject to the Section 7 consultation requirements of the Endangered Species Act (ESA).¹ Section 7 of the ESA states that "all other federal agencies shall ... utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species..." and "each federal agency ... shall ... insure that any action authorized, funded or carried out by such

¹ Where EPA concludes that its approval action will have "no effect" on listed endangered or threatened species, no ESA Section 7 consultation is required and EPA can issue an unconditional approval. In today's action, EPA is making a "no effect" finding for specific water quality standards revisions, and those elements are approved without condition.

agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical..." EPA's approval of the water quality standards revisions, therefore, may be subject to the results of consultation with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the ESA. Nevertheless, EPA also has a Clean Water Act obligation, as a separate matter, to complete its water quality standards action. Therefore, in approving South Dakota's water quality standards revisions today, EPA is completing its CWA Section 303(c) responsibilities. However, should the consultation process with the U.S. Fish and Wildlife Service identify information that supports a conclusion that one or more of these revisions is likely to jeopardize the continued existence of any endangered or threatened species, EPA will revisit and amend its approval decision for those revised or new water quality standards.

Pursuant to the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* (66FR11202, February 22, 2001), EPA Headquarters and the Services have initiated a national consultation on all of EPA's published water quality criteria for the protection of aquatic organisms. As explained in the MOA, the national consultation provides Endangered Species Act Section 7 consultation coverage for any water quality criteria included in State water quality standards, approved by EPA, that are identical to or more stringent than EPA's recommended Section 304(a) criteria. EPA Region 8, therefore, will defer to the national consultation on questions of protectiveness for aquatic life criteria. In the unlikely event that the national consultation discovers EPA's published Section 304(a) criteria (and by extension, the State standards) are likely to cause jeopardy to listed species or the adverse modification or destruction of designated critical habitat, EPA has retained its authority to revise its approval decision.

Today's action includes a finding that EPA's approval of certain elements of the revised water quality standards will have no effect on listed or proposed endangered or threatened species. For these revisions, no consultation with the U.S. Fish and Wildlife Service is required. The discussion below, therefore, covers two categories of revisions: 1) revisions approved without condition, and 2) those approved subject to ESA consultation.

Approved Revisions

EPA has concluded that approval of certain revisions will have no effect on listed or proposed endangered or threatened species. For these revisions, no consultation with the U.S. Fish and Wildlife Service is required. Accordingly, revisions approved without condition include the following:

- All revisions to recreational use designations for lakes and streams.
- All revisions to numeric standards for the protection of those recreational use designations.
- All revisions to human health-based numeric standards.

Approved Revisions (continued)

- The amended language in 74:51:01:02.01, *Beneficial use analysis required*, allowing for more timely and straightforward upgrades to designated uses assigned to lakes and streams.
- The revised Section 74:51:01:53.01, which establishes a site-specific, irrigation water SAR value applicable to the Belle Fourche River.
- All revisions addressing corrections to the rule, such as updates to current reference material, corrections or revisions to definitions, correction of typographical errors, name changes to certain waterbodies, corrections to segment boundaries, etc.

Approved Revisions, Subject to ESA Consultation

With the exception of the revisions approved without condition, above, the remaining revisions are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA. Revisions approved subject to ESA consultation include the following:

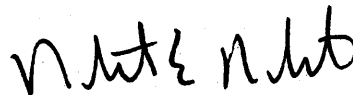
- All revisions to the aquatic life use designations for lakes and streams.
- All revisions to the numeric standards for the protection of aquatic life.

Conclusion

The Board has adopted important revisions to South Dakota's water quality standards, and I commend the Board for its action. I also appreciate the cooperative and constructive way in which the DENR staff has worked with my staff as the DENR developed its proposal for this triennial review of the water quality standards.

If you have questions concerning this letter, please call Max Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation at 303-312-6598, or have the DENR staff contact Bill Wuerthele, Regional Water Quality Standards Coordinator, at 303-312-6943.

Sincerely,



Robert E. Roberts
Regional Administrator

Enclosure

cc: Steve Pirner, Secretary, Department of Environment and Natural Resources
Pete Gober, Field Supervisor, FWS South Dakota Field Office
Donna Davis, OST, EPA Headquarters

**RATIONALE FOR EPA'S APPROVAL ACTION
ON THE REVISED SOUTH DAKOTA WATER QUALITY STANDARDS**

This enclosure provides the rationale for today's Environmental Protection Agency, Region 8 (EPA) approval of the revised South Dakota water quality standards adopted by the South Dakota Board of Water Management (Board) on July 7, 2004. The rationale for today's action is presented in the following categories: 1) revisions approved without condition; and 2) revisions approved, subject to Section 7 consultation under the Endangered Species Act (ESA).

Approved Revisions

Recreational use designations for a number of streams, chapter 74:51:03

To satisfy the requirements of Section 74:51:01:02.01, the Department of Environment and Natural Resources (DENR) conducted beneficial use analyses (equivalent to EPA's use attainability analyses) on a number of streams designated as Class 9, fish and wildlife propagation, recreation, and stock watering, and Class 10, irrigation waters. Applying its guidance document, *Recommended Procedures for Reviewing Beneficial Use Designations, with Special Emphasis on Fishery and Recreational Uses*, the DENR made recommendations on the recreational use classification to be assigned to each of these streams. In each case, the DENR's recommendation was that the streams be designated Class 8, limited-contact recreation.

The DENR's recommendation for the Class 8 designations was based on consideration of a suite of factors common to the small streams addressed in these revisions to the water quality standards. Specifically, the beneficial use analyses noted that: 1) there was no evidence of immersion recreation or facilities that would support immersion recreation on these streams (where local citizens could be contacted, lack of use of these streams for immersion recreation was confirmed); 2) the small, shallow streams lack the physical habitat and flow to support immersion recreation; and 3) the stream segments in question are in isolated rural areas, and the farms through which they run are private property with public access limited to road crossings. In its July 7, 2004 action, the Board adopted the DENR's recommendations, assigning Class 8, limited-contact recreation, to these streams. The Class 8 numeric standards, for fecal coliform and dissolved oxygen, now apply to these streams as well.

EPA concurs that the information provided in the DENR's beneficial use analyses supports a finding that immersion recreation is neither an existing nor attainable use for these streams. EPA, therefore, agrees with the designation of Class 8, limited-contact recreation, for these stream segments (listed below in the aquatic life use discussion) and the numeric standards assigned to protect that use. The designations and numeric standards are consistent with the federal requirements at 40 CFR Sections 131.10 and 131.11 and, accordingly, are approved. It is important to note, however, that, because the Class 8 designation is less than the CWA Section 101(a)(2) recreational goal use, EPA's regulation, at 40 CFR Section 131.20, requires that the State re-examine these stream segments at its next triennial review to determine if any new information has become available that would alter the DENR's present finding that immersion recreation is unattainable.

Human health-based numeric standards in Appendix B

A key EPA priority for the water quality standards program is that States review EPA's updated, national toxic pollutant criteria and revise their water quality standards, as appropriate, to be consistent with EPA's most recently published recommendations or State-derived, defensible alternatives that would be protective of designated uses. In its July 7, 2004 action, the Board adopted changes to the human health-based numeric standards in Chapter 74:51:01, Appendix B, that follow the recommendations in EPA's *National Recommended Water Quality Criteria: 2002* (EPA-822-R-02-047, November 2002). Further, the adopted revisions include updated values for fifteen human health criteria published by EPA in December 2003. EPA views these as important revisions, bringing the human health-based numeric standards in Appendix B in line with the current science on this topic. The revisions to the human health-based numeric standards in Chapter 74:51:01, Appendix B, are consistent with the federal requirements at 40 CFR Section 131.11 and, accordingly, are approved without condition.

Revision to 74:51:01:02.01, beneficial use analysis required

Section 74:51:01:02.01 requires that the DENR conduct a beneficial use analysis before renewing an existing or issuing a new individual surface water discharge permit to a waterbody with a Class 9 designation. The revision to 74:51:01:02.01, adopted by the Board on July 7, 2004, deleted language instructing the DENR to bring proposed beneficial use upgrades, based on its analyses, to the Board at "the next regularly scheduled triennial review." The DENR viewed this language as limiting consideration of upgraded use classifications to the triennial review hearing cycle. Thus, even where the DENR had beneficial use analysis data indicating a higher use classification was warranted for a specific waterbody, the language in this Section would have had the Department hold the proposed upgrade until the next triennial review. By deleting this language, the Board is clarifying that it can consider upgrades to use classifications on a more timely basis. EPA views this as a sensible revision that will allow for more timely and straightforward upgrades to designated uses assigned to streams and lakes in South Dakota. This revision is consistent with the federal requirements at 40 CFR Section 131.10 and, accordingly, is approved without condition.

Revision to 74:51:01:53.01, site-specific SAR value for the Belle Fourche River

The revision to 74:51:01:53.01 established a site-specific sodium adsorption ratio (SAR) standard of ≤ 6 for the Belle Fourche River from the Wyoming-South Dakota border to its confluence with the Cheyenne River. This site-specific standard is lower than the current statewide SAR irrigation standard of ≤ 10 . The site-specific standard is based on an analysis by the DENR showing this to be the existing ambient condition. DENR concluded that maintaining this ambient condition would protect the current irrigation practices in the basin. EPA agrees that, based on the information available, the revised standard is appropriate for the Belle Fourche River and current irrigation practices. This revision is consistent with the federal requirements at 40 CFR Section 131.11 and, accordingly, is approved without condition.

Miscellaneous revisions making corrections to the rule

Revisions to the water quality standards adopted by the Board on July 7, 2004 include a number of amendments that make corrections to the State's regulation. These include changes such as: updates to current reference material, corrections or revisions to definitions, correction of typographical errors, name changes to certain waterbodies, corrections to segment boundaries for certain waterbodies, etc. Such routine "housekeeping" revisions are needed to ensure the State rule is correct and current. EPA has determined that these revisions are consistent with the federal requirements at 40 CFR Part 131 and, accordingly, are approved without condition.

Approved Revisions, Subject to ESA Consultation

The following revisions are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA.

Numeric standards for protection of aquatic life in Appendix B

As noted above, an EPA priority is for States to revise their water quality standards, as appropriate, to be consistent with EPA's most recently published recommendations or State-derived, defensible alternatives that would be protective of designated uses. In its July 7, 2004 action, the Board adopted revisions to the aquatic life numeric standards in Chapter 74:51:01, Appendix B, that follow the recommendations in EPA's *National Recommended Water Quality Criteria: 2002* (EPA-822-R-02-047, November 2002). EPA views these as important revisions, bringing the aquatic life protection standards in Appendix B in line with the current science on this topic. The revisions to the aquatic life-based numeric standards in Chapter 74:51:01, Appendix B, are consistent with the federal requirements at 40 CFR Section 131.11 and, accordingly, are approved subject to the results of consultation under Section 7(a)(2) of the ESA. As noted in the cover letter to this enclosure, EPA Region 8 will defer to the national ESA consultation, now underway between EPA Headquarters and the Services, on questions of protectiveness of the aquatic life criteria for endangered and threatened species.

Revision clarifying application of numeric standards in Appendix B to Class 9 waters

In the 1997 revisions to South Dakota's water quality standards, a number of changes were made to various sections of the standards that, taken as a whole, added a presumption of aquatic life and recreation uses to Class 9 waters, effectively upgrading all waters with that classification. In addition to ensuring protection of the aquatic life and recreation uses where those uses were in place or attainable, the revisions clarified the application of the numerical criteria to Class 9 waters. A key 1997 revision, for example, explained that the toxics control provisions in Section 74:51:01:55 applied "... in controlling the discharge or presence of pollutants which could reasonably be expected to interfere with the uses in Class 9 and as necessary to support those uses." The application of the toxic criteria in Appendix B is key to implementing this provision. Previously, however, Appendix B specifically identified only the

fish life propagation uses, Classes 2 - 6, as those uses to which the numeric aquatic life standards apply. This seemed to be inconsistent with the overall intent of Class 9 regarding control of toxics. In revisions adopted on July 7, 2004, the Board addressed this apparent inconsistency by specifically including Class 9 in Appendix B as one of the uses to which the aquatic life standards will apply where the discharge or presence of these pollutants could reasonably be expected to interfere with uses assigned to Class 9 waters and as necessary to support those uses. We believe this is an important clarification. This revision to Chapter 74:51:01, Appendix B, is consistent with the federal requirements at 40 CFR Sections 131.10 and 131.11 and, accordingly, is approved subject to the results of consultation under Section 7(a)(2) of the ESA.

Numeric standards for ammonia

In its July 7, 2004 action, the Board adopted revised ammonia standards for the protection of aquatic life. The revised standards follow the recommendations in EPA's national ammonia criteria document, *1999 Update of Ambient Water Quality Criteria for Ammonia*, December 1999 (EPA-822-R-99-014). Consistent with the recommendations in EPA's document, the revised numeric standards include provisions for ensuring the protection of early life stages of fish. These provisions include time periods when early life stages (ELS) of fish are expected to occur in fish propagation waters. The Board's revisions to the ammonia standards also include changes to Appendix A, replacing the previous un-ionized ammonia criteria tables with the equations, from EPA's 1999 ammonia criteria document, for calculating acute and chronic ammonia criteria.

The basis for the fish ELS periods, applicable to the various fish life propagation uses, is set out in the Statement of Basis which accompanies the revised water quality standards. As explained in the Statement of Basis, the fish ELS chronic values for coldwater fisheries, Classes 2 and 3, will apply year round. This is based on a consideration of the spawning behavior, incubation periods, and early life stages of several key species typically present in South Dakota's coldwater streams, i.e., brook, brown and rainbow trout and the longnose dace. Based on the breeding biology of these species, the DENR concluded that there would be early life stages of one or another of these species present throughout the year, warranting application of the ELS chronic criteria year round.

For the warmwater permanent and warmwater semipermanent fish life propagation waters, Classes 4 and 5, the DENR considered the breeding biology of key early and late spawners among the fish typically found in these waters, i.e., walleye, northern pike and fathead minnows. Based on the breeding biology for these species, the DENR identified March 1st through October 31st as the period when the ELS chronic criteria should apply to these Classes. For the warmwater marginal fish life propagation waters, Class 6, the DENR considered the breeding biology of key early and late spawners among the fish typically found in these waters, i.e., black bullheads and fathead minnows. Based on the breeding biology of these species, the DENR identified May 1st through October 31st as the period when the ELS chronic criteria should apply to Class 6.

EPA concurs with the DENR's analysis and conclusions concerning appropriate application of the ELS chronic ammonia criteria to the fish life propagation uses. In addition, the equations for calculating the acute and chronic criteria are the same as EPA's recommendations. Therefore, the revisions to South Dakota's numeric ammonia standards, incorporated in Sections 74:51:01:45 - 49 and Appendix A, are determined to be consistent with the federal requirements at 40 CFR Section 131.11 and, accordingly, are approved subject to the results of consultation under Section 7(a)(2) of the ESA.

Amendments to the aquatic life use for certain streams following beneficial use studies required by Section 74:51:01:02.01

To satisfy the requirements of Section 74:51:01:02.01, the DENR conducted beneficial use analyses (equivalent to EPA's use attainability analyses) on a number of streams designated as Class 9, fish and wildlife propagation, recreation, and stock watering, and Class 10, irrigation waters. The intent of these stream studies was to determine whether a higher fish life propagation use designation was warranted for these streams.

The stream studies consisted of several site visits at different times of the year during which DENR staff: 1) evaluated and measured flow and habitat at a number of stations along the stream (with photo-documentation of each station); 2) used ground water information to estimate the likelihood of ground water contributions to surface flow; 3) collected water quality information; 4) collected, identified and measured fish; and 5) evaluated fish spawning occurrence or potential. With a few exceptions for small, ephemeral tributaries, the DENR recommended upgrades for the streams studied, and the Board adopted those recommendations. Below is a list of the streams, and the revised use classifications adopted by the Board on July 7, 2004.

- Bachelor Creek, a tributary to the Big Sioux River.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation. An unnamed, ephemeral tributary was retained at Class 9.
- East Brule Creek, a tributary to Brule Creek.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.
- Medary Creek, a tributary to the Big Sioux River.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation. An unnamed, ephemeral tributary was retained at Class 9.
- Willow Creek, a tributary to Skunk Creek.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.
- Lafferty Gulch Creek and its unnamed tributary, tributaries to Battle Creek.
This stream segment was upgraded from Class 9 to Class 2, coldwater permanent fish life propagation.

- Box Elder Creek, Pennington County.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.
- Unnamed tributary to Box Elder Creek (S18, T2N, R9E).
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.
- Unnamed tributary to Box Elder Creek (S13, T2N, R8E).
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.
- Foot Creek, tributary to Moccasin Creek.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.
- Saddle Creek, tributary to Long Creek.
This stream segment was upgraded from Class 9 to Class 6, warmwater marginal fish life propagation.

The revisions adopted by the Board are upgrades to the designated fish life propagation uses for these streams. The revisions are consistent with the federal requirements at 40 CFR Section 131.10 and, accordingly, are approved subject to the results of consultation under Section 7(a)(2) of the ESA.

Upgrades to the aquatic life use for certain streams to support Topeka shiner critical habitat

In response to a request from the U.S. Fish and Wildlife Service, the DENR proposed upgrades from Class 9 to Class 6, warmwater fish life propagation, for a number of streams within the then proposed critical habitat¹ for the endangered Topeka shiner. Those recommendations were adopted by the Board on July 7, 2004. The upgraded fish life propagation use, Class 6, was applied to the following streams:

- Four Mile Creek, tributary to Beaver Creek
- Springwater Creek, tributary to Beaver Creek
- West Pipestone Creek, tributary to Split Rock Creek
- Slip-up Creek, tributary to the Big Sioux River
- Dry Creek, tributary to the James River
- North Branch Dry Creek, tributary to Dry Creek
- Haram Creek, tributary to Saddle Creek
- Camp Creek, tributary to the Vermillion River
- Silver lake Creek, tributary to the West Fork Vermillion River

¹ The U.S. Fish and Wildlife Service, in the end, did not designate critical habitat in South Dakota because the State has a management plan which provides comprehensive conservation measures and programs necessary to achieve recovery of the Topeka shiner.

The revisions adopted by the Board are upgrades to the designated fish life propagation uses for these streams. The revisions are consistent with the federal requirements at 40 CFR Section 131.10 and, accordingly, are approved subject to the results of consultation under Section 7(a)(2) of the ESA.

Amendments deleting several lakes from the regulation

Based on information provided to the DENR and site surveys, the DENR recommended that three lakes be deleted from coverage in Chapter 74:51:02, Uses Assigned to Lakes. In its July 7, 2004 action, the Board adopted the DENR's recommendation, and deleted reference to Mitchell, Covey and Hamill Lakes from the Chapter.

- Mitchell Lake, Pennington County

The current condition of Mitchell Lake is such that it no longer functions as a "lake." Mitchell Lake was created by a U.S. Forest Service dam, but over the years, the reservoir has filled with sediment to the point where the "lake" is more of a pool within Spring Creek. There are no plans to rehabilitate the reservoir. Based on the current condition of the waterbody, DENR concluded it would be more appropriate to consider Mitchell Lake to be part of Spring Creek. The current uses assigned to Mitchell Lake are Class 3, coldwater marginal fish life propagation and Classes 7 and 8, immersion and limited-contact recreation. By more accurately describing the true condition of the waterbody as a pool within Spring Creek and incorporating the waterbody segment now occupied by the "lake" within the segment of Spring Creek from Sheridan Lake to the Black Hills, the waterbody will be upgraded to Class 2, coldwater permanent fish life propagation. The Classes 7 and 8, immersion and limited-contact recreation, also apply to Spring Creek. This change, therefore, more accurately describes the true condition of the waterbody and improves the level of protection for this water resource from Class 3 to Class 2.

EPA's regulation, at 40 CFR Section 131.3(e), defines existing uses as "... those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards." 40 CFR 131.10(g), then, prohibits removal of existing uses. The Class 3 use assigned to Mitchell Lake is both a designated and existing use, and therefore, an initial reading of the federal regulation might suggest that the revision adopted by the Board, removal of the existing Class 3 use, would be prohibited. It is important to understand, however, that the intent of the federal prohibition on removing existing uses is to establish a regulatory "floor," prohibiting backsliding from water quality conditions and uses achieved. The prohibition is not intended to be a "ceiling," prohibiting designation of higher uses. In this case, the revision adopted by the Board, removing Mitchell Lake from coverage in Chapter 2 and adding that waterbody segment to Spring Creek, both accurately describes the current condition of the waterbody and upgrades the level of protection assigned to the water resource. The revision is consistent with the federal requirements at 40 CFR Section 131.10 and, accordingly, is approved subject to the results of consultation under Section 7(a)(2) of the ESA.

- Covey Lake, Tripp County

The Covey Dam, owned by the South Dakota Game, Fish and Parks Department, was built in 1936 and normally stored 96 acre-feet of water, with a maximum storage of 493 acre-feet. The reservoir created by the dam had been assigned uses of warmwater marginal fish life propagation, immersion recreation, limited-contact recreation, fish and wildlife propagation and stock watering. The Covey dam was breached in 1999, removing the reservoir, and there are no plans to rebuild the dam. The waterbody that had been the reservoir has now returned to the original, natural stream channel that existed prior to construction of the dam. That stream, a tributary to No Moccasin Creek, is designated Class 9, fish and wildlife propagation, recreation, and stock watering.

- Hamill Lake, Tripp County

The Hamill Dam was constructed in 1933 and normally stored 380 acre-feet of water, with maximum storage of 580 acre-feet. The reservoir created by the dam had been assigned uses of warmwater semi-permanent fish life propagation, immersion recreation, limited-contact recreation, fish and wildlife propagation and stock watering. The Hamill dam was recently breached, removing the reservoir, and there are no plans to rebuild the dam. The waterbody that had been the reservoir has now returned to the original, natural stream channel that existed prior to construction of the dam. That stream, No Moccasin Creek, is designated Class 9, fish and wildlife propagation, recreation, and stock watering.

The deletion of Covey and Hamill Lakes from Chapter 2 is based on the actual loss of these reservoirs following the breaching of the dams which created them. The condition of these waterbodies has returned to the natural stream channels that existed prior to construction of the dams. There are no plans to rebuild the dams, and there is no requirement to do so. The deletion of the Lakes from Chapter 2, therefore, accurately reflects the current and attainable condition for these waterbodies. As such, the revisions are acceptable to EPA and are approved subject to the results of consultation under Section 7(a)(2) of the ESA.

Clarification to the Rule in the Statement of Basis

Flow Rates for Low Quality Fishery Waters, Section 74:51:01:30

Section 74:51:01:30 has not been revised, and therefore, it is not subject to EPA review and approval in this triennial review cycle. Nevertheless, the Statement of Basis includes an important clarification for this Section of the rule that warrants a comment. Section 74:51:01:30 includes a provision allowing for a minimum 1.0 cfs design flow applicable to warmwater semipermanent and warmwater marginal fishery waters. In the past, the 1.0 cfs "default" flow had been a concern for EPA, but our concern was largely resolved in the State's 1997 revisions which removed the toxic criteria in Appendix B from the default flow consideration, effectively limiting its application to calculation of ammonia limits. And, as we understand it, this default design flow is currently used in the calculation of ammonia limits for publically-owned wastewater treatment plants, where the low flow in the receiving stream falls below the 7Q5. In

discussing this provision with the DENR staff, we have further learned that, in practice, this provision is limited to intermittent dischargers (lagoons that discharge once or twice a year) and that those discharges, where possible, are timed to periods where there is background flow in the receiving stream. Although this Section of the rule has not been modified, the DENR has included a discussion in the Statement of Basis which explains how this provision has been and will be applied. The statement notes that: 1) the majority of South Dakota's surface water discharges to low quality fisheries are municipal discharges from lagoon and/or artificial wetland systems; 2) these systems discharge very infrequently and do not contribute significantly to the pollutant load present in the stream for any length of time; and 3) where possible, the discharge is timed to periods where there is background flow greater than 1 cfs in the receiving stream. This explanation provides a useful clarification which adds important qualifiers to the intended implementation of the default flow provision.