



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

JAN 25 2002

Ref: 8EPR-EP

Ms. Wendy Hutchinson, Chairperson
Wyoming Environmental Quality Council
Herschler Building
122 West 25th Street
Cheyenne, WY 82002

Subject: EPA Action on Revisions to the
*Water Quality Rules and Regulations -
Chapter 1, Wyoming Surface Water Quality
Standards*

Dear Ms. Hutchinson:

The U.S. Environmental Protection Agency (EPA) has completed its review of the revisions to the *Water Quality Rules and Regulations - Chapter 1, Wyoming Surface Water Quality Standards*. These revisions were adopted by the Wyoming Environmental Quality Council (Council) on June 21, 2001 and submitted to EPA Region 8 for review with a letter dated August 21, 2001 from Dennis Hemmer, Director of the Department of Environmental Quality (Department). The submittal package included certification from the Governor and Secretary of State that the regulations were duly adopted pursuant to State law. Receipt of the revised standards on August 27, 2001 initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA or the Act) and the implementing federal water quality standards regulation (40 CFR Part 131). EPA has completed its review, and this letter is to notify you of our action.

The Region commends the Environmental Quality Council and the Department of Environmental Quality for adopting significant improvements to the State's water quality standards and for doing so in a manner that allowed for extensive public participation. Important revisions include:

- a new and more refined use classification system;
- extensive revisions to the numerical criteria, bringing those values in line with EPA's current recommendations;
- development of an antidegradation implementation procedure;
- development of a mixing zone implementation procedure;
- the upgrading of all waters currently classified Class 4 to Class 3;



- development of a narrative biological criterion;
- elimination of fecal coliform exemptions on 24 waterbodies; and
- development of an approach that would allow the Department to administratively amend use classifications in a manner consistent with federal requirements.

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 shall not later than the ninetieth day after the date of submission of such standard 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 shall promulgate such standard pursuant to CWA Section 303(c)(4). The Region'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 such disapproval and promulgation actions.

TODAY'S ACTION

I am pleased to inform you that today, with certain exceptions, the Region is approving all revisions to the *Water Quality Rules and Regulations - Chapter 1, Wyoming Surface Water Quality Standards*. The exceptions are: 1) the Region is disapproving designation of a number of canals and ditches as Class 4A, a classification that does not include protection of aquatic life; 2) the Region is not acting today on the standards for radioactive materials; and 3) the Region is not acting today on the standards applied to waters in Indian Country.

It is important to note that EPA's approval of the State'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 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..." On April 12, 2000, EPA initiated informal consultation with the U.S. Fish and

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.

Wildlife Service concerning EPA's review of Wyoming's water quality standards. Our evaluation will include identification of any potential effects to listed or proposed endangered or threatened species which might result from the new or revised water quality standards. EPA's approval of the water quality standards revisions, therefore, is subject to the results of consultation under Section 7(a)(2) of the ESA, and completion of the consultation process is a high priority for the Region. Nevertheless, EPA also has a Clean Water Act obligation, as a separate matter, to complete its water quality standards approval action. Therefore, in approving Wyoming's water quality standards revisions today, EPA is completing its CWA Section 303(c) responsibilities.

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. As explained above, however, EPA does have ESA responsibilities for the remaining revisions. As a result, the discussion below covers three categories of revisions that EPA is acting on today: (1) revisions approved without condition, (2) revisions that are approved, subject to ESA consultation and (3) disapproved revisions. In an enclosed rationale document, we explain the basis for today's action.

APPROVED STANDARDS

EPA has concluded that approval of the new or revised water quality criteria for the protection of human health will have no effect on listed or proposed endangered or threatened species. For these adopted revisions, no consultation with the U.S. Fish and Wildlife Service is required. In addition, EPA has concluded that these revisions are consistent with the requirements of the Clean Water Act and EPA's implementing regulation. Accordingly, these revisions are approved, without condition.

APPROVED STANDARDS, SUBJECT TO ESA CONSULTATION

With the exception of the revisions approved without condition, above, disapproved standards, below, and the revisions where EPA is taking no action today, the remaining new or revised water quality standards are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA. Included in this category are the new or revised elements of: (1) the aquatic life use classifications, (2) the mixing zone provisions in the State's rule, (3) the antidegradation provisions in the State's rule, (4) the numeric criteria for the protection of aquatic life, and (5) other miscellaneous adopted revisions. Should the consultation process with the U.S. Fish and Wildlife Service identify information that supports a conclusion that one or more of the revisions in this category is likely to jeopardize the continued existence of any listed endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species, the Region will revisit and revise, as necessary, its approval decision for the identified water quality standards.

DISAPPROVED STANDARDS

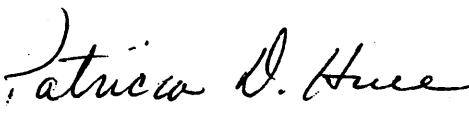
EPA is disapproving the State's designation of a number of canals and ditches as Class 4A, a classification that does not include protection of aquatic life. Class 4A is reserved for those canals and ditches with limited flow and habitat such that there are no aquatic resource values (i.e., no possibility for more than incidental occurrence of aquatic organisms). Although 4A is an acceptable classification and may be appropriately applied to constructed conveyances with limited aquatic resources, the federal regulation requires that the State provide documentation, in the form of a use attainability analysis, supporting the State's conclusion that the ditches assigned a 4A classification are, in fact, limited resources without the potential to support aquatic life uses (see 40 CFR Part 131.10(j)(1)). Until the State provides the required use attainability analyses, the Region is unable to approve those waters designated as Class 4A in the *Wyoming Surface Water Classification List*.

CONCLUSION

EPA Region 8 commends the Council and the Department for the significant improvements to Wyoming's water quality standards that were adopted as a result of the recently-completed rulemaking action. The Region looks forward to continuing work with the Department in making future, additional improvements to the State's water quality standards.

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

Sincerely,


for Jack W. McGraw
Acting Regional Administrator

Enclosure

cc: Dennis Hemmer, Director
Wyoming Department of Environmental Quality
Mike Long, Field Supervisor
Wyoming Field Office, U.S. Fish and Wildlife Service
William Morrow, OST, EPA Headquarters

Enclosure

RATIONALE FOR EPA'S ACTION ON THE REVISIONS TO WYOMING'S WATER QUALITY STANDARDS

This enclosure provides the rationale for today's EPA action. The discussion below is organized as follows: (1) standards approved without condition; (2) standards approved subject to ESA consultation; (3) disapproved standards; and (4) standards for which EPA is taking no action today.

The Wyoming water quality standards submittal package included four implementation policies describing procedures that will be used to implement various Sections of Chapter 1. The submitted implementation policies apply to: (1) antidegradation, Section 8; (2) mixing zones, Section 9, (3) turbidity, Section 23, and (4) use attainability analyses, Sections 33 and 34. These are Department policies, and as such, they were not adopted by the Environmental Quality Council and are not water quality standards. Nevertheless, because implementation policies/procedures affect the application of the standards and, as well, inform EPA as to a State's interpretation of its standards, EPA's review of State water quality standards includes review of such policies/procedures. The content of these policies, therefore, played an important role in EPA's conclusions about the acceptability of State's water quality standards.

STANDARDS APPROVED, WITHOUT CONDITION

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. In addition, as discussed in more detail below, EPA has concluded that these revisions are consistent with the requirements of the Clean Water Act and EPA's implementing regulations. EPA approves these revisions without condition.

Revised Water Quality Criteria for the Protection of Human Health

Water quality protection provisions for human health are included in the body of Chapter 1, e.g., Section 18, and Appendix B, *Water Quality Criteria*. The revisions to Chapter 1 include extensive updates to the human health criteria listed in Appendix B. The adopted revisions are consistent with EPA's published CWA Section 304(a) criteria or the Safe Drinking Water Act maximum contaminant levels (MCLs) available at the time of the public hearing process. MCLs were adopted where there were no Section 304(a) criteria or where the MCL was more protective than the published Section 304(a) criterion. The adopted revisions are appropriate and consistent with federal requirements.

EPA approves, without condition, the new or revised water quality criteria for the protection of human health, consistent with federal requirements at 40 CFR Part 131.11. Our approval is based on a determination that the new or revised standards describe a level of water quality that is protective of the drinking water and fish consumption use classifications.

Sections 4 and 27, Revised Recreational Uses and Criteria

Sections 4 and 27 have been revised to clarify that protection of primary contact recreation will apply to all Wyoming surface waters throughout the year. In making this change, the Council specifically removed a listing of 24 stream segments that previously had received a limited, incidental contact recreation level of protection and then only for a period from May through September. The upgrading of all Wyoming waters to primary contact recreation is a significant and positive change, and the Council is commended for making these revisions.

Section 27 uses fecal coliform as the microbiological indicator for establishing the level of protection for primary contact recreation. Although EPA has long accepted fecal coliform as an appropriate indicator for protection of recreational uses, the Agency now has determined that *E. coli* is a superior indicator organism and that fecal coliform is no longer acceptable. EPA published its revised microbiological criteria recommendations as long ago as 1986 in a document entitled, *Ambient Water Quality Criteria for Bacteria - 1986* (EPA 440/5-84-002). The Agency's current position is that States are to use the recommendations in this document as the appropriate criteria for protecting recreational uses. States will have until 2003 to make the transition from fecal coliform to *E. coli*. In 2003, EPA intends to begin promulgation of the new microbiological criteria where States have failed to make the transition to those criteria.

Although the fecal coliform indicator is acceptable for this present action, Wyoming will have to make a change in its microbiological indicator for the protection of recreational uses before 2003. In today's action, EPA is approving the new or revised designated recreational uses and the water quality criteria assigned to protect those uses. Our approval is based on a determination that the new or revised uses and criteria are consistent with the federal requirements at 40 CFR Parts 131.10 and 131.11.

STANDARDS APPROVED, SUBJECT TO ESA CONSULTATION

With the exception of the revisions approved without condition, discussed above, the specific designated uses EPA is disapproving, and the revisions where EPA is taking no action today, 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 Endangered Species Act.

The Region has initiated informal consultation with the U.S. Fish and Wildlife Service, and should that process identify information supporting a conclusion that a revised standard is likely to jeopardize the continued existence of federally listed endangered or threatened species or result in destruction or adverse modification of designated critical habitat of such species, the Region will revisit and revise, as necessary, its approval decision. The following discussion identifies the principal revisions in this category and the basis for EPA's action.

Revised Water Quality Criteria for the Protection of Aquatic Life

Water quality criteria for the protection of aquatic life are included in the body of Chapter 1, e.g., Sections 21, 24, 25, 26, etc., and Appendices B - G. The revisions to Chapter 1 include extensive updates to the aquatic life criteria. Included among the key revisions are the adoption of numerical criteria values consistent with those in EPA's *National Recommended Water Quality Criteria - Correction* (EPA 822-Z-99-001, April 1999), adoption of EPA's new ammonia criteria, and clarification that the aquatic life values for metals will be implemented as the dissolved form of the metal.

EPA has concluded that the adopted revisions to Chapter 1 are consistent with the EPA's published CWA Section 304(a) criteria available at the time of the public hearing process. Our approval is based on a determination that the new or revised criteria describe a level of water quality that is protective of the aquatic life uses and are consistent with the federal requirements at 40 CFR Part 131.11. EPA approves these revisions subject to ESA consultation.

Sections 3 and 4, Revised Aquatic Life Uses

The aquatic life uses for Wyoming's surface waters, fisheries and aquatic life other than fish, are described in Section 3. The fisheries use, Class 2, includes water quality, habitat conditions, spawning and nursery areas, and food sources necessary to sustain populations of game and nongame fish. The aquatic life other than fish use, Class 3, includes water quality and habitat necessary to sustain populations of organisms other than fish in proportions which make up diverse aquatic communities common to waters of the State.

The aquatic life use classification provisions were extensively modified in this revision of Chapter 1. Key changes included: a more refined use classification system; identification of Class 3 as the default use classification, effectively upgrading all surface waters to include an aquatic life use; use of wetland characteristics as an indicator in identifying Class 3 waters; and use of the Wyoming Game and Fish Department's *Streams and Lakes Inventory* database to incorporate a vast amount of fisheries information into the classification system. Appendix A sets out the application of and linkage among the aquatic life use classifications for both listed and unlisted waters.

EPA has concluded that the revisions to Chapter 1 are consistent with the requirements of the Clean Water Act and EPA's implementing regulations. In today's action, EPA is approving the new or revised aquatic life uses and their application as set out in Sections 3 and 4, Appendix A and Tables A and B. Our approval is based on a determination that the new or revised uses are consistent with the federal requirements at 40 CFR Part 131.10. EPA approves these revisions subject to ESA consultation.

Section 4(d)(iii), Class 4C

Section 4(d)(iii) establishes Class 4C, which will apply to “all waters that have been determined to lack the potential to normally support and sustain aquatic life pursuant to the provisions of Section 33(b)(i), (iii), (iv), (v), and (vi) of these regulations.” These provisions are the same as the “use removal” or “downgrading” criteria in the federal regulation. (See 40 CFR 131.10(g)) The federal regulation sets out the criteria that must be met to demonstrate, on a case-by-case basis, that the Clean Water Act Section 101(a)(2) “fishable/swimmable” uses are not attainable on a specific waterbody. By establishing such criteria, the federal regulation acknowledges that there may be a limited number of waters where the Clean Water Act’s “fishable/swimmable” goal is unattainable. Therefore, it is acceptable for a State to include, in its standards, a classification, such as 4C, which does not include an aquatic life use. EPA has concluded, therefore, that Class 4C is an acceptable use classification and that this revision to Chapter 1 is consistent with the federal requirements at 40 CFR Part 131.10. EPA approves this revision subject to ESA consultation.

Section 4(d)(iii), however, also includes a provision which would allow application of Class 4C to “effluent-dominated streams where it has been determined under Section 33(b)(iii) that removing a source of pollution to achieve full attainment of aquatic life uses would cause more environmental damage than leaving the source in place.” In a letter to the Council dated August 29, 2000, the Region explained its concerns with this potential application of Class 4C. As explained in that letter, it is the Region’s view that this anticipated application of Class 4C to effluent-dominated streams could lead to removal of aquatic life use protection from a waterbody that clearly supports an aquatic community. This would be an unacceptable outcome.

Although we acknowledge there may be an issue regarding a suitable level of protection for effluent-dominated waters, it is the Region’s view that addressing this level of protection question would more properly involve development of site-specific water quality criteria appropriate for the aquatic communities in such waters. The Region will evaluate application of Class 4C on a case-by-case basis. Where Class 4C is applied to a waterbody that supports an aquatic life use and application of Class 4C is justified solely on the basis that the waterbody is effluent-dominated, it is our intention to reject that 4C designation.

Section 8, Antidegradation Policy and Implementation Procedure

Section 8, Antidegradation, establishes the regulatory provisions applicable to Wyoming’s antidegradation policy. The policy establishes the level of protection applicable to high quality waters, requires appropriate intergovernmental coordination on all reviews, and, at a minimum, ensures that existing uses will be maintained and protected in all waters of the State. Section 8 also references Wyoming’s *Antidegradation Implementation Policy*, which explains, in detail, how the provisions of Section 8 will be applied on a case-by-case basis. This new procedure sets out the process that will be followed by the Department in completing antidegradation reviews of regulated activities.

EPA has determined that the revisions to Chapter 1, Section 8, supported by the new *Antidegradation Implementation Policy*, are consistent with national and regional guidelines and the federal requirements found at 40 CFR Part 131.12. Accordingly, EPA approves Wyoming's antidegradation policy at Section 8 subject to ESA consultation. Although the *Antidegradation Implementation Policy* is not a water quality standard, its application interprets the provisions of Section 8. The content of this policy, therefore, played an important role in EPA's conclusions about the acceptability of antidegradation provisions.

Section 9, Mixing Zone Policy and Implementation Procedure

Section 9 establishes the regulatory provisions for allowing a mixing zone. Section 9 sets out the principal constraints for mixing zones: e.g., no exceedence of acute aquatic life criteria outside a zone of initial dilution; no mixing zone within 500 yards of a drinking water intake; no acute lethality to aquatic life allowed within the zone; and a mandatory zone of passage around the mixing zone. Section 9, then, references Wyoming's *Mixing Zone and Dilution Allowances Policy* which explains, in detail, how the provisions of Section 9 will be applied in developing chemical-specific discharge limitations for point source discharges. Although the *Mixing Zone and Dilution Allowances Policy* is not a water quality standard, its application interprets the provisions of Section 9. The content of this policy, therefore, played an important role in EPA's conclusions about the acceptability of mixing zone provisions.

EPA has determined that the revisions to Chapter 1, Section 9, supported by the new *Mixing Zone and Dilution Allowances Policy*, are consistent with EPA's national and regional policies and guidance and EPA's implementing regulation at 40 CFR Part 131.13. Accordingly, EPA approves Section 9, Mixing Zones, subject to ESA consultation. The Region believes it is important to note, however, that today's EPA approval action does not constrain nor forgo the Agency's ability to oversee future individual discharge permits and total maximum daily loads (TMDLs) to ensure that mixing zone or dilution decisions are consistent with the revised mixing zone and dilution policy.

Section 23, Turbidity

Section 23 establishes turbidity criteria for the protection of cold and warm water fisheries. Section 23(c)(ii) allows for short-term increases in turbidity where the potential effect will be minimal and all uses will be fully protected and maintained. The procedures used to implement the provisions of this Section are set out in the Department's new *Turbidity Implementation Policy*. The Policy allows the Department's Administrator to authorize short-term increases in turbidity, limited to construction-related activities, where, among other things: the activity will be limited in time and duration; all existing uses will be fully maintained and protected throughout the duration of the activity; the magnitude of the water quality change will be limited to the extent practicable; and there will be an opportunity for public review and comment.

EPA has determined that the revisions to Chapter 1, Section 23, supported by the new *Turbidity Implementation Policy*, are consistent with EPA's policies, current guidance and EPA's implementing regulation at 40 CFR Part 131. Accordingly, EPA approves Section 23, Turbidity, subject to ESA consultation.

Section 25. Temperature

Section 25 establishes temperature criteria for Wyoming waters and prohibits discharges that would result in harmful acute or chronic effects to aquatic life or would not fully support existing or designated uses. Sections 25 (b) and (c) identify the specific incremental temperature changes allowed for both cold water and warm water fisheries. These Sections also include a 60 degree F threshold at which the incremental temperature limits take effect.

This temperature threshold provision was added to address a practical problem. Specifically, the problem that publically owned wastewater treatment plants, where their discharges make up a significant portion of the flow in receiving streams, would have in meeting the incremental temperature limits in this Section during the winter months. In comments made during the standards development process, the Region expressed concern with this temperature threshold approach. Although we acknowledged the practical problem the temperature threshold was designed to address, our comments noted other problems this approach to resolution might pose.

In the final revisions to Section 25, the Council added language to Section 25(a) providing that discharges could not alter the ambient water temperatures "... to levels which result in harmful acute or chronic effects to aquatic life, or which would not fully support existing and designated uses." Further, the revised mixing zone provisions in Section 9 and the Department's new *Mixing Zone and Dilution Allowances Policy* prohibit lethality to aquatic organisms within a mixing zone. Together, the Region believes these new provisions provide Wyoming with the needed authority to control any discharge that might cause thermal stress to aquatic organisms that is associated with rapid temperature change

Although Section 25, as now written, is acceptable, the Region believes that it would be useful for the Department to develop a procedure explaining how the provisions of Sections 25(a), (b) and (c) would be implemented on a case-by-case basis. The Region offers to work with the Department in developing such a procedure. In the near future, the Region hopes to be able to offer more specific information on the temperature criteria issue as a result of the Agency's ongoing temperature criteria work related to protection of salmonid fisheries in the Pacific Northwest.

EPA has determined that the revisions to Chapter 1, Section 25, supported by the additional mixing zone safeguard prohibiting lethality within mixing zones, are consistent with EPA's policies and guidance and EPA's implementing regulation at 40 CFR Part 131.11. Accordingly, EPA approves Section 25, Temperature, subject to ESA consultation.

Section 33, Reclassifications and Site-specific Criteria

Section 33 sets out the provisions for establishing site-specific criteria and/or amending use classifications based on the six “use removal” or “downgrading” criteria. The criteria listed in Section 33 are the same as those listed in the federal regulation for removing designated uses (40 CFR 131.10(g)). Although EPA’s approach generally separates the use and site-specific criteria issues, the Region acknowledges that it is often difficult to separate the two. Therefore, combining the two issues and applying the “use removal” or “downgrading” criteria to the analysis of both issues, as Section 33 does, is acceptable.

In comments made during the standards development process, however, the Region expressed concern that Section 33(b) would allow application of economic factors, in part (vi), to criteria development. The federal regulation allows development and adoption of criteria only where those criteria are based on sound science. (See 40 CFR 131.11(a)(1)) Economic considerations, which are allowed in the designation of uses, are not allowed in the development of criteria. The final version of Section 33 adopted by the Council included language clarifying that Section 33(b)(vi) would not apply to the derivation of site-specific criteria. That change resolves our initial concern.

EPA has determined that the revisions to Chapter 1, Section 33, are consistent with EPA’s policies and guidance and EPA’s implementing regulation at 40 CFR Parts 131.10 and 131.11. Accordingly, EPA approves Section 33, Reclassifications and Site-specific Criteria, subject to ESA consultation.

Section 34, Use Attainability Analysis

Section 34 establishes a new process for making determinations regarding use classification changes or site-specific water quality criteria adjustments based on the use attainability provisions in Section 33. For use classification changes, Section 34(a) allows the Department to administratively amend use classifications in Wyoming’s water quality standards and do so outside the Council’s formal rulemaking process. In comments made during the standards development process, the Region expressed concern with Section 34(a) as initially proposed. Specifically, in a May 31, 2001 letter to the Water Quality Division, the Region explained its concerns and noted that the new process could be acceptable to EPA if it were demonstrated to be functionally equivalent to the current rulemaking process and result in enforceable provisions identified as State water quality standards.

In the Region’s May 31, 2001 letter to the Division, we set out our understanding of how the revised Section 34(a) would be implemented. It was then, and continues to be, our understanding that implementation of Section 34(a) would include the following elements:

- the standard applicable to use classifications includes Sections 3, 4, 33, 34, 35 and Appendix A all taken together;

- this standard sets out the process by which the use classifications will be amended (this is the process now formally adopted by the Council);
- use classifications, for a specific water body, will be an output of the process as established in Chapter 1;
- implementation of the process will involve the public, with participation requirements equivalent to those applied in rulemaking;
- any use classification change made by the Department will be appealable to the Council;
- all use classification changes made by the Department will be submitted to EPA for review and approval and will not become effective for Clean Water Act purposes until approved by EPA;
- the designated uses identified in Tables A and B, although not in the regulation, are an element of Wyoming's water quality standards and are binding (an enforceable provision);
- Tables A and B will be maintained and updated once a year, at a minimum, to reflect any new use classifications; and
- Tables A and B, although not in the regulation, will continue to be appended to Chapter 1 as a publicly available list of the amended use classifications in Wyoming's water quality standards.

In a letter dated June 8, 2001 from Gary Beach, Administrator for the Water Quality Division, the Division confirmed that the Region's understanding of Section 34(a) (then identified as Option 1) and its intended implementation was correct.

Based on this understanding, EPA has determined that the revisions to Chapter 1, Section 34, are consistent with EPA's water quality standards regulation at 40 CFR Part 131. Accordingly, EPA approves Section 34, Use Attainability Analysis, subject to ESA consultation.

Section 35. Credible Data

Section 35(b) provides that credible data ". . . in combination with other available and applicable information shall be used through a weight-of-evidence approach to designate uses and determine whether those uses are being attained." Section 35(c) further provides that "(a)ll changes to use designations after the effective date of this rule shall include the consideration of credible data relevant to the decision. Changes which involve the removal of a use or the replacement of a designation shall be supported by a use attainability analysis (UAA)."

Although this provision is acceptable, the Region believes it would be useful to re-state our position on the credible data issue as it applies to water quality standards actions, particularly as it applies to upgrading waters to include aquatic life and primary contact recreational uses. Our position on credible data was presented in a letter, dated February 8, 1999, from Max Dodson to Dennis Hemmer. The letter provided EPA's comments on the then proposed credible data law as the Legislature was considering that law.

For water quality standards, Mr. Dodson's letter explained, in part:

The burden is on the State to demonstrate that attaining an "aquatic life/recreation" use is infeasible (40 CFR 131.10). Therefore, the federal regulation effectively establishes a "rebuttable presumption" that "aquatic life/recreation" uses are attainable and should apply to a water body. This presumption can be overcome only where it is affirmatively demonstrated, through a use attainability analysis, that such uses are not attainable. Because of the presumption that the "aquatic life/recreation" uses are attainable, the federal regulation establishes a high threshold for overcoming that presumption so as to ensure that the interim goals of the Clean Water Act are not abandoned without appropriate cause.

The letter then addressed what appeared to us to be a potential internal conflict in the proposed law. Our concern was that the lack of credible data might be used as the basis for not designating aquatic life and primary contact recreational uses, which would conflict with the federal attainability requirement. To address this concern, Mr. Dodson noted:

The potential internal conflict in Section 35-11-302(b)(i) is that it requires the use of "credible data" in designating uses and consistency with federal requirements. As indicated above, the federal requirements presume that the "aquatic life/recreation" uses are attainable, and therefore, no data are required to satisfy that presumption. Although data and information are certainly useful, they are not required to justify designating a water body for the "aquatic life/recreation" uses. On the contrary, data, as part of a use attainability analysis, are needed only to overcome the presumption and to justify a determination that such uses are not attainable. If Section 35-11-302(b)(i) is intended to mean that "credible data" will be required where the State fails to designate aquatic life and recreational uses or is removing or amending such designated uses, there is no conflict with federal requirements. If, however, the proposed Section is intended to mean that lack of "credible data" will be an acceptable basis either for not designating "aquatic life/recreation" uses or for deleting such designated uses, there is a conflict with the federal requirements.

The revised Chapter 1 upgrades all waters currently classified Class 4 to Class 3. This will mean that, at a minimum, all waters of the State include aquatic life and primary contact recreation uses. This effectively moots our concerns about the credible data provisions as they might apply to upgrading uses to include aquatic life and primary contact recreation. Nevertheless, we believe it is important that we clearly explain our position on the credible data issue in this approval action so there is no misunderstanding should this become an issue in the future.

Based on the above understanding, EPA has concluded that the revisions to Chapter 1, Section 35, are consistent with the requirements of the Clean Water Act and EPA's implementing regulation at 40 CFR 131. In today's action, EPA is approving Section 35 subject to ESA consultation.

Other Miscellaneous Adopted Revisions

The revisions to Chapter 1 include a number of other changes that are not discussed in detail in this rationale document. Some of the more prominent amendments in this category include: use classification revisions in Sections 3 and 4, in addition to those discussed in more detail above; a new, narrative biological criterion in Section 32; and revisions to Section 21, addressing aquatic pesticides and fish toxicants, adding language specifically ensuring protection of existing and designated uses for sites undergoing treatment. These are positive amendments to Chapter 1.

Further, the adopted revisions to Chapter 1 include a variety of editorial and other minor changes that are not specifically discussed above. These miscellaneous revisions are spread throughout the water quality standards document. EPA believes these revisions serve to clarify or otherwise improve the water quality standards and are consistent with federal requirements and guidance. Accordingly, EPA approves all such revisions today, subject to ESA consultation.

DISAPPROVED STANDARDS

EPA is disapproving designation of a number of canals and ditches as Class 4A, a classification that does not include protection of aquatic life. Class 4A is reserved for those canals and ditches with limited flow and habitat such that there are no aquatic resource values (i.e., no possibility for more than incidental occurrence of aquatic organisms). Although 4A may be an appropriate designation for constructed conveyances with limited aquatic resources, the federal regulation requires that the State provide documentation, in the form of a use attainability analysis, supporting the State's conclusion that each ditch assigned a 4A classification is, in fact, a limited resource without the potential to support aquatic life uses (see 40 CFR Part 131.10(j)(1)). Further, Wyoming's Chapter 1, Appendix A(b)(3), similarly requires that the designation of a waterbody as Class 4 is to be supported by an approved use attainability analysis. Because the State has not provided the required use attainability analysis, the Region is disapproving those waters designated as Class 4A in the *Wyoming Surface Water Classification List*.

As noted above, the assumption that the limited flow in irrigation canals and ditches will not support aquatic life uses may be correct for the majority of these waters. There is, however, a need to test that assumption with more specific information provided in the form of a use attainability analysis. The Region has provided the Department with what we think would be a reasonable approach to collecting that information. It is not our intention to make this a resource intensive effort, and the suggested approach would rely heavily on existing information, a field evaluation (i.e., a field visit to the canals and ditches) and best professional judgement. Although 4A may turn out to be the appropriate classification for all of the ditches with that designation, we cannot approve the designated 4A classification until information supporting that conclusion is provided. It is our understanding that the Department intends to complete the needed use attainability analyses, and therefore, this disapproval should be easily resolved.

STANDARDS FOR WHICH EPA IS TAKING NO ACTION

EPA is not acting today on the revised standards applicable to waters in Indian Country or the standards for radionuclides. Below, we have provided a brief discussion of these two issues.

Surface Waters in Indian Country

The water quality standards approvals in today's letter apply only to waterbodies in the State of Wyoming, and do not apply to waters that are within Indian Country, as defined in 18 U.S.C. Section 1151. Today's letter is not intended as an action to approve or disapprove 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.

Standards for Radionuclides

Section 22(a), Radioactive Material, establishes EPA's Federal Primary Drinking Water Standards as the radiological standards not to be exceeded in Wyoming waters. Section 22(a) was amended in this triennial review to identify the 1998 version of 40 CFR Parts 141.15 and 141.16 as the applicable radiological standards. Today EPA is not acting on the new or revised numeric standards for radionuclides. The drinking water standards include MCLs for radioactive materials that are (or could be) source, byproduct or special nuclear materials as defined by the Atomic Energy Act (AEA materials). Currently, the Agency has not determined whether it is appropriate to act on water quality standards for AEA materials.

It is clear that there are a number of legal factors complicating regulation of discharges containing radionuclides under the CWA, including the Supreme Court's finding in Train v. Colorado Public Interest Research Group (1976). We also acknowledge that a number of States have agreements with the Nuclear Regulatory Commission (NRC) which discontinue NRC's regulatory authority over AEA materials in some situations. Please be assured that EPA will carefully consider all pertinent information prior to making a determination. Until the Agency makes a determination, EPA will act on new or revised standards for radionuclides only if it can be determined that they are not AEA materials. Agency action on water quality standards for AEA materials will occur if and when the Agency determines it is appropriate to act on such standards.