

MEMORANDUM

TO: The Utah Water Quality Working Group

FROM: Western Resource Advocates

SUBJECT: Utah's Primary Contact Recreation Designation

DATE: April 13, 2011

| Proposal:

To eliminate the distinction between “frequent” & “infrequent” primary contact recreation use designations within the state of Utah. Instead, have a single designated use category for “primary contact recreation” waters.

The code in its current form:

R317-2-6 Use Designations

“6.2 Class 2 – Protected for recreational use and aesthetics

a. Class 2A – Protected for frequent primary contact recreation where there is a high likelihood of ingestion of water or a high degree of bodily contact with the water. Examples include, but are not limited to, swimming, rafting, kayaking, diving, and water skiing.

b. Class 2B – Protected for infrequent primary contact recreation. Also protected for secondary contact recreation where there is a low likelihood of ingestion of water or a low degree of bodily contact with the water. Examples include, but are not limited to, wading, hunting, and fishing.”

| Proposed Change to R 317-2-6.2:

“Class 2 – Protected for recreational use and aesthetics:

Protected for primary contact recreation where there is a high likelihood of ingestion of water or a high degree of bodily contact with the water. Examples include, but are not limited to, swimming, rafting, kayaking, diving, and water skiing.”

Reason for Proposed Change:

The goal of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”. 26 USC § 1251(a). As part of that goal, Congress seeks for all waters in the United States to attain a level of water quality that “provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation *in and on the water.*” 26 USC § 1251(a)(1)(emphasis added). This goal is commonly known as the “fishable/swimmable” goal. *See also*, 40 CFR § 131.10(j). The fishable/swimmable goal is the relevant goal for recreational use designations. 26 USC § 1251(a)(1). A primary contact recreation designation also encompasses secondary contact recreation activities, and the primary contact recreation protections would also apply to activities like hunting, wading, and fishing. *See*, 40 CFR § 131.10.

The EPA's Designation of Uses Guidance outlines three possible methods states may choose from in order to meet the "swimmable" goal. *EPA Water Quality Standards Handbook, Ch. 2: Designation of Uses*, EPA823/B-94-005a, August 1999, at 2.1.3, available at http://water.epa.gov/scitech/swguidance/standards/upload/2008_01_22_standards_handbook_handbookch2.pdf. Under the first option, states may "designate primary contact recreation uses for all waters in the state, and set biological criteria sufficient to support primary contact recreation." *Id.* at 2.1.3. Under the second option, states may designate water bodies for other forms of recreation, but states must set biological criteria for water bodies designated for secondary or other non-primary contact recreation "sufficient to support primary contact recreation." Under the third option, states may designate all water bodies for either primary or secondary contact recreation, but all water bodies designated for any form of recreation must meet the biological criteria for primary contact recreation, unless the state has performed a use attainability analysis on a particular water body and determined that the water body naturally cannot meet the biological criteria necessary to support primary contact recreation. *Id.* at 2.1.3. Under a Use Attainability Analysis, however, a State can only downgrade a water body from either its current designated or existing use if it proves that::

- “1. Naturally occurring pollutant concentrations prevent the attainment of the use; or
2. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
3. Human caused conditions of sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct that to leave in place; or
4. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in attainment of the use; or
5. Physical conditions related to the natural features of the water body, such as the lack of proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
6. Controls more stringent than those required by section 301(b) and 306 of the [Clean Water] Act would result in substantial and widespread economic and social impact”. 40 CFR § 131.10(g).

The three options are not substantially different. In fact, all of these options require that water bodies classified for any form of contact recreation must meet the biological water quality criteria for primary contact recreation protection. The only exception is that the state may opt to conduct a UAA for individual water bodies that have specific, unique needs. This means that no matter which option Utah chooses, the numeric biological water quality criteria will be the same.

The EPA has expressed this understanding of the Clean Water Act's contact recreation beneficial use designations in its September 30, 2009 Action letter to Amanda Smith, where the EPA took action on the 2008 Revisions to Utah's Water Quality Standards. See 8-11, enclosure at 3-6, available at http://www.waterquality.utah.gov/WQS/2009-10-29_UT_WQS_Action_Letter.pdf ("2009 Action Letter"). In EPA's 2009 Action letter, it approved general Class 2A & 2B

designations for all water bodies in the state. It also approved designations of either “frequent” or “infrequent” primary contact recreation for the different bays of the Great Salt Lake. *Id.* at 8-11, enclosure at 3-6. However, the EPA approves the distinction between “frequent” and “infrequent” because it concludes that both standards require protection for primary contact recreation. The EPA assumes, therefore, that a 2B (or “infrequent”) designation will provide the same “swimmable” level of protection as a 2A (or “frequent”) designation. *Id.* at 8-9, enclosure at 3-4. Both levels of primary contact recreation “provide a high level of protection that is appropriate for primary contact activities”. *Id.* 8, enclosure at 3. *See*, EPA’s criteria document: *Ambient Water Quality Criteria for Bacteria – 1986* (EPA440/5-84-002, January 1986).

In its 2009 Action Letter, the EPA anticipates that Utah will eventually eliminate the 2B designation by working to convert all waters in the State to 2A status. *Id.* at 10, enclosure at 5. Utah could save itself immense time and effort if it simply eliminated the 2B designation, removing the “frequent”/“infrequent” distinction (that has no legal significance) from its regulations. In doing so, Utah avoid having to re-designate water bodies to 2A status one at a time.

Eliminating the 2B designation would also provide greater certainty for holders of UPDES discharge permits, since no further upgrading of the water body would be necessary. This means that permit holders would be certain of the Class 2A status and the numeric water quality standards associated with the water body. Eliminating the 2B designation and moving all water bodies to 2A should have no effect on permit holders or water quality, it should simply maintain and better reflect the status quo.

The greatest potential conflict with the 2A/2B distinction lies in the Great Salt Lake designations. Since there are currently no numeric water quality standards for the Great Salt Lake, the EPA approved the “frequent”/“infrequent” designation upon the assumption that the numeric biological water quality standards and aesthetic criteria would be the same for the each of the five bays, regardless of the different designations. *Id.* at 9, enclosure at 4. However, if insufficiently protective biological standards are promulgated for the bays designated for infrequent primary contact recreation, the EPA is likely to disapprove the numeric standards. At that point, the EPA can decide to promulgate its own standards for the Great Salt Lake under its authority in 40 CFR § 131.10. Having the EPA take over numeric standards for the Great Salt Lake is not in the agency’s best interest, nor in the best interest of industry and UPDES permits holders for the Great Salt Lake and its tributaries.

Parties Who Will Benefit from this Change:

1. Agency: eliminates the potential for litigation against the agency due to numeric biological water quality standards that are insufficiently protective of the primary contact recreation designated uses. Eliminates uncertainty in permitting and enforcement actions. Avoids EPA disapproval and the potential for EPA to promulgate standards for Utah water bodies.
2. Industry: Increases certainty in UPDES discharge permits into waters classified for primary contact recreation. Eliminates the potential for EPA interference.

3. The Public at Large: Continues to enjoy the waters of Utah for primary contact recreation and enjoyment.