



WESTERN RESOURCE
ADVOCATES

June 10, 2010

Director Walt Baker
Executive Secretary
Water Quality Board
P.O. Box 144870
Salt Lake City, Utah 84114-4870

Re: Petition for Amendment to either Utah Admin. Code r. 317-2-12 or r. 317-2-13.

Walt:

In accordance with Utah Code Ann. § 63G-3-601 and Utah Admin. Code r. 15-2-3, Utah Waterfowl Association, FRIENDS of Great Salt Lake, Western Wildlife Conservancy, League of Women Voters of Utah, League of Women Voters of Salt Lake, National Audubon Society, Bridgerland Audubon Society, Utah Airboat Association, Utah Mud Motor Association, the Utah Chapter of the Sierra Club, the Great Salt Lake Yacht Club, and the Utah Physicians for a Healthy Environment (Collectively Utah Waterfowl Association) respectfully submits the enclosed Petition for Rule Change to amend either Utah Admin. Code r. 317-2-12 or, in the alternative, Utah Admin. Code r. 317-2-13.

Enclosed with this letter is a Petition for Rule Change and accompanying memorandum in support of the proposed rule change. Utah Waterfowl Association respectfully requests that the Water Quality Board exercise its rulemaking power and either (1) provide notice of its intent to exercise its rulemaking power to amend either Utah Admin. Code r. 317-12 or -13 in a manner consistent with this request; or (2) adopt and publish the proposed rule as permitted under Utah Admin. Code R15-2-5.

Additionally, Utah Waterfowl Association respectfully requests a hearing to explicate the intended purpose of the proposed changes to either Utah Admin. Code r. 317-12 or -13. If the Water Quality Board needs any further information in processing this Petition, please do not hesitate to contact me. Thank you for your consideration of this important matter.

Yours,

ROB DUBUC
JORO WALKER
Attorneys for Utah Waterfowl Association

Petition for Rule Change

Jurisdiction:

Utah Waterfowl Association, FRIENDS of Great Salt Lake, Western Wildlife Conservancy, League of Women Voters of Utah, League of Women Voters of Salt Lake, National Audubon Society, Bridgerland Audubon Society, Utah Airboat Association, Utah Mud Motor Association, the Utah Chapter of the Sierra Club, the Great Salt Lake Yacht Club, and the Utah Physicians for a Healthy Environment (Collectively Utah Waterfowl Association), pursuant to Utah Code Ann. § 63G-3-601 and Utah Admin. Code r. 15-2-3, hereby petition the Water Quality Board (Board) to exercise its rulemaking power and amend Utah Admin. Code r. 317-2-12 to add Willard Bay¹ as a Category 1 water. Separately, and in conjunction with this rule change, Utah Waterfowl Association requests that the Board nominate Willard Bay as an Outstanding National Resource Water. Alternatively, Friends requests that the Board amend Utah Admin. Code r. 317-2-13 to designate the open waters of Willard Bay (to include Willard Spur) above 4,200 feet as class 2B, 3B and 3D.

The proposed rule change-amendment to Utah Admin. Code r. 317-2-12 is set forth below (proposed amendment language emboldened and italicized):

R317. Division of Water Quality

R317-2. Standards of Quality for Waters of the State.

R317-2-12. Category 1 and Category 2 Waters.

R317-2-12.1 Category 1 Waters

12.1 Category 1 Waters.

In addition to assigned use classes, the following surface waters of the State are hereby designated as Category 1 Waters:

a. All surface waters geographically located within the outer boundaries of U.S. National Forests whether on public or private lands with the following exceptions:

Category 2 Waters as listed in R317-2-12.2.

Weber River, a tributary to the Great Salt Lake, in the Weber River Drainage from Uintah to Mountain Green.

b. Other surface waters, which may include segments within U.S. National Forests as follows:

1. Colorado River Drainage...

12. Farmington Bay Drainage

Holmes Creek and tributaries, from Highway US-89 to headwaters (Davis County).

Shepard Creek and tributaries, from Height Bench diversion to headwaters (Davis County).

¹ For the purposes of these petitions, references to Willard Bay refer to the unimpounded water body north of the Great Salt Lake Minerals, Harold Crane and Willard Reservoir impounds, south of the Bear River Refuge impounds, and including the Willard Spur down to elevation 4200.

Farmington Creek and tributaries, from Height Bench Canal diversion to headwaters (Davis County).

Steed Creek and tributaries, from Highway US-89 to headwaters (Davis County).

13. Willard Bay (including Willard Spur), open water above approximately 4,200 feet.

Alternatively, should the Board decline to amend r. 317-2-12 to add Willard Bay as a Category 1 water, Utah Waterfowl Association requests that the Board amend r. 317-2-13 as set forth below (proposed amendment language emboldened and italicized):

R317. Division of Water Quality

R317-2. Standards of Quality for Waters of the State

R317-2-13. Classifications of Waters of the State

R317-2-13.11. National Wildlife, and Other Areas Associated with Great Salt Lake

TABLE

Bear River National Wildlife Refuge, Box Elder County	2B	3B	3D	
Bear River Bay				
Open Water below approximately 4,208 ft.				5C
Transitional Waters approximately 4,208 ft. to Open Water				5E
Open Water above approximately 4,208 ft.	2B	3B	3D	
<i>Willard Bay (Including Willard Spur)</i>				
<i>Open Water above approximately</i>	<i>2B</i>	<i>3B</i>	<i>3D</i>	
<i>4,200 ft.</i>				

Reason for the Proposed Rule Change:

The Utah Waterfowl Association has a direct stake in the Board’s consideration of the proposed amendment and will be substantially affected by the amendment inasmuch as the present rule currently fails to adequately protect Willard Bay and its pristine water quality, as well as the aquatic wildlife in and around the Bear River Migratory Bird Refuge. See Utah Admin. Code r.317-2-8 (“All actions to control waste discharges under these regulations shall be modified as necessary to protect downstream designated uses..”). The proposed amendments have substantial value to the citizens of this State because they would provide the necessary protection of wildlife resources that thrive in the Great Salt Lake ecosystems, which are enjoyed by Utah Waterfowl Association and other recreational users of the Lake. Likewise, the proposed amendments have national significance as they provide greater protection for migratory birds, which utilize the Willard Bay area, Bear River Migratory Bird Refuge and surrounding wetlands for nesting and feeding. The legal basis for this proposed rule change is set forth in the accompanying Memorandum in Support of Petition for a Rule Change.

Address and Daytime Telephone Number of Petitioner:

Utah Waterfowl Association
c/o Rob Dubuc
Western Resource Advocates
150 South 600 East, Suite 2A
Salt Lake City, Utah 84102
Phone: 801.487.9911

Request for copies of all correspondence, memoranda, or notices:

Pursuant to Utah Code Ann. § 63G-3-301(10), I hereby request that the Board provide me, as counsel for Utah Waterfowl Association, with complete copies of any correspondence resulting from this Petition, including any rule analysis performed by the Board, advance notice of any rulemaking proceedings, or any other correspondence, memoranda, or notice. Such copies may be sent to me at the above address.

DATED this 10th day of June, 2010.



ROB DUBUC
JORO WALKER
Attorneys for Utah Waterfowl Association

MEMORANDUM IN SUPPORT OF PETITION FOR A RULE CHANGE

INTRODUCTION

Utah Waterfowl Association, FRIENDS of Great Salt Lake, Western Wildlife Conservancy, League of Women Voters of Utah, League of Women Voters of Salt Lake, National Audubon Society, Bridgerland Audubon Society, Utah Airboat Association, Utah Mud Motor Association, the Utah Chapter of the Sierra Club, the Great Salt Lake Yacht Club, and the Utah Physicians for a Healthy Environment (Collectively Utah Waterfowl Association) hereby petition the Utah Water Quality Board (Board) to exercise its rulemaking power pursuant to Utah Code Ann. §65A-2-2 and Admin. Code r. 15-2-3 to amend either Utah Admin. Code r. 317-2-12 or r. 317-2-13. The amendments are described below. Utah Waterfowl Association is directly affected by the amendment since the current rule unnecessarily limits the protection of the designated uses of Willard Bay. Utah Waterfowl Association is dedicated to the protection of the natural resources and recreational opportunities of State water bodies, to include Great Salt Lake. We have participated extensively in processes relating to State and Federal decision making that affect Great Salt Lake, including its ecosystems and Public Trust resources. The amendments would be beneficial to citizens of the State because they would protect critical Public Trust resources.

PROPOSED AMENDMENTS

The Executive Secretary of the Utah Water Quality Board (Executive Secretary) is authorized by statute to “advise, consult, and cooperate with . . . affected groups in furtherance of the purposes of [the Water Quality Act], Utah Code Ann. § 19-5-106(2), to cooperate with any person in studies and research related to preventing water pollution, § 19-5-106(11), and to exercise all incidental powers necessary to carry out the Water Quality Act. § 19-5-106(10). The Utah Water Quality Board (Board) is authorized by statute to “make rules in accordance with [the] Utah Administrative Rulemaking Act . . . to: (iii) set effluent limitations and standards . . . “ Utah Code Ann. § 19-5-104(1)(f)(iii).

Utah Admin. Rule r. 317-2 delineates the Standards for Quality of Waters of the State. Utah Admin. Rule r. 317-2-12 outlines the Category 1 and Category 2 Waters of the State. A Category 1 water is a water body which has been determined by the Board to be of exceptional recreational or ecological significance requiring protection and which shall be maintained at existing high quality by the Board. Utah Admin. Rule r. 317-2-3.2. New point source discharges of wastewater are prohibited in Category 1 waters. *Id.* A Category 2 water is a water body which is treated as a Category 1 water but allows for a point source discharge if that discharge does not degrade existing water quality. *Id.* Utah Waterfowl Association proposes that the Board amend Utah Admin Rule r. 317-2-12 to include Willard Bay as a Category 1 water. Specifically, we request that the rule be changed to read (proposed amendment language emboldened and italicized):

R317. Division of Water Quality

R317-2. Standards of Quality for Waters of the State.

R317-2-12. Category 1 and Category 2 Waters.

R317-2-12.1 Category 1 Waters

12.1 Category 1 Waters.

In addition to assigned use classes, the following surface waters of the State are hereby designated as Category 1 Waters:

a. All surface waters geographically located within the outer boundaries of U.S. National Forests whether on public or private lands with the following exceptions:

Category 2 Waters as listed in R317-2-12.2.

Weber River, a tributary to the Great Salt Lake, in the Weber River Drainage from Uintah to Mountain Green.

b. Other surface waters, which may include segments within U.S. National Forests as follows:

1. Colorado River Drainage...

12. Farmington Bay Drainage

Holmes Creek and tributaries, from Highway US-89 to headwaters (Davis County).

Shepard Creek and tributaries, from Height Bench diversion to headwaters (Davis County).

Farmington Creek and tributaries, from Height Bench Canal diversion to headwaters (Davis County).

Steed Creek and tributaries, from Highway US-89 to headwaters (Davis County).

13. Willard Bay (including Willard Spur), open water above approximately 4,200 feet.

Rule 317-2-13 delineates the Classification of Waters of the State. The Board is required to group the waters of the state into classes in order to protect the beneficial uses of those waters. Utah Admin. Code r. 317-2-6. Specifically, we request that the rule be changed to read (proposed amendment language emboldened and italicized):

R317. Division of Water Quality

R317-2. Standards of Quality for Waters of the State

R317-2-13. Classifications of Waters of the State

R317-2-13.11. National Wildlife, and Other Areas Associated with Great Salt Lake

TABLE

Bear River National Wildlife
Refuge, Box Elder County

2B 3B 3D

Bear River Bay

Open Water below approximately
4,208 ft.

5C

Transitional Waters approximately
4,208 ft. to Open Water

5E

Open Water above approximately
4,208 ft.

2B 3B 3D

Willard Bay (Including Willard Spur)
Open Water above approximately
4,200 ft.

2B 3B 3D

ANALYSIS

I. Willard Bay is an Unimpaired Water Body Deserving Both Nomination as a an Outstanding National Resource Water (ONRW) and a Re-categorization as a Category 1 Water Under Utah Law.

The Federal antidegradation policy states that “where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.” 40 C.F.R. § 131.12(a)(3). The EPA qualification criteria for ONRWs include: (1) location such as federally protected land; (2) previous special designation such as wild and scenic river; (3) existing pristine or naturally-occurring water quality; (4) ecological value such as the presence of threatened or endangered species during one or more life stages; (5) recreational or aesthetic value; and (6) other factors that indicate outstanding ecological or recreational resource value such as rare or valuable wildlife habitat. *Water Quality Standards Handbook*, Chs. 2, 9. (EPA Antidegradation Guidance Region VIII).

While Utah does not have a procedure for designating waters as ONRWs, the State’s “High Quality Waters” classification echoes most of the federal guidelines for ONRWs. Specifically, DWQ regulations state:

Waters of high quality which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or Nation resource requiring protection, shall be maintained at existing high quality through designation, by the Board after public hearing, as high Quality Waters – Category 1.

Utah Admin. Code r. 317-2-3.2.

The protections provided to an ONRW under Utah law include:

New point source discharges of wastewater, treated or otherwise, are prohibited in such segments after the effective date of designation. ... Other diffuse sources of wastes shall be controlled to the extent feasible through implementation of BMPs or regulatory programs.

Id.

EPA guidance notes that “Outstanding water quality is not a prerequisite for ONRW designation. The only requirement is that the segment have outstanding value as an aquatic resource, which may derive from the presence of exceptional scenic or recreational attributes, or from the presence of unique or sensitive ecosystems that have naturally low water quality (i.e., as measured by conventional parameters).” *Water Quality Standards Handbook* at 9-10. According to the *Water Quality Standards Handbook*, “[t]he public may nominate any state water for ONRW protection at any time by sending a written request . . . [which] should explain why an ONRW designation is warranted” based on one or more of the factors identified above. *Water Quality Standards Handbook* at 10.

Through this Petition for Agency Rulemaking, Utah Waterfowl Association requests that the Board nominate Willard Bay as an ONRW under EPA guidelines, and re-categorize and protect the Bay as a Category 1 water body under Utah law. Willard Bay is a fresh water body that we believe meets the necessary qualifications for designation as an ONRW, and we encourage the Board to move forward with the nomination process. Additionally, we believe that the Bay should be re-categorized as a Category 1 water under Utah law. Willard Bay and its waters intermix with Refuge waters, and these waters are of crucial ecological significance in supporting the Refuge’s migratory bird population and the freshwater fish that inhabit the freshwaters of Bear River Bay and Willard Bay. This designation provides the best method for ensuring that these waters do not become impaired and that the aquatic wildlife that rely on these waters are not jeopardized by discharges of polluted water. As such, we request that the Board direct the Executive Secretary to undertake any studies necessary to determine whether it is appropriate to nominate Willard Bay as an ONRW and re-categorize the Bay as a Category 1 water. Until such a determination can be made, we request that any approval of UPDES permits that would result in a discharge into Willard Bay be stayed.

II. The Board Should Reclassify Willard Bay as a Class 2B, 3B, 3D Water

Should the Board deny Utah Waterfowl Association’s request to nominate Willard Bay as an ONRW and re-categorize the Bay as a Category 1 water, the Association requests that the Board reclassify Willard Bay be as a Class 2B, 3B, and 3D water. As justification for its request for reclassification Utah Waterfowl Association asks the Board to consider, *inter alia*, the article entitled *Avian Ecology of Great Salt Lake*, which describes Bear River Bay and Willard Bay as the freshest region of the Lake that receives the largest volume of riverine inflow. Tom Aldrich & Don Paul, *Avian Ecology of Great Salt Lake*, in GREAT SALT LAKE: AN OVERVIEW OF CHANGE, at 344 (Utah Department of Natural Resources, 2002). The article goes on to describe the waters of that portion of the lake fresh enough to support a community of submergent hydrophytes including sago pondweed (*Potamogeton pectinatus*) and widgeon grass (*Ruppia maritima*), and notes that there are significant islands of emergent wetlands in that part of the Lake, especially in the east part of the bay in the Willard Spur. Further evidence that Willard Bay is a freshwater body can be found in the Great Salt Lake Waterbird Survey (Survey) published by the U.S. Fish and Wildlife Service. See

www.wildlife.utah.gov/gsl/waterbirdsurvey. The survey describes the primary habitat of Willard Bay as Fresh Water, Freshwater Shorelines and Freshwater Wetlands. Survey at p. 121.

Due to the freshwater nature and hydrology of Willard Bay, the Board should, at a minimum, reclassify Willard Bay to ensure the same water class protections as the Refuge. The evidence shows that Willard Bay is a freshwater body of water, and plays host to migratory birds and freshwater fish. Reclassifying Willard Bay as a 2B, 3B, and 3D water is the first step necessary to ensure that the designated uses for both Willard Bay and the Refuge are being met.

CONCLUSION

The Utah Waterfowl Association respectfully requests that the Board, through its Executive Secretary, exercise its rulemaking power and either (1) provide notice of its intent to exercise its rulemaking power to amend either Utah Admin. Code r. 317-2-12 or -13 in a manner consistent with this request; or (2) adopt and publish the proposed rule as permitted under Utah Admin. Code R15-2-5.

Yours,



ROB DUBUC

JORO WALKER

Attorneys for Utah Waterfowl Association