WESTERN RESOURCE
ADVOCATES

February 18, 2011

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Via Email: cbittner@utah.gov

Re: Comments on Triennial Review Scoping and Action Items List

Dear Walt:

Thank you for the opportunity to comment on the 2011 Triennial Review action items list proposed by the Division of Water (DWQ). I submit these comments on behalf of FRIENDS of Great Salt Lake, Utah Chapter of the Sierra Club, Utah Rivers Council, Utah Waterfowl Association, South Shores Wetland & Wildlife Management, League of Women Voters of Utah and League of Women Voters of Salt Lake, Western Wildlife Conservancy and Great Salt Lake Yacht Club (collectively FRIENDS). We hope that DWQ will thoroughly consider these comments as it considers its critical task of improving Utah's Water Quality Standards to protect Utah's waters, public and wildlife.

FRIENDS commends the DWQ for undertaking the Triennial Review and its scoping process as an important part of ensuring that our water quality standards are up to date. As you know, standards underlie all the important Clean Water Act tools that protect Utah's waters, from discharge permits to total maximum daily loads. As such, the Triennial Review is a critical piece of the strategy to keep these water bodies healthy and productive, and we thank you for your work on toward this goal. We also greatly appreciate your efforts to include the public in the rule revision process.

We make the following specific comments on your efforts:

1. Utah has an affirmative duty to promulgate numeric water quality criteria for the Great Salt Lake and this task should be one of DWQ's highest priorities.

Utah has an affirmative duty to establish and implement numeric water quality criteria for the Great Salt Lake. 33 U.S.C. § 1313(a)(3)(A-C)(2000); 33 U.S.C. § 1313a (1981). The Clean Water Act requires, without exception, that each state write water quality criteria for all its water bodies, including saline bodies. 33 U.S.C. § 1313(a)(3)(A-C)(2000); 33 U.S.C. 1313a (1981). Water quality criteria must include both designated uses and criteria sufficient to protect those uses. United States Environmental Protection Agency (EPA) regulations also require states to develop numeric criteria for their water bodies. 40 C.F.R. § 131.11(b)(1). *See also, Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1400 (4th Cir. 1993).

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States have been required to establish numeric water quality criteria for over 40 years. 33 U.S.C. § 1313(a)(3)(A)(2000). Numeric criteria for Great Salt Lake are long overdue, and therefore, establishing numeric water quality criteria for the Lake should be DWQ's highest priority for this triennial review.

In the past, DWQ has asserted that EPA does not currently provide any guidance for states to use to establish numeric water quality criteria for saline water bodies like Great Salt Lake *in particular*, despite the fact that it has adopted extensive guidance for a wide range of pollutants and other water quality parameters relative to both fresh waters and marine waters. However, states are not required to rely on EPA or wait for such guidance before formulating numeric water quality criteria for its water bodies. *See* 48 Fed.Reg. 51,400, 51,411 (1983), *see also, City of Albuquerque v. Browner*, 865 F.Supp. 733, 738 (D.N.M.1993). Moreover, the state's duty to promulgate all aspects of water quality standards under section 303 is independent of EPA's duty to adopt water quality criteria guidance under section 304(a). If Utah fails to promulgate numeric water quality criteria for Great Salt Lake, EPA has a duty to write those numeric water quality criteria for Utah, and Utah will then be required to either use EPA's numeric criteria or to establish more stringent criteria than those initially drafted by the EPA. CWA § 303(b)(1), 33 U.S.C. § 1313(b)(1) (2006), *see also, Northwest Environmental Advocates v. U.S. EPA*, 268 F. Supp. 2d 1255, 1261 (D. Or. 2003). For this reason, DWQ should prioritize the task of establishing narrative water quality criteria for Great Salt Lake. If Utah does not do this itself, it may be forced to adopt numeric criteria promulgated by EPA instead.

Thus, Utah has a non-discretionary duty to promulgate numeric water quality criteria for Great Salt Lake, and it needs to make numeric water quality criteria for Great Salt Lake the highest priority for the 2011 triennial review, and each year thereafter.

In undertaking this task, DWQ should also prioritize pollutants so that numeric criteria for pollutants that are currently impairing the water body, and present the most serious risks to the environment and human health, are established first. FRIENDS proposes a focus on selenium, mercury, heavy metals (such as arsenic, lead, and copper), phosphorus, nutrients and pathogens. However, during this process DWQ should not stop with these pollutants of highest concern based on currently available information, and should also promulgate numeric water quality criteria for any pollutant that is impairing or has the potential to impair Great Salt Lake.

It is possible that promulgating numeric water quality criteria for Great Salt Lake will require significant time and resources. However, dedicating these resources to the establishment of numeric water quality criteria for the Great Salt Lake will be beneficial to DWQ in the long run, because numeric criteria will provide a basis for evaluating UPDES permits that allow discharges into Great Salt Lake, determining whether Jordan River water quality criteria are stringent enough to protect the downstream uses of the Lake, and preventing potential legal conflicts over the lack of numeric criteria for Great Salt Lake. Moreover, there are at least two reasons why DWQ could promulgate water quality criteria for at least some parameters at lower resource costs.

First, for some pollutants, the salinity of the water may not make any difference for the purposes of pinpointing a numeric standard. When this is the case, DWQ can rely on EPA 304(a) guidance to promulgate water quality criterion for those pollutants. Therefore, DWQ should work immeidately to identify pollutants that are not affected by a water body's salinity and use EPA's current guidance to promulgate numeric water quality criteria for the Great Salt Lake for such pollutants.

Second, other states have promulgated numeric water quality criteria for saline lakes. DWQ can use other states' work on saline water bodies to help reduce the amount of resources required to develop numeric water quality criteria for the Great Salt Lake. California, Nevada, Oregon, North Dakota, and Louisiana all have saline lakes. *See, Lehr, Jay; Keeley, Jack; Lehr, Janet (2005). Water Encyclopedia, Volumes 1-5.. John Wiley & Sons.*[1] Oregon has narrative and numeric criteria for its saline water bodies, including Malheaur Lake and Harney Lake. *See* ORS §§ 340-041-0001 to 340-041-0350.[2] California has many saline lakes, and has even promulgated TMDL's for the Salton Sea. *See*, California EPA's TMDL Page, under Water issues tab;[3] California EPA's Salton Sea page.[4] Devil's Lake in South Dakota, the state's only saline lake, is protected with specific numeric water quality criteria. *See*, N.D. Admin. Code 33-16-02.1 *et seq*, & Appendix II: Lake and Reservoir Classification.[5] Although these saline lakes may have different characteristics than Great Salt Lake, states that have numeric water quality criteria for saline water bodies may be able to provide a wealth of resources that Utah can use to develop its own numeric water quality standards for Great Salt Lake.

DWQ can and should use already established information, research, and materials addressing pollutants in and corresponding numeric water quality criteria for saline lakes as a starting point for developing numeric water quality criteria for Great Salt Lake. In any case, DWQ must develop numeric water quality criteria for Great Salt Lake.

2. FRIENDS supports the revision of the narrative water quality standard at Utah Admin Code R317-2-7 to include a narrative biological standard, but reminds DWQ that this standard must be an additive standard, and should not be used to replace current standards or excuse a water body's failure to achieve other existing water quality criteria and standards. Moreover, the form of the draft of the biological standard violates the Clean Water Act.

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[1] *Online version available at:* http://www.knovel.com/web/portal/browse/display?_EXT_KNOVEL_DISPLAY_bookid=1449&VerticalID=0.
[2] *Available at:* http://arcweb.sos.state.or.us/rules/OARs_300/OAR_340/340_041.html.
[3] *Available at:* http://www.swrcb.ca.gov/rwqcb7/water_issues/programs/tmdl/tmdl_current_projects.shtml#salton.
[4] *Available at:* http://www.swrcb.ca.gov/coloradoriver/water_issues/programs/salton_sea/.
[5] *Available at:* http://www.legis.nd.gov/information/acdata/pdf/33-16-02.1.pdf.

FRIENDS agrees with DWQ that biocriteria should be established and are useful tools for determining use impairment of water bodies even when numeric criteria for individual pollutants are being met. A narrative biological standard alone, however, does will not provide sufficient standards to ensure meaningful implementation of biocriteria, and therefore Utah should continue to develop detailed scientific protocols for biocriteria.

Congress' goal in enacting the Clean Water Act was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Federal Water Pollution Control Act, 33 USC § 1251(a). Water Quality Standards must serve this greater purpose. 33 USC § 1313(c)(2)(A). Therefore, the purpose of the Clean Water Act is not only to protect one aspect of the nation's waters, but all aspects, the biological, chemical, and physical integrity of the waters. A separate narrative water quality standard for biological water quality will be an excellent tool for expanding the protection Utah affords its water bodies, but such a standard must be applied in addition to current narrative and numeric criteria, and may not be considered a substitute for other types of water quality standards and criteria.

In its current draft form, DWQ's narrative biological standard provides that the standard, "shall not be used for regulatory and enforcement actions." This provision impermissibly violates the Clean Water Act. The Clean Water Act requires all discharges to meet each and every applicable water quality standard. 33 USC § 1313(a)(1). Therefore, UPDES permits shall be required to meet the narrative biological standard to the same degree as any other standard for water quality. This language also impermissibly limits DWQ's discretion. For example, if biocriteria were being violated downstream from a major discharge, DWQ must be able to take appropriate action in order to enforce the applicable water quality standard and resolve the violation. However, DWQ cannot do so if the standard cannot be used in enforcement actions. Although we understand that it may be more challenging to translate violations of biocriteria into enforceable permit requirements, that does not eliminate the legal requirement to do so, and DWQ cannot rid itself of valid regulatory authority to implement that duty wherever possible.

3. FRIENDS supports DWQ's efforts to establish a methyl mercury criterion and implementation methods, but encourages DWQ to use EPA's methyl mercury criterion guidance report as a basis for this process. Moreover, DWQ is required to adopt an elemental mercury criterion as well, because elemental mercury is the original source of methyl mercury, and a control only on methyl mercury will fail to address mercury contamination issues in the Great Salt Lake and other water bodies in Utah.

FRIENDS supports DWQ's plans to promulgate methyl mercury criterion and implementation plans. However, in doing so, DWQ may not use methyl mercury criterion as a replacement or substitute for water quality criteria addressing elemental mercury. Both forms of mercury are dangerous to the environment, and elemental mercury is required to create methyl mercury. *See*, Benoit, J., C. Gilmour, A. Heyes, R.P. Mason, C. Miller. 2003. Geochemical and Biological Controls Over Methylmercury

Production and Degradation in Aquatic Ecosystems. In: "Biogeochemistry of Environmentally Important Trace Elements," ACS Symposium Series #835, Y. Chai and O.C. Braids, Eds. American Chemical Society, Washington, DC. pp. 262-297;[6] Ekstrom, E.B., F.M.M. Morel, J.M. Benoit, Mercury Methylation Independent of Acetyl-CoA Pathway in SRB. *Appl. and Environ. Microbiol.*, 69 (9) 5414 – 5422 (2003).[7]

As part of its methyl mercury program, therefore, DWQ must promulgate numeric water quality criterion for both elemental mercury and methyl mercury in Great Salt Lake and elsewhere. This would advance Utah's progress in meeting its obligatory duty to promulgate numeric water quality criteria for Great Salt Lake. 33 U.S.C. § 1313(a)(3)(A-C)(2000), 33 U.S.C. § 1313a (1981). High concentrations of mercury and methyl mercury are currently polluting Great Salt Lake. *See*, Naftz, David; Fuller, Christopher; Cederberg, Jay; Krabbenhoft, David; Whitehead, John; Garberg, Jodi; and Beisner, Kimberly (2009) "Mercury inputs to Great Salt Lake, Utah: Reconnaissance-Phase results," *Natural Resources and Environmental Issues*: Vol. 15, Article 5.[8] This USGS study suggests that the lake's unique chemistry may actually speed up the conversion of mercury to a more toxic form, methyl mercury. **A key conclusion of the study was that all the water samples collected exceeded mercury criteria for protection of aquatic life in marine environments.** A good way to begin addressing this problem is for DWQ to set numeric water quality criteria for both types of mercury in Great Salt Lake. We encourage DWQ to make mercury and methyl mercury criteria for the Great Salt Lake among its highest priorities in the coming months.

4. FRIENDS supports DWQ's efforts in promulgating and implementing statewide nutrient criterion for Utah's waters, as long as DWQ establishes a nutrient criterion for Great Salt Lake's four major bays, as well as Willard Spur. Moreover, the resulting criterion must be sufficient to protect each water body.

Nutrient pollution, especially from nitrogen and phosphorus, has consistently ranked as one of the top causes of degradation in U.S. waters for decades. Excess nitrogen and phosphorus lead to significant water quality problems, including harmful algal blooms, hypoxia and declines in wildlife and wildlife habitat. Excesses have also been linked to higher amounts of chemicals that make people sick.

Nutrient pollution, generally nitrogen and phosphorus pollution, is one of the top three causes of impairment of the nation's waters. Collectively, 49 states have listed over 10,000 nutrient and nutrient-related water quality impairments. As a result, EPA, the states, and the public have placed high priority on reducing nutrient water pollution through the promulgation of numeric nutrient Water Quality Standards (WQS). These standards will enable water quality assessment and watershed protection management, as well as facilitate more effective and efficient program implementation, including easier

[6] Available at: http://www.serc.si.edu/labs/microbial/pubs/Benoit%20et%20al.%20ACS%202003.pdf.
[7] Available at: http://geoweb.princeton.edu/research/tracemetals/pdf/ekstrom2003.pdf.

[8] Available at: http://digitalcommons.usu.edu/nrei/vol15/iss1/5.

and faster development of Total Maximum Daily Loads (TMDLs) and National Pollution Discharge Elimination System (NPDES) permits. Consequently, EPA has encouraged all states to accelerate adoption of numeric nutrient WQS or numeric translators for narrative standards for all waters that contribute nutrient loadings to the Nation's waterways.[9]

Farmington Bay illustrates the problem with nutrient pollution in Utah's water bodies. Farmington Bay suffers from excess nutrients and algal growth, which is commonly called eutrophication. The conditions eutrophication engenders allow for excessive algal blooms and the growth of toxic cyanobacteria. Most of these problems could be addressed by DWQ adopting a numeric nutrient criterion for Farmington Bay[10].

Once again, FRIENDS stresses that DWQ has a legal obligation to establish and implement statewide numeric nutrient criteria that will include all Utah water bodies.

5. FRIENDS supports a translator for Great Salt Lake selenium criterion from a tissue standard to a water-based standard. However, the current selenium standard is insufficiently protective and must be reissued at a level that provides greater protection for migratory birds.

FRIENDS agrees with DWQ that a translator is necessary for the selenium standard. However, FRIENDS still also believes that the current selenium standard is improper and violates the Migratory Bird Treaty Act (MBTA).

Approval of a Water Quality Standard Based on Egg Mortality Would Violate the MBTA and Executive Order.

Legal Background

Congress passed the MBTA in 1918 to implement a treaty between the United States and Great Britain protecting migratory birds in North America. *See generally Missouri v. Holland*, 252 U.S. 416 (1920). The MBTA now implements four bilateral migratory bird treaties signed between the United States and Canada (entered on Canada's behalf by Great Britain), Mexico, Japan and Russia.[11]

Justice Holmes observed that the Migratory Bird Treaty signed between the United States and Great Britain establishes a national approach to the management of migratory bird populations. *Missouri v. Holland*, 252 U.S. at 435. "Wild birds are not in

[9] See Western Resource Advocate's January 2010 Triennial Review Comments
[10] See Western Resource Advocate's January 2011 Integrated Report Comments
[11] Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702, T.S. No. 628; Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 1311, T.S. No. 912; Convention for the Protection of Birds and Birds in Danger of Extinction and their Environment, Mar. 4, 1972, U.S.-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; Convention Concerning the Conservation of Migratory Birds and their Environment, Nov. 19, 1976, U.S.-U.S.S.R., 29 U.S.T. 4647, T.I.A.S. No. 9073.

the possession of anyone. . . . The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." *Id.* at 434. "Here, a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power." *Id.* at 435. *Missouri v. Holland* acknowledges that under the Treaty, the signatories, including the United States, have ceded absolute and unfettered control over the management of migratory bird populations. *Id.* at 434.

To implement these national policies, the MBTA makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory bird or "any part, nest, or egg of any such bird . . . by any means or in any manner," 16 U.S.C. § 703(a), except as authorized by a valid permit issued pursuant to regulations. *See* 50 C.F.R. § 21.11.[12] Pursuant to 16 U.S.C. § 704(a), Congress authorized the Secretary of Interior, acting through the U.S. Fish and Wildlife Service, to regulate when and to what extent migratory birds may be captured or killed. The Fish and Wildlife Service has responded with a permit program that regulates activities involving migratory birds and issuing permits that, in limited circumstances, allow the take of migratory birds or their eggs. 50 C.F.R. § 21. The Fish and Wildlife Service does **not** offer a permit that authorizes the unintentional take of migratory birds that would result from a bird egg tissue water quality standard based on egg mortality. *Id.*

The MBTA prohibits both intentional and unintentional take of migratory birds and their eggs. For example, in *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998), the Tenth Circuit joined the majority of Circuit Courts of Appeal in holding that violation of the MBTA is a strict liability crime. *Id.* at 805 (collecting cases). "Simply stated . . .'it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.'" *Id.* (quoting *United States v. Manning*, 787 F.2d 431, 435 n. 4 (8th Cir. 1986)); *see also* S.Rep. No. 445, at 16, *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 ("Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld by many Federal court decisions."); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971) (same). Indeed, "courts consistently hold that the MBTA applies to both intentional and unintentional behavior." *Center for Biological Diversity v. Pirie*, 191 F.Supp.2d 161, 175 (D.D.C. 2002), *vacated on other gds.*, 2003 WL 179848 (D.C. Cir. Jan 23, 2003).

Finally, the prohibitions of the MBTA apply to federal agencies. *Humane Soc. of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1203-04 (9th Cir. 2004) (*citing Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)); *Seattle Audubon Soc'y v. Evans,* 952 F.2d 297 (9th Cir. 1991); *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996); *see also Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992). In fact, the Fish and Wildlife Service recently

[12] The relevant regulations further define "take" as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (1997).

concluded that the U.S. Environmental Protection Agency (EPA) is bound by the MBTA to prevent the take of migratory birds that would result from a proposed Great Salt Lake selenium standard allowing 10 percent egg mortality. Letter from Acting Regional Director, Mountain-Prairie Region, Fish and Wildlife Service to Acting Administrator, EPA Region 8 (May 18, 2009) (FWS Letter), Exhibit A, attached.

Executive Order 13186 – "Responsibilities of Federal Agencies to Protect Migratory Birds"

In 2001, President Clinton promulgated Executive Order 13186 to further "the purposes of the migratory bird conventions [and] the Migratory Bird Treaty Act[.]" Initially, the President recognized that "[m]igratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries." EO 13186, Sec. 1.

The Order "directs Executive departments and agencies to take certain actions to further implement the [MBTA]." For example, Federal agencies are required to "prevent or abate the pollution . . . of the Environment for the benefit of migratory birds" and "develop and use principles, standards, and practices that will lessen the amount of unintentional take" that are "reasonably attributable to agency actions."[13] *Id.* at Sec. 3 (e)(3) & (9); *Id.* at Sec. 3(f) (encouraging Federal agencies to comply with Section 3 (1-15) prior to entering memoranda of understanding).

The Proposed 12.5 µg/g Dry Weight Selenium Standard for Great Salt Lake

EPA is currently considering whether to reject a proposed selenium standard for Great Salt Lake of 12.5 µg/g dry weight in egg tissue. This proposed standard, submitted for EPA approval by the Utah Division of Water Quality, is based on modeling that predicts – **as the most likely result** of this concentration of selenium in egg tissue – 10 percent mortality of mallard eggs. This same modeling predicts, even under the best case – which has only a 2.5 percent chance of occurring – a 4 percent mortality of mallard eggs.[14] Because best estimates conclude that the 12.5 µg/g dry weight standard would

[13] Under the Executive Order, each Federal agency whose activities may adversely affect migratory birds is required to enter into a Memorandum of Understanding (MOU) with the Service, outlining how the agency will promote conservation of migratory birds. Although the MOUs are still under development, per the Executive Order, Federal agencies are encouraged to immediately begin implementing conservation measures.

[14] Mallards are believed to be fairly sensitive to selenium toxicity. However, comparative toxicity profiles are available for very few bird species. Moreover, of the handful of species for which such data exists, at least two species, American coot (Ohlendorf et al. 1986) and chickens (reviewed in Detwiler 2002), are known to be more sensitive to selenium than mallards. As a result, it has been suggested that 25 percent of bird species are more sensitive to selenium than are mallards. This means that a water

lead to 10 percent mortality in bird eggs, it is considered to have an "effects concentration" of 10 or an "EC10."

In furtherance of its role as the agency responsible for implementing and enforcing the MBTA, the Fish and Wildlife Service has asked EPA to reject the proposed EC10 selenium standard for Great Salt Lake, explaining that approval of the standard would violate the MBTA. FWS Letter, Exhibit A. Initially, the Fish and Wildlife Service determined that the EC10 standard would have, as "an inevitable outcome," the take of Great Salt Lake's migratory birds. *Id*. at 4. This is because the models of the effects of the standard predict 10 percent mortality of migratory bird eggs. The Fish and Wildlife Service further stated that EPA approval of an EC10 water quality standard would be inconsistent with Executive Order 13186 and would frustrate the goal of the long-term conservation of Great Salt Lake's migratory birds. To avoid running afoul of the MBTA, the Fish and Wildlife Service recommended that EPA set the selenium standard for Great Salt Lake "at a no effect level" of 5 μg/g dry weight. *Id.*

Violation of MBTA

Therefore, the unintentional take of migratory birds, such as by adopting a bird egg tissue criteria for selenium that is associated with known or observed effects such as Utah's proposed bird egg tissue standard of 12.5 μg Se/g dw, is prohibited. Moreover, the MBTA requires a standard for selenium be established at a "no effects concentration" for bird egg tissue.

The MBTA prohibits a water quality standard that predicts the mortality of migratory birds in a variety of ways. First, as a general matter, courts have found that the MBTA prohibits even the unintentional poisoning of migratory birds. *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (upholding prosecution for killing of migratory birds by dumping waste water); *United States v. Corbin Farm Serv.*, 444 F.Supp. 510 (E.D. Cal.), *affirmed on other grounds*, 578 F.2d 259 (9th Cir. 1978) (upholding prosecution for deaths of birds resulting from misapplication of pesticides); *see also Exxon Shipping, Co. v. Baker*, 28 S.Ct. 2605, 2613 (2008) (the Federal government charged Exxon with, and the company pled guilty to, violations of the MBTA resulting from a tanker accident spilling millions of gallons of crude oil into Prince William Sound); *U.S. v. Moon Lake Electric Ass'n, Inc.*, 45 F.Supp.2d 1070 (D. Colo. 1999) (upholding charges against electricity provider for electrocution of migratory birds on power lines); *Center for Biological Diversity v. Pirie*, 191 F.Supp.2d 161 (D.D.C. 2002), vacated, 2003 WL 179848 (D.C. Cir. 2003) (circuit court found the case mooted by the Bob Stump Defense Authorization Act for Fiscal Year 2003, which amended 16 U.S.C. § 703) (holding that military live fire training exercises involved activity that, while not directed at migrating birds, nonetheless resulted in bird deaths that were not incidental but were a consequence of that fire). Applying this reasoning to the present inquiry

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quality standard predicted to result in 10 percent mortality in mallard eggs could result in greater mortality rates among other migratory bird eggs.

demonstrates that a water quality standard that predicts the mortality of migratory birds as the most likely outcome of the authorized selenium concentration is unlawful under the MBTA. Under this premise, only a standard that is based on a "no effects concentration" is permissible.

Second, only the Fish and Wildlife Service can properly permit the take – even the unintentional take – of migratory birds. 16 U.S.C. §§ 703(a) & 704(a). EPA, which must ultimately approve any site-specific water quality standard, *see* 33 U.S.C.A. 1313(c), may not circumvent this MBTA requirement by authorizing the take of migratory birds through selenium poisoning. *See Humane Soc. of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (because it failed to obtain a permit from Fish and Wildlife Service, Department of Agriculture violated the MBTA by implementing its management plan through means that included the taking of Canada geese); *Center for Biological Diversity v. Pirie*, 191 F.Supp.2d 161 (Secretaries of Navy and Defense must obtain valid permits from Fish and Wildlife Service before conducting military live fire training exercises). Said another way, EPA may not authorize an EC10 water quality standard that allows the take of migratory birds without first obtaining a permit from Fish and Wildlife Service. Without a permit, such a move would be arbitrary and capricious and a violation of the MBTA.[15]

Third, EPA may not approve a water quality standard under its Clean Water Act authority that contravenes the MBTA. Such authorization would violate the Administrative Procedures Act (APA), which prohibits agency actions that are arbitrary and capricious or otherwise in violation of the law. 5 U.S.C. § 706(2)(a); *see also Fund For Animals v. Norton*, 281 F.Supp.2d 209 (D.D.C. 2003) (plaintiff may sue federal agency under the APA for violations of the MBTA); *Center for Biological Diversity v. Pirie*, 191 F.Supp.2d at 175; *Hill v. Norton*, 275 F.3d 98, 103 (D.C.Cir. 2001); Humane Society of the *United States v. Glickman*, 217 F.3d 882 (D.C.Cir. 2000) (holding federal agency action in violation of MBTA violates "otherwise not in accordance with law" provision of the APA).

Fourth, DWQ is likewise bound by the MBTA. For the reasons stated above, the agency is also prevented from authorizing the take of migratory birds. By promulgating and applying a water quality standard that foresees mortality among migratory bird eggs, the agency would be in violation of the Act.

Fifth, selenium discharges are subject to prosecution under the MBTA. As case law confirms, actors otherwise participating in lawful activity are liable for even the unintentional deaths of migratory birds. *E.g. U.S. v. Moon Lake Electric Ass'n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999) (rural electrical distribution liable under MBTA for

[15] Of course, the Fish and Wildlife Service has determined that there is **no** permit that allows the take of migratory birds as implicit in a water quality standard. Therefore, no entity, including EPA, could obtain such as permit under the current statutory and regulatory scheme.

unintended bird deaths caused by its power lines).[16] As a result, an entity with a purportedly valid permit that discharges selenium in concentrations sufficient to cause mortality in bird eggs could be liable under the MBTA.

Finally, EPA – again, the federal agency charged with approving the SSO – is bound by the MBTA and Executive Order 13186 to prevent the discharge of pollutants for the benefit of migratory birds and to develop and use standards that will reduce unintentional take. Plainly, when given a choice between a water quality standard that unlawfully takes migratory birds and one that does not, EPA is legally bound by the MBTA and Executive Order 13186 to authorize only the standard that does not result in a take.

Approving a Water Quality Standard that Allows the Likely Selenium Poisoning of Waterbird Eggs Constitutes an Unlawful "Take" of Migratory Birds.

Legal Background

To contend that the MBTA does not prohibit the taking of migratory birds by selenium poisoning, it has been argued that the MBTA does not prohibit the adverse modification of migratory bird habitat and that selenium poisoning is a habit modification. For example, the *Seattle Audubon* Court distinguished between the word "take" as defined by the MBTA, and as defined by the Endangered Species Act (ESA), to hold that the MBTA does not forbid the U.S. Forest Service and Bureau of Land Management from authorizing timber cutting on lands that may provide suitable habitat for the northern spotted owl. *Seattle Audubon Soc'y v. Evans,* 952 F.2d 297, 302-03 (9th Cir. 1991). The MBTA "makes it illegal to 'pursue, hunt, take, capture, kill, attempt to take, capture, or kill' any migratory bird or 'any part, nest, or egg of any such bird ..., by any means or in any manner,' 16 U.S.C. § 703, except as permitted by valid permit issued pursuant to regulations. *See* 50 C.F.R. § 21.11." *Id*. at 302; *Newton County Wildlife Ass'n v. U. S. Forest Serv.,* 113 F.3d 110, 115 (8th Cir. 1997) (same). "Take" is, in turn, defined by regulation as "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12.

However, while the ESA makes it unlawful for any person to "take" endangered or threatened species, 16 U.S.C. § 9(a)(1)(B), it goes further than the MBTA by defining "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 3(19). Under the ESA, "harm" is defined as including "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3. As the *Seattle Audubon* Court stated, the ESA's "broadest term, 'harm,' . . . is not included in the regulations under the Migratory Bird Treaty Act." *Id.* at 303.

[16] *E.g. see also U.S. v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *U.S. v. Corbin*, 444 F.Supp. 510 (E.D. Cal. 1978), *Exxon Shipping*, 28 S.Ct. 2605 (2008); *CBD v. Pirie*, 191 F.Supp.2d 161 (D.D.C. 2002).

Thus, while noting that the MBTA does prohibit even unintended poisoning of birds, the Court concluded that habitat modification, including destruction that leads to bird deaths, is "harm" under the ESA but not "take" under the MBTA. *Id.* In other words, "[h]abitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA." *Id.*

Newton County Wildlife Ass'n v. U. S. Forest Serv., 113 F.3d 110 (8th Cir. 1997), expressly followed Seattle Audubon to hold that the MBTA did not prohibit the Forest Service from proceeding with four timber sales. Similarly, in *Mahler v. United States Forest Serv.,* 927 F. Supp. 1559, 1574 (S.D. Ind. 1996), the Court announced that "MBTA and regulations promulgated under it make no mention of habitat modification or destruction" and therefore that "habitat destruction in the form of logging causes 'harm' under the Endangered Species Act but does not 'take' birds within the meaning of the MBTA." *See also Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502 (D. Or. 1991) ("a 'taking' under the MBTA does not include habitat modification resulting from Forest Service sales activity").

Thus, it is not appropriate to rely on a single line of cases that hold that federal approval of timber sales, which would adversely modify or even destroy migratory bird habitat, was not unlawful under the MBTA. As those courts noted, the scope of the MBTA does not preclude harm to birds that results from habitat loss, but rather prohibits the killing and take of migratory birds.

Selenium Poisoning is a "Take" of Migratory Birds, not an Adverse Modification of Habitat.

It would be wrong to suggest that an egg-tissue based water quality standard that predicts the mortality of migratory bird eggs constitutes a modification of habitat, not a take. In other words, in an attempt to circumvent the prohibition of the statute, one may not equate the release of toxic selenium into the environment with authorizing the cutting down of trees. For several reasoning, this argument is ill-conceived.

First, and most obviously, the models on which, for example, an EC10 standard is based, predict the mortality of 10 percent of migratory bird eggs. This means that the models do not foresee the modification of migratory bird habitat – the place where the birds live – as the potential threat to birds. Rather, the models specifically forecast the killing of bird eggs as a result of the release of selenium into the water. Thus, the very basis for the EC10 standard is an acknowledgement that the concentration of selenium the standard permits will result in the take of migratory bird eggs.

Second, selenium is regulated precisely because it has the potential to kill migratory birds. Selenium is a toxic water pollutant. List of Section 307(a) Priority Toxic Pollutants, Appendix P, Water Quality Standards Handbook, Second Edition. The Clean Water Act defines "toxic pollutant" as any

> pollutant[] . . . which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will . . . cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

Clean Water Act, § 503(13), 33 U.S.C.A. § 1362(13). Thus, the definition of toxic pollutant underscores that the very reason that selenium is regulated under the Clean Water Act is because the toxin has the potential to kill organisms and their offspring. This, applied in the context of the water quality standard, demonstrates that the anticipated outcome will indeed occur – selenium will kill bird eggs.[17] Plainly, neither the statutory scheme of the Clean Water Act nor the water quality standards itself indicates that selenium causes habitat modification.

Third, *Seattle Audubon* and the other habitat modification cases have no bearing on the present inquiry. Indeed, *Seattle Audubon* itself distinguishes between habitat alteration, which the MBTA does not prevent, and the poisoning of birds, which the MBTA does prohibit:

> Courts have held that the Migratory Bird Treaty Act reaches as far as direct, though unintended, bird poisoning from toxic substances. *See, e.g., United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (killing of migratory birds by dumping waste water); *United States v. Corbin Farm Serv.*, 444 F.Supp. 510 (E.D. Cal.), *affirmed on other grounds*, 578 F.2d 259 (9th Cir. 1978) (deaths of birds resulting from misapplication of pesticides). In *FMC Corp.*, the Second Circuit imposed strict criminal liability for poisoning birds by analogizing to principles of strict tort liability arising from dangerous conditions or substances. 572 F.2d at 906-08. That case involved the manufacture of a highly toxic pesticide. *Id.* at 906. In *Corbin Farm Serv.*, the district court simply held that the MBTA can "constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds." 444 F.Supp. at 536.

952 F.2d 297, 303 (9th Cir. 1991); *Mahler v. Forest Serv.*, 927 F. Supp. at 1574, fn. 8 (citing and agreeing with this analysis in *Seattle Audubon*). Thus, the habitat modification cases recognize a plain distinction between poisoning and habitat destruction, finding that the MBTA prohibits the former. The attempt to gloss over this distinction ultimately fails, not only for the reasons stated above, but because the case law on which the Memo relies does not support its core argument.

Finally, the Fish and Wildlife Service, the agency charged with implementing the MBTA states plainly that the scope of the Act includes a prohibition against a water

[17] Indeed, rather than preventing mortality of bird eggs from selenium poisoning, the concentration of toxic selenium authorized by the standard will most likely result in the mortality of 10 percent of bird eggs.

quality standard that predicts migratory bird egg mortality. The Fish and Wildlife Service also states that, to comply with the law, EPA should adopt a "no effects concentration" standard. As the *Newton County* Court conceded when qualifying its MBTA analysis, "[o]ur conclusions about the apparent scope of MBTA are necessarily tentative because we lack the views of the Fish and Wildlife Service, the agency charged with administering and enforcing that statute." *Newton County*, 113 F.3d at 115. Here, where we have the benefit of the input of the expert agency, its recommendations should be heeded.

Thus, based on the requirements of the MBTA and determination by the Fish and Wildlife Service, Utah's proposed selenium standards is insufficiently protective, as would be a translation of that standard to an effluent limit. The only appropriate standard for selenium is a no effect standard.

6. FRIENDS supports additional primary contact recreation (2A) designations for Ogden River, Fremont River, and specific ditches (not named in the list, action item #10).

All water bodies in the state of Utah should be classified for primary contact recreation in order to fulfill the "fishable/swimmable" goals of the Clean Water Act. CWA § 101(a)(2); see also, EPA's Water Quality Standards Handbook: Second Edition, Ch. 2: Designation of Uses, EPA823/B-94-005a, June 2007).[18] FRIENDS fully supports DWQ's proposal to reclassify various waters to 2A, suitable for primary contact recreation. Further, this reclassification meets with EPA's reasons and rationale for approving the 2A/2B distinction in 2009. The 2A/2B distinction can only be proper when both categories protect primary contact recreation. As the agency stated: "these revisions clarify situations where it is appropriate to apply each recreation use designation, and because currently a large majority of waters in Utah are assigned to Class 2B, EPA expects that these[2A/2B use designations for primary recreation] revisions will facilitate an increase in the number of waters assigned to Class 2A. For example, as a result of this rulemaking several heavily-used waterbody segments were moved from Class 2B to Class 2A." EPA's Water Quality Standards Action letter, Sept. 30, 2009 at 3.[19]

FRIENDS strongly supports designating waters of the state as 2A. FRIENDS encourages DWQ to continue to make this designation for all water bodies of the state, and to make a change to 2A designations a high priority not only during triennial review, but at all times and for all water bodies that do not currently fall under 2A designation but are used for primary contact recreation.

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[18] *Available at,* http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/index.cfm

[19] *Available at,* http://www.waterquality.utah.gov/WQS/2009-10-29_UT_WQS_Action_Letter.pdf.

7. FRIENDS opposes any changes of existing beneficial uses for the Jordan River, any individualized criteria that would impair the existing characteristics (i.e.; TDS and temperature), and any downgrade from a Class 2B water. FRIENDS encourages DWQ to instead designate the Jordan River as a class 2A water.

FRIENDS does not oppose site-specific criteria for the Jordan River in principle, so long as those criteria provide either the same or a higher level of water quality protection that it receives currently. The Jordan River is a critically important water body and also flows directly in to Great Salt Lake; therefore DWQ should place a high priority on protection the Jordan River's water quality. FRIENDS does not oppose a reclassification for the designated use of the Jordan River, so long as that designation is for 2A status. Because of the Jordan River's great importance and value, it should be protected accordingly.

When DWQ considers changes to the designated uses of the Jordan River, DWQ should not remove any beneficial use designations. The removal of designated uses is only allowed under the narrow circumstances specified in 40 CFR § 131.10:

> (g) States may remove a designated use which is not an existing use, as defined in Sec. 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:
>
> (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 or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than 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 the attainment of the use; or
>
> (5) Physical conditions related to the natural features of the water body, such as the lack of a 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 sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

Further, Utah cannot remove an existing use of the Jordan River under 40 CFR § 131.10(h):

> (h) States may not remove designated uses if:

(1) They are existing uses, as defined in Sec. 131.3, unless a use requiring more stringent criteria is added; or

(2) Such uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.

A designated use, under 40 CRF § 131.3(e), is any use "actually attained on the water body on or after November 28, 1975, whether or not they are included in the water quality standards." EPA's water quality handbook clarifies the meaning of existing use to include both whether the use has occurred in the relevant timeframe (after Nov. 28, 1975) or the water quality would have supported the use during the timeframe, whether or not the use occurred. U.S. EPA's Water Quality Handbook.[20]

Therefore, DWQ may not remove any designated uses or reduce the water quality protections of the Jordan River unless these strict criteria are met. If DWQ intends to make changes in use designations and water quality criteria on the Jordan River, DWQ should change the criteria so that they afford more protection to the Jordan River, and classify the Jordan River's designated use under 2A, primary contact recreation. DWQ must make a 2A classification for the Jordan River.

8. FRIENDS opposes the construction exception of R317-2-3.3, and instead of expanding it, DWQ should eliminate the exception entirely because it is likely to exempt from review water quality impacts that will not be *de minimus*.

The construction exception in Utah Admin. Code R317-2-3.2 purports to exempt certain limited construction projects from anti-degradation review, in violation of the CWA and applicable EPA regulations. 33 USC § 1326; CWA § 316; 40 CFR § 131.12 *et seq.* This exception, although it appears only to apply to projects that use best management practices to minimize the effects of pollution, poses a risk of substantial impairment to water quality. Utah Admin. Code R317-2-3.2. Without any level of either monitoring or review, it would be impossible for DWQ to ensure that these projects are actually minimizing the effects of pollution, employing the required management practices, or meeting anti-degradation controls and criteria. EPA requires states to use anti-degradation controls and techniques, including review and monitoring, in order to ensure that minimum water quality required to ensure the protection and preservation the water body's existing uses. 40 CFR § 131.12. This exception, in its current form, would allow construction projects to be exempt from anti-degradation policies and implementation methods, running a risk that water bodies will become impaired as a result of the discharges and pollutants associated with the projects. Therefore, the exemption violates anti-degradation policy requirements, and should be removed from the Utah Administrative Code. FRIENDS encourages DWQ, instead of expanding this exemption, to eliminate it entirely.

[20] *Available at*: http://www.epa.gOv/waterscience/standards/handbook/chapter04.html#section4

9. FRIENDS supports DWQ's efforts to implement and monitor water temperature criteria. FRIENDS encourages DWQ to expand these criteria to more bodies of water and to promulgate site-specific TMDLs where those criteria are violated. FRIENDS opposes any reduction of monitoring and use of a less rigid assessment methodology.

FRIENDS supports DWQ's efforts to implement and monitor water temperature criteria. DWQ is required to expand these criteria to more bodies of water and to promulgate site-specific TMDLs where those criteria are violated. FRIENDS opposes any reduction of monitoring and use of a less rigid assessment methodology and narrow focus on thermal discharges as DWQ proposes in their 2011 Triennial List of Topics. Cold water discharges from dams could be just as harmful to warm water aquatic life as a thermal discharge would be to cold water aquatic life. DWQ should work with the TDML team to promulgate site-specific TDMLS for both thermal and cold water discharges.

10. FRIENDS opposes any change to the Anti-Degradation Standards which would reduce the review obligation under R317-2-3. Specifically, FRIENDS opposes the proposed reduction of a Level II antidegradation review. FRIENDS request that DWQ notify them after the finalization of the antidegradation rule so that they may review it.

FRIENDS opposes any change to the Anti-Degradation Standards that would reduce the State's mandatory review obligations under the Clean Water Act's Antidegradation Rule. EPA's antidegradation policy set forth at 40 C.F.R § 131.12 establishes the minimum requirements for all state antidegradation policies, and must apply to all state water bodies. "Tier I" of EPA's regulation expressly provides that "existing instream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." "Tier II" of EPA's regulation requires that levels of water quality higher than necessary to protect those uses must be maintained and protected, unless certain specific conditions are met (addressed further below), in all waters in which those conditions exist. While obviously water quality higher than necessary to protect existing and designated uses will not necessarily exist in all of Utah's waters, the EPA regulation requires that antidegradation requirements must apply to all waters in which those conditions do occur. "Tier III" of EPA's antidegradation regulation, by contrast, applies only with respect to specifically-identified waters, which are designated as "Outstanding National Resource Waters."[21]

DWQ, in accordance with 40 C.F.R. § 131.12 (a), promulgated an antidegradation policy and implementation procedure. Utah Admin. Code R317-2-3. However, FRIENDS opposes the proposed reduction of Level II antidegradation review under R317-2-3. The proposed revision to R317-2-3 Antidegradation Policy reads:

b. An Anti-degradation Level II review is not required where any of the following conditions apply:

1. Water quality will not be lowered by the proposed activity or for existing permitted facilities, water quality will not be further lowered by the proposed

[21] See Western Resource Advocate's January 2010 Triennial Review Comments.

activity, examples include situations where:

(a) the proposed concentration-based effluent limit is less than or equal to the ambient concentration in the receiving water during critical conditions; or
(b) a UPDES permit is being renewed and the proposed effluent concentration and loading limits are equal to or less than the concentration and loading limits in the previous permit; or
(c) a UPDES permit is being renewed and new effluent limits are to be added to the permit, but the new effluent limits are based on maintaining or improving upon effluent concentrations and loads that have been observed, including variability; or
(d) a new or renewed UPDES permit is being issued, and water quality-based effluent limits are not required for a specific pollutant because it has been determined that the discharge will not cause, have reasonable potential to cause, or contribute to an exceedance of a State water quality standard for the pollutant.

DWQ should do away with these examples because they are subject to open-ended discretion and too vague. In example (a), the use of the word "conditions" is ambiguous. Does it mean low flow conditions? DWQ needs to clarify what "conditions" mean. Also, ambient concentrations will be variable even at critical conditions.

In example (c), the word "upon" is ambiguous. Does it mean "lower than"? The subjectivity of "upon" could be problematic and lead to headache down the road.

FRIENDS is particularly concerned with example (d) of the proposed revision. Example (d) illegally shifts the focus of the review from what a Level II ADR requires. The purpose of a Level II ADR is to protect the existing water quality levels even if they are higher than the water quality standards implement by DWQ. This is to ensure that the standard is not exceeded. Example (d), if adopted, would essentially eliminate a Level II ADR altogether.

FRIENDS urges DWQ to adopt all comments EPA made on the proposed antidegradation rule. FRIENDS also request that DWQ notifies them after the finalization of the antidegradation rule and implementation procedures, and allow a sufficient period of time so that they may review it and comment further on it.

11. FRIENDS supports DWQ's efforts to implement sediment quantity criteria but encourages DWQ to adopted sediment quantity criteria for all water bodies of Utah and to adopt the criteria that protects fish (game and non-game), waterfowl, shorebirds and other water-oriented wildlife. Also, FRIENDS encourages the DWQ to adopt criteria for Great Salt Lake tributaries and the Lake because of its special characteristic of being a terminal lake.

12. FRIENDS appreciates DWQ's meetings and discussion regarding the impounded wetlands of Farmington Bay, and would like to thank DWQ for reaching a mutually agreeable compromise to find a more efficient and scientifically sound method for impounded wetlands assessment. However, FRIENDS would like to note that per our agreement, DWQ is behind schedule in formulating a new assessment method for

impounded wetlands, and FRIENDS is eagerly awaiting more information on this topic including the furtherance of a stakeholder associated with this effort.

13. FRIENDS opposes the use of a class 2B for any Utah water. DWQ is required to designate all bodies of water appropriate for recreation for frequent primary contact recreation under class 2A, and to apply the associated 2A water quality criteria to those water bodies. DWQ should not have changed any of designated uses of the Bays of Great Salt Lake from 2A to 2B, and should restore GSL to 2A status.

First, although EPA has approved DWQ's 2B use designation category, that category cannot be used to give a water body a lower status of protection. Even when EPA allows states to use a designation like 2B, states must still protect those 2B water for primary contact recreation. CWA 101(a)(2) & EPA's Water Quality Standards Handbook: Second Edition, Ch. 2: Designation of Uses, EPA823/B-94-005a, June 2007.[22]

Second, EPA also expects that the 2A/2B designation will lead to more waters being classified as 2A, and stated this expectation as a primary reason for approving the 2A/2B distinction. EPA's Water Quality Standards Action letter, Sept. 30, 2009 at 3.[23]

Third, EPA also approved the distinction between 2A and 2B for some bays in the Great Salt Lake only because EPA expected all Bays to continue to be designated for primary contact recreation, protected for primary contact recreation, and that the distinction would not cause any relaxation of water quality protection for the Lake. EPA's Water Quality Standards Action letter, Sept. 30, 2009 at 4.[24]

EPA has also made clear that even if a waterbody were designated for secondary contact recreation, it must be protected at the same level is if it were designated for primary contact recreation. CWA 101(a)(2) & EPA's Water Quality Standards Handbook: Second Edition, Ch. 2: Designation of Uses, EPA823/B-94-005a, June 2007).[25] The EPA offers a variety of different options states may choose in order to fulfill this obligation to protect primary contact recreation on its waters in its Water Quality Standard Handbook. Ch. 2: Designation of Uses, 2.1 Use Classification, EPA823/B-94-005a, June 2007.[26]

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[22] *Available at:* http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/index.cfm

[23] *Available at:* http://www.waterquality.utah.gov/WQS/2009-10-29_UT_WQS_Action_Letter.pdf

[24] *Available at:* http://www.waterquality.utah.gov/WQS/2009-10-29_UT_WQS_Action_Letter.pdf.

[25] *Available at:* http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/index.cfm

[26] *Available at:* http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/index.cfm

The simplest option is the first:

> A number of acceptable State options may be considered for designation of recreational uses.
>
> **Option 1**
>
> Designate primary contact recreational uses for all waters of the State, and set bacteriological criteria sufficient to support primary contact recreation. This option fully conforms with the requirement in section 131.6 of the Water Quality Standards Regulation to designate uses consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the CWA. States are not required to conduct use attainability analyses (for recreation) when primary contact recreational uses are designated for all waters of the State.

Water Quality Standard Handbook. Ch. 2: Designation of Uses, 2.1 use classification, EPA823/B-94-005a, June 2007.[27]

This option achieves the same result as all the other options for designated uses and corresponding water quality criteria: it requires water bodies to be protected for primary contact recreation. The other options allow secondary contact recreation, or infrequent primary contact recreation designations, but then require the water body to be protected for primary contact recreation. Therefore, the simplest and least-resource intensive option is to designate all water bodies as class 2A, with the appropriate corresponding numeric water quality criteria attached. This is the same result as if there were 2B or other designations, but allows DWQ to focus its resources on more pressing and necessary actions, like establishing numeric water quality criteria for Great Salt Lake. The 2A and 2B is essentially a distinction without a difference, as the effect is the same: protection for primary contact recreation. DWQ should instead focus its resources on water bodies that are impaired, or do not have numeric water quality criteria.

We appreciate the opportunity to comment on this DWQ action. We hope that you will carefully consider these comments as you consider your future actions. Please keep us informed of any and all opportunities to continue to be involved in any agency actions and decisions that will lead to final agency action on this matter. Please inform us of your final action and any chance we have to comment further on or appeal that action. We also request that we be provided with any records associated with this action. Finally, we ask that we be told when any relevant proposals, actions or decisions are presented to EPA for that agency's approval or consideration so that we may comment to that agency prior to any final action taking place.

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[27] *Available at:* http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/index.cfm

Thank you for all you do to protect Utah's waters and aquatic habitats and organisms and particularly, for all you do to safeguard Great Salt Lake and its internationally and nationally important ecosystem.

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