

MATTHEW H. MEAD
GOVERNOR



2323 Carey Avenue
CHEYENNE, WY 82002

Office of the Governor

June 17, 2016

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Honorable Suzette Kimball
Director
United State Geologic Survey
12201 Sunrise Valley DR
Reston, VA 20192

RE: Docket ID No. EPA_HQ-OW-2015-0335; Protecting Aquatic Life from Effects of Hydrologic Alteration; Technical report

Dear Administrator McCarthy and Director Kimball,

Thank you for the opportunity to comment on the Draft EPA-USGS Technical Report. The subjects of both aquatic habitat and flows jurisdiction (quantity) are outside the purview of the Agencies. This guidance should be withdrawn.

The authority to manage wildlife and water quantity resources resides with the states under state law. The Wyoming Constitution, ratified by Congress, establishes that “the water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state.”¹

Since statehood Wyoming has recognized water as its most important natural resource. We continue to work to make sure that federal law, rule, and policy do not encroach on state authority. This proposal violates those limits.

¹ Wyoming Constitution, Article 8, Section 1

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Section 101(g) the Clean Water Act (CWA) clearly outlines that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired.”²

The author of the cited amendment, Wyoming Senator Malcom Wallop, said it was “designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes.”³

The attempt to apply the CWA to flows for the benefit of habitat is precisely the “mischievous abrogation” the law prohibits.

The Agencies offer several examples where they suggest that the CWA contains authority to require a minimum flow. These examples are not used in context of the law. Individual states make these decisions based on unique regulatory frameworks. Any interests of the Agencies is limited to support of state and local efforts and is not to replicate or replace them.

In developing this guidance the Agencies have relied heavily on states’ expertise, repeatedly referencing the work of the Instream Flow Council (IFC) in its text *Instream Flows for Riverine Resource Stewardship*. Notably, Wyoming Game and Fish Department’s Tom Annear is the senior contributing author of the work and is cited as a recognized national leader on this subject. The text, and the authors, recognize appropriate limitation of federal authority.

“Because states and provinces have primacy over water allocation within their boundaries, we contend that the effectiveness of most federal natural resource laws will be greater when they are integrated with state and provincial water law.”⁴ The IFC continues, “Federal agencies should integrate their water and riverine management efforts within the constructs of state and provincial laws, regulations, and policies to protect riverine resources.”

It is troubling that the Agencies have advocated misapplication of the CWA and in a manner that exceeds the Agency boundaries.

Sincerely,



Matthew H. Mead
Governor

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²33 U.S. Code § 1251

³ 95th Congress, 2d Session; Congressional Research Service of the Library of Congress; Volume 3; October 1978; Serial No. 95-14; Printed for the use of the Committee on Environment and Public Works

⁴ Annear et al., *Instream Flows for Riverine Resource Stewardship*, pages 70-71. Cheyenne, WY: Instream Flow Council, 2004.