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DEPARTMENT OF ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

WATER MONITORING AND STANDARDS

Surface Water Quality Standards

Surface Water Classifications

Adopted Amendment: N.J.A.C. 7:9B-1.15

Proposed: December 20, 2004 at 36 N.J.R. 5612(a)
Adopted: May 12, 2005 by Bradley M. Campbell, Commissioner, Department of
Environmental Protection
Filed: May 12, 2005 without change.

Authority: N.J.S.A. 58:10A-1 et seq., 58:11A-1 et seq.,
N.J.S.A.13:1D-1 et seq.

DEP Docket Number: 32-04-11/432

Effective Date: June 6, 2005
Expiration Date: August 17, 2005

The Department of Environmental Protection (Department) is adopting amendments to the Surface Water Quality Standards (SWQS) at N.J.A.C. 7:9B, proposed on December 20, 2004, at 36 N.J.R. 5612(a). The adopted amendments amend the SWQS at N.J.A.C. 7:9B-1.15(c) to segment the non-tidal portion of Shark River from its source to Remsen Mill Road, rename this segment as Shark River Brook and upgrade the antidegradation designation of the Shark River Brook and its named and unnamed tributaries from Category Two to Category One based on "exceptional water supply significance."

The amendments also delete the twofold fresh and saline use classifications, FW2-TM/SE1 and FW2-NT/SE1, applicable to portions of the Shark River Brook and Shark River based on the monitoring data available on the levels of salinity. As a result, the non tidal portion of Shark River Brook from Route 33 to Remsen Mill Road is reclassified as freshwater (FW2) and the tidal portion of the Shark River from Remsen Mill road to Atlantic Ocean is reclassified as saline estuarine

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(SE1). However, the use classifications based on the trout status (FW2-TM and FW2-NT) applicable to the freshwater portion of the Shark River Brook remain unchanged.

The comment period for this proposal was scheduled to close on February 18, 2005. The Department extended the comment period to March 20, 2005. See 37 N.J.R. 770 (March 7, 2005).

Summary of Public Comments and Agency Responses:

The following people submitted written comments on the proposal:

1. Anfuso/Forester, Timothy/ Benjamin T. Township of Colts Neck
2. Bernard, Art THP, Inc. (on behalf of the Borough of Tinton Falls)
3. Chapman, Fred Standard Supply Co., Inc.
4. Charette, David Langan Engineering & Environmental Services, Inc.
5. Ferrara, Raymond A. TRC Environmental Corp. on behalf of Hovtown, Inc.
6. Fine, Frank A. Blueberry Acres
7. Fraley, Carl
8. Gemma, Gordon N. Stone Mandia, LLC
9. Golden, Thomas Mack-Cali Realty Corp.
10. Gross, Sheldon A. Sheldon Gross Realty, Inc.
11. Hegarty, Brian Shark River Cleanup Coalition, Inc.
(on behalf of The American Littoral Society, New Jersey Environmental Federation, Sierra Club (NJ Chapter), Clean Ocean Action, New Jersey Audubon Society, Save Barnegat Bay, Lacey Rail Trail, Edison Wetlands Association, Hackensack River Keeper, and NJPIRG)
12. Heilmann, Richard The Garibaldi Group
13. Kellers, K. Thomas Watershed Management Area 12 (WMA 12)
14. Ladell, Ronald S. Avalon Bay Communities, Inc.
15. Lippincott, Edward
16. Lishak, John NJR Commercial Realty & Resources
17. Mans, Deborah A. NY/NJ Baykeeper
18. Napier, John A.
19. Paparozzi, Louis Board of Chosen Freeholders of Monmouth
20. Pittenger, Dwight W. John D. Pittenger Builder, Inc.
21. Domidion, Vincent/ Monmouth County Water Resources Assoc.

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22.	Poulsen, Vincent C. Shea, Edward E.	Windels Marx Lane & Mittendorf, LLP for Chelsea Property Group, Inc.
23.	Shibles, John C.	Main Street Properties
24.	Shibles, John P.	SSS Neptune Associates, LLC.
25.	Shif, Prescott J.	Sea Wood Associates- South, LLC
26.	Sitar, William J.	Sitar Company
27.	Sitar, William J.	Asbury Avenue East, LLC
28.	Sitar, Douglas	
29.	Tittel, Jeff	The Sierra Club
30.	Wittenberg, Nancy	New Jersey Builders Association
31.	Wolfe, Bill	
32.	Zaayenga, Lawrence J.	Monmouth County Solid Waste Coordinator

The timely submitted comments and the agency's responses are summarized below. The number(s) in parentheses after each comment correspond to the number identifying the commenter(s) above.

1. COMMENT: The commenters support the reclassification of Shark River Brook. (1, 11, 15, 17, 19, 29, 31)
2. COMMENT: The Department's proposal to rename the section of the Shark River from Remsen Mill Road upstream to its source, as the "Shark River Brook", is supported. (11)
3. COMMENT: The Category One upgrade will prevent further degradation of drinking water supplies. (11, 15)
4. COMMENT: The commenter supports the designation of the Shark River Brook and its tributaries as a Category One stream. The proposed Category One designation would enhance the Division of Watershed Management's overall efforts to preserve and restore the exceptional water supply significance of the watershed. The Department's decision to upgrade the Shark River Brook and its tributaries to Category One serves a public purpose, protects the drinking water supply and will benefit the watershed as a whole by preventing further degradation. (13)

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5. COMMENT: The Department's proposal to reclassify the Shark River Brook and its HUC 14 tributaries to Category One is consistent with the Department's efforts to respond to public suggestions and participation and fulfill the Department's statutory mandate to protect the waters of the State. (11)

RESPONSE TO COMMENTS 1 through 5: The Department acknowledges the commenters' support of the proposed amendments.

6. COMMENT: The Department should hold a public hearing about the proposed amendment, pursuant to N.J.A.C. 7:9B-1.11(d). (4, 22)

RESPONSE: A public hearing on the reclassification that is the subject of this adoption is not required under N.J.A.C. 7:9B-1.11(d). N.J.A.C. 7:9B-1.11(d) requires the Department to hold a public hearing on a proposed reclassification of specific segments for more restrictive uses, such as an upgrade from non-trout to trout production. More stringent water quality criteria are imposed to protect the more restrictive uses. The upgrade in antidegradation designation does not impose more restrictive uses but requires applicants for new and expanded activities to implement measures to maintain water quality.

7. COMMENT: The Department should make the referenced Shark River Cleanup Coalition and municipal resolutions available for public review, by posting them on the Department's website. (4, 22)

RESPONSE: The documents referenced in the proposal summary that included the information provided by the Shark River Cleanup Coalition and the municipalities were available for review on request during the comment period as part of the administrative record. In addition, the Department provided copies of the municipal resolutions and the Shark River Cleanup Coalition information to the commenter in response to its request within the original 60-day comment period.

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8. COMMENT: The Department should extend the comment period by an additional 30 to 90 days. (4, 19, 22)

RESPONSE: The Department provided the public with a total of 90 days to comment on the rule proposal; the initial 60 day comment period was extended an additional 30 days.

9. COMMENT: The proposed reclassification of parts of the Shark River Brook to a Category One stream will impair commenters' planned property developments and/or render the respective properties "undevelopable." Inability to develop the properties at issue will result in job loss, tax revenue losses for the local and state governments, and diminution in property value for private landowners, among other losses. The resulting diminution in property value is effectively a "taking" by the Department. (2, 3, 5, 6, 7, 8, 9, 10, 12, 14, 18, 20, 21, 23, 24, 25, 26, 27, 28)

10. COMMENT: Category One designation of the Shark River Brook HUC 14 sub-watershed will not affect affordable housing. (11)

11. COMMENT: The Department has grossly underestimated the economic impact of adoption of the proposal. There is no question that adoption of this proposal will impact the scope and extent of development potential. (5, 8, 9, 14, 21, 24, 26, 27, 28)

12. COMMENT: The drinking water supply of 245,000 people is far more significant than any economic impacts Category One may have on the limited PA1 and PA2 in the Shark River Brook HUC 14 area. (11)

13. COMMENT: The antidegradation designation of a waterbody is required to be based on characteristics and criteria stated in the SWQS. Under the Clean Water Act, states may not consider economic factors in setting SWQS. Economic considerations are to be addressed in implementation, not in setting standards. (29, 31)

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RESPONSE TO COMMENTS 9 through 13: As described in the proposal, reclassification of the Shark River Brook to Category One is expected to have economic impacts. These impacts will include impacts to property development, including residential development with an affordable housing component. However, the reclassification of the Shark River Brook does not preclude development, or constitute a taking as commenters suggest. Regulatory programs throughout the Department consider site-specific factors when issuing permits for development projects. These permits enable permittees to conduct a variety of activities on properties containing Category One waterbodies.

The designation of Shark River Brook as Category One stream requires the application of special water resource protection areas under the Stormwater Management rules, N.J.A.C. 7:8. The Category One designation may impact new major development if the proposed site is within 300 feet of a named or unnamed stream in the Shark River Brook watershed. Because the actual plans for developing individual parcels are not readily available and are subject to other requirements such as local zoning, it is difficult to predict the actual impacts of the proposed rule on any individual site. For example, development at a site may already be restricted due to local zoning and site-specific factors such as soils, slope, wetlands, and the presence of threatened and/or endangered species.

14. COMMENT: The commenters believe that the Department's antidegradation implementation procedures are inadequate and fail to meet minimum federal requirements. The Department must adopt SWQS that identify, for EPA review and approval, specific and protective implementation procedures, including procedures for how the antidegradation policies are enforced in affected permit programs in a way that assures that the policies are actually achieved. (29, 31)

15. COMMENT: The commenters request that the Department respond in detail concerning how the antidegradation policies for Category One waters are implemented in all water resource, drinking water, land use, and natural resource management programs. (29, 31)

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RESPONSE TO COMMENTS 14 through 15: In the summary at 36 N.J.R. 5612 and in the economic impact statement at 36 N.J.R. 5613, the Department briefly explained the Department's antidegradation policies and Category One implementation, and provided a link to the Department's web page for further discussion. The antidegradation implementation procedures are beyond the scope of this rulemaking. However, the Department will be evaluating the antidegradation provisions when it proposes to readopt the SWQS.

16. COMMENT: The commenters believe that the amendment to upgrade the antidegradation designation for Shark River Brook is an amendment to State's Surface Water Quality Standards and requires USEPA review and approval pursuant to the Clean Water Act. We understand that State SWQS amendments are not enforceable unless and until approved by USEPA. It is our understanding that the Clean Water Act and EPA implementing regulations require that the Department conduct, and EPA approve, a triennial review of State SWQS. (29, 31)

17. COMMENT: Must EPA approve the Department's Surface Water Quality Standards before these new standards are effective? (4, 22)

RESPONSE: New Jersey is authorized to establish water quality standards pursuant to the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Water Quality Planning Act, NJSSA 58:11A-1 et seq., and its general enabling authority, N.J.S.A. 13:1D-1 et seq. In New Jersey, adopted water quality standards are effective on promulgation.

The Federal Clean Water Act contemplates the states' conducting a periodic review and public comment on their water quality standards. Thereafter, states must submit their adopted standards to USEPA for review to determine whether the standards meet the Federal Clean Water Act. If the state standards are determined by USEPA to not comply with the Federal Clean Water Act, a state is provided an opportunity to rectify the problem or else USEPA may initiate rulemaking for the state.

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18. COMMENT: There have been no studies, reports or analyses prepared on an economic impact, environmental impact, jobs impact or smart growth impact. Therefore a Category One reclassification of the Shark River Brook should not be adopted. (9, 12, 14, 16)

RESPONSE: As required by the Administrative Procedure Act, N.J.S.A. 52:14-B-1 et seq., the proposal included analyses regarding the expected economic impact, environmental impact, social impact, agricultural impact, jobs impact, and small business impact of the reclassification. The Administrative Procedure Act does not require the preparation of detailed studies, reports or analyses on the economic impact, environmental impact, jobs impact or smart growth impact of a proposed rule amendment.

19. COMMENT: Upgrading all of Shark River to Category One status would undermine the Borough of Tinton Falls' current smart growth objectives and plans for a balance of growth and preservation while not furthering the stated objective of enhancing buffers around water bodies that should properly be classified as Category One. (8, 26, 27)

20. COMMENT: The proposed reclassification would be in conflict with the State Smart Growth Plan and any potential development in line with its intention. (3, 10, 12, 20, 23, 24, 25, 26, 28)

21. COMMENT: The proposal to reclassify the tributary to Reeve Branch is inconsistent with the State Plan. The subject property owned by Hovtown is within Planning Area 2 (PA2) in the State Development and Redevelopment Plan. Properties in PA2 are designated to provide for much of the State's future development. This rule proposal is contrary to that designation as it would seriously impinge on the ability to develop the subject property. (5)

22. COMMENT: The proposed rule amendment is inconsistent with and undermines the objectives of the New Jersey State Development and Redevelopment Plan. The proposed rule undermines the planning process itself. If regulatory changes like this proposed rule amendment are able to proceed, growth area status will not be deemed a reliable marker for a site's suitability

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for development. If regulatory changes like this proposed rule amendment were to be tolerated, neither local municipalities nor the private sector will be able to effectively rely on the State Plan. (14)

23. COMMENT: Upgrading the Shark River Brook and its named and unnamed tributaries in its HUC 14 is consistent with Smart Growth objectives. (11)

RESPONSE TO COMMENTS 19 through 23: Smart Growth is the term used in the New Jersey State Development and Redevelopment Plan (State Plan or SDRP), N.J.S.A. 52:18A-196 et seq., to describe well-planned, well-managed growth that adds new homes and creates new jobs, while preserving open space, farmland, and environmental resources. Smart Growth supports livable neighborhoods with a variety of housing types, price ranges and multi-modal forms of transportation. Smart Growth is an approach to land-use planning that targets the State's resources and funding in ways that enhance the quality of life for New Jersey residents.

As explained in the Smart Growth Impact statement in the proposal, the upgraded antidegradation designation for the Shark River Brook is consistent with and supports the SDRP. The Category One designation implements State Planning Goal 4 by providing a clean, safe and attractive environment essential to assuring the health of the State's citizens. Sustainable supplies of clean water, clean air, and an abundance of open space and recreational opportunities also assure a sustainable economy. The implementing strategy is to "protect the environment by planning for growth in compact forms at locations and densities of use that make efficient use of the existing and planned infrastructure and by increasing infrastructure capacities and growth potential in areas where development will not damage water resources, critical habitats or important forests" The same surface water quality criteria apply in Category One and Category Two streams. The additional protection provided by the Category One designation prevents degradation of existing water quality. While Category Two does provide water quality protection, the Department has made a determination that some waterbodies deserve the Category One level of protection to ensure that potable water supplies, and therefore, drinking water, are as pollutant-free as possible.

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The Department believes that the upgraded antidegradation designations are consistent with Smart Growth and will ensure that development can occur without compromising critical environmental resources.

24. COMMENT: Will future development along the Shark River Brook affect the health and well-being of New Jersey residents or destroy natural resources? (3, 10, 12, 20, 21, 23, 25, 26, 28)

RESPONSE: The Department has determined that Shark River Brook qualifies as a waterbody of exceptional water supply significance and warrants the additional protections afforded as a Category One waterbody. The additional protections afforded Shark River Brook as a Category One waterbody should ensure that future development will not adversely affect the health and well-being of New Jersey residents or destroy the natural resources of the Shark River Brook.

25. COMMENT: The Department uses the term "exceptional water supply significance" as a basis for reclassifying the Shark River Brook and its tributaries to Category One waters, but does not define or provide any criteria for the determination of an "exceptional water supply significance". (4, 22)

26. COMMENT: There is no evidence that the Shark River Brook deserves a greater level of protection to ensure potable water supplies. (3, 9, 10, 12, 20, 21, 23, 24, 25, 26, 28)

27. COMMENT: The proposed Shark River Brook does not meet any of the Category One Waters criteria listed at N.J.A.C. 7:9B-1.4; the Shark River Brook does not provide an exceptional water supply with any degree of significance for the State of New Jersey. (4, 22)

28. COMMENT: One of the Department's criteria for Category One classification is that the reservoir serves a population of at least 100,000. Sources suggest that the Shark River Brook serves less than 10,000 people and therefore does not meet the threshold for Category One classification. (4, 22)

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29. COMMENT: The Shark River Brook and its tributaries provide a relatively small amount of water to the regional water supply system. The Department has not demonstrated that the Shark River Brook's contribution is "significant" or "exceptional." (4, 22)

30. COMMENT: The proposed Shark River Brook should not be classified as a Category One water since it does not have an "exceptional water supply" significance. (4, 22, 24)

31. COMMENT: The population served by the Jumping Brook Plant, stated in the Department's proposal, is inaccurate and should be much lower; the Department's proposal cited approximately 245,000 customers, while the U.S. Census Bureau and other sources lead to a number that is less than 10,000. (4, 22)

32. COMMENT: Is the Shark River Brook a vital drinking water supply to New Jersey residents? (3, 10, 12, 14, 20, 21, 23, 25, 26, 28)

33. COMMENT: The Department should explain why it is "critical" to the Glendola Reservoir that "all" of the sub-watershed be protected. (14, 30)

34. COMMENT: The Department should not designate small watersheds in the Shark River Watershed, such as Reevy Branch, as Category One waters, since they have relatively small flows to the Brook. (4, 22)

35. COMMENT: It is imperative that the Department designates the Shark River Brook and its HUC 14 tributaries Category One, to protect them from degrading and to protect the Glendola Reservoir, a Category One waterbody, as well. (11)

36. COMMENT: The commenters take the position that the Shark River Brook pump station at Remsen Mill Road, which withdraws water from the brook and distributes it to the Glendola Reservoir, a Category One waterbody, is already a tributary to the reservoir and the classification to

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Category One is warranted to ensure that the brook and its HUC 14 tributaries do not degrade the Glendola reservoir. (11)

37. COMMENT: The Category One designation will benefit the entire Shark River Brook HUC 14 and the restoration and protection plan for the water bodies by creating the opportunity to use a more watershed-based and water supply-based initiative, rather than location-specific initiatives that sometimes are not capable of fully addressing the overall needs of the HUC 14. (11)

38. COMMENT: Protecting the Glendola Reservoir from further degradation by designating it Category One is not adequate if the streams that flow or are pumped into the reservoir are allowed to degrade. Therefore the Shark River Brook and its HUC 14 tributaries must be protected from degradation in order to protect the Glendola Reservoir from no measurable changes in water quality characteristics, as required by N.J.A.C. 7:9B-1.4. The majority of the area, which encompasses the Shark River Brook HUC 14, is designated environmentally sensitive and the entire HUC 14 is of "exceptional water supply significance"; for these reasons, the commenters agree with the Department that Category One is justified. (11)

39. COMMENT: The Department's proposal to prevent degradation of the water quality characteristics of the Shark River Brook and its tributaries and thereby protect the water supply of 245,000 New Jersey American Water Company customers by changing the Surface Water Quality Standard to Category One is supported by resolution from the following governments: Avon By The Sea, Borough of Bradley Beach, Borough of Belmar, Neptune City, Neptune Township, Wall Township, Borough of Tinton Falls, and the Monmouth County Board of Chosen Freeholders. (11)

RESPONSE TO COMMENTS 25 through 39: The Department has determined that Shark River Brook deserves a greater level of protection because of its use by New Jersey American Water Company as a supply of potable water. The number of customers served by a particular water system is a factor but is not determinative of whether a waterbody is of "exceptional water supply significance."

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The New Jersey American Monmouth System is a very large system that serves numerous municipalities in Monmouth County and is also interconnected with New Jersey American Lakewood System. The New Jersey American - Monmouth System relies on water from the Swimming River Treatment Plant, the Aberdeen Treatment Plant and the Jumping Brook Plant. This system serves approximately 300,000 customers in Aberdeen, Allenhurst, Asbury Park, Bradley Beach, Colts Neck, Deal, Eatontown, Fair Haven, Highlands Boro, Holmdel, Interlaken, Little Silver, Loch Arbour Village, Long Branch, Middletown, Monmouth Beach, Neptune City, Neptune Township, Ocean Township, Oceanport, Red Bank, Rumson, Sea Bright, Shrewsbury, Shrewsbury Township, Tinton Falls, Union Beach, and West Long Branch. The Jumping Brook Plant treats water from the Glendola Reservoir, ground water wells and water purchased from the New Jersey Water Supply Authority. The New Jersey American Water Company – Monmouth is currently utilizing the entire Safe Yield from the Jumping Brook Plant to service approximately 110,000 customers (based on 100 gallons per day per person.) The Jumping Brook Plant treats 255 Million Gallons per month from surface water sources. Water from Shark River Brook is pumped and stored in the Glendola Reservoir during high flow conditions. The Jumping Brook Plant uses a combination of surface water from either the Shark Brook or the Glendola Reservoir depending on flow conditions. Therefore, almost all of the flow in Shark River Brook is captured by the intake at Remsen Mill Road for water supply.

The Department has designated the Glendola Reservoir as a Category One waterbody. In this rulemaking the Department has determined that Shark River Brook and its tributaries should be afforded the same level of protection because water from the Shark River subwatershed is pumped to the Glendola Reservoir for storage. With New Jersey's increasing population and recent drought conditions, it has become increasingly apparent that actions such as this are necessary to safeguard the State's precious and limited water resources. It has long been recognized that degradation in headwaters and tributaries creates downstream pollution. Protecting the States' water supplies from degradation will help ensure that potable water supplies, and therefore drinking water, are as pollutant free as possible.

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40. COMMENT: The essential purpose of this rule proposal is to protect the watershed for use by the New Jersey American Water Company. However, no information has been provided showing that the water withdrawn by NJ American has violated standards or has caused any problems with regard to New Jersey American Water Company providing a safe supply of water to its customers. Speculation that continuation of the current water quality classification for the streams in this watershed will lead to problems for New Jersey American Water Company is not sufficient. Therefore, an adequate basis for the proposal has not been provided. (5)

RESPONSE: New Jersey American Water Company-Monmouth provides a safe supply of water to its customers after treatment. The determination to upgrade the antidegradation designation of Shark River Brook was not based on the quality of the water delivered to customers. Rather it was based on the need to protect the water supply from future degradation.

41. COMMENT: The proposed rule amendment is not supported by all affected municipalities. The Department did not explain the Category One designation to at least one, and possibly other, municipalities. The adopted Resolution in Tinton Falls was more than likely an expression of generic support for a worthy cause as opposed to a substantive policy initiative. (14, 24)

RESPONSE: The Department received supportive resolutions to upgrade Shark River Brook from every municipality with land in the Shark River Brook watershed. Tinton Falls' resolution was adopted on September 16, 2003.

42. COMMENT: The Department must provide a concise definition of "existing water quality" as used in N.J.A.C. 7:9B-1.5(d)(6)(iii). It is unclear how "existing water quality" is determined in the case of Reevy Branch since water quality is influenced by such fluctuating factors as: stormwater runoff, changes in channel geometry, substrate, vegetative cover, etc. (5)

RESPONSE: Existing water quality is the quality of the water based on all existing approved wastewater discharges authorized through a NJPDES permit, existing approved water transfers or withdrawals authorized through a Water Allocation Permit, and existing development and

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associated nonpoint source pollution contributions. The antidegradation requirements at N.J.A.C. 7:9B-1.5(d) are triggered when an applicant proposes a new or expanded activity. The only time the Department requires existing water quality to be determined is when an applicant proposes a new or expanded point source in a Category One waterbody. When an applicant proposes a new major development, which would result in nonpoint source pollution from stormwater, existing water quality is not determined.

As stated in the Economic Impact analysis in the proposal there are no existing wastewater discharges, i.e., point source discharges, in the Shark River Brook and its tributaries, including Reevy Branch. Therefore, unless an applicant proposes a new or expanded activity on Reevy Branch, it is unlikely that the existing water quality will be required to be determined. To implement the antidegradation requirements at N.J.A.C. 7:9B-1.5(d), new major development will be required to comply with the best management practices imposed under the Stormwater Management rules.

43. COMMENT: The rule proposal is internally inconsistent as to the "named and unnamed tributaries" intended to be upgraded to Category One status. One section of the proposal states that the Department is proposing to upgrade to Category One status the Shark River Brook "and all of its unnamed tributaries based on exceptional water supply significance." Later in that section, the Department states that it is proposing Category One designation for the Shark River Brook and "named tributaries," specifically identified as Reevy Branch, Robins Swamp Brook, Sarah Green Brook, South Brook and Webleys Brook. The Department should clarify its intention to limit its upgrades to "named tributaries" of the Shark River and/or the Shark River Brook to those five streams that are actually named in Table 1 as proposed or any unnamed tributaries as to those streams. (8, 26, 27)

RESPONSE: The proposal at 36 N.J.R. 5612 states that "The Department is proposing to upgrade the antidegradation designation of Category One for Shark River Brook and all of its named and unnamed tributaries based on 'exceptional water supply significance'." Additionally, at 36 N.J.R. 5612, the Department indicated that this would protect the entire Shark River Brook subwatershed.

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For ease of identification, the Department provided the names of the referenced tributaries where applicable. However, there are approximately 12 unnamed tributaries in the Shark River Brook. The proposal clearly expresses the Department's intention to include these unnamed tributaries in the classification upgrade proposal.

44. COMMENT: Upgrading this waterway to Category One will not result in a measurable improvement to water supply quality. (5, 30)

RESPONSE: The upgrades in antidegradation designation alone are not intended to improve water quality. The antidegradation requirements are intended to prevent future water quality degradation.

45. COMMENT: The commenter opposes the proposal and states that the Department must develop an overall plan for how water bodies are chosen for reclassification and what criteria are used. Without such an explanation, the process is wholly subjective and precludes any predictability for future planning. (30)

46. COMMENT: The Department reviewed waterbodies in Monmouth and Ocean Counties for Category One based on "exceptional water supply significance". Shark River Brook was not included because the Department did not consider Shark River Brook to be of "exceptional water supply significance." Since nothing has changed, Shark River Brook should not be upgraded. (4, 22)

RESPONSE: The Surface Water Quality Standards at N.J.A.C. 7:9B-1.4 define Category One waters. Waterbodies may be designated as Category One because of their clarity, color, scenic setting, other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance or exceptional fisheries resource. On November 3, 2003, the Department proposed to upgrade the Metedeconk River watershed and portions of the Manasquan River located Monmouth and Ocean Counties to Category One based upon "exceptional water supply significance." These upgrades were effective on August 2, 2004. The Department did not evaluate Shark River Brook for Category One designation as part of that

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proposal. This rulemaking is part of a continuing process to review information on the State's waters and determine where upgrades are appropriate. The Department has provided a technical justification concerning why Shark River Brook and its named and unnamed tributaries qualify as Category One. For further discussion of the process, see responses to comments in the adoption of SWQS amendments upgrading the antidegradation designations for various waters. 35 N.J.R. 2264(b) (May 19, 2003).

47. COMMENT: The Borough of Tinton Falls, the Council on Affordable Housing, and Avalon Bay Communities detrimentally relied on the State's Planning Area 2 designation before proceeding with their plan to provide affordable housing in Tinton Falls. (14)

48. COMMENT: The proposal fails to specify which projects will be exempt from the buffers associated with the Category One designation if the Department adopts the proposed amendments. (4, 19, 22, 26, 32)

49. COMMENT: The Department should limit the rule change to new and future projects only, and only after sufficient time has passed for the regulated community to identify itself and its projects within the scope of the new rule. Only projects that require discharge and/or development permits that have not yet been applied for locally or at the State level as of 60 to 90 days from the date of adoption of the proposed rule change should be required to comply with the new Category One limitations. An additional notice and comment period should be provided in the event of adoption of these provisions. (26)

50. COMMENT: The entire Shark River Brook HUC 14 upstream of the Remsen Mill Road intake must be included in the Category One rule. No areas upstream should be given an exemption from Category One or grandfathered from the rules if they do not meet all of the criteria for exemption status in the rules. (11)

51. COMMENT: The Department should amend the applicability language in the Stormwater Management rules at N.J.A.C. 7:8-1.6 to clearly state that it is the date of adoption of the

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reclassification to Category One that approvals should be received in order to be exempt from being considered a major development and the provisions of the Special Water Resource Protection Areas. (4, 22)

RESPONSE TO COMMENTS 47 through 51: The Department acknowledged in the Smart Growth Impact analysis in the proposal that under the preliminary State Plan Policy Map, there are small areas of the Shark River Brook watershed that would be located in either the Metropolitan (PA 1) or Suburban (PA 2) Planning Areas. The Department has upgraded the antidegradation designation of the Shark River Brook and tributaries. However, the upgraded antidegradation designation does not preclude development or the ability of a community to satisfy affordable housing obligations.

The Surface Water Quality Standards do not contain a grandfathering provision. The Category One designation of the Shark River Brook will take effect upon publication, and permits issued by the Department thereafter will have to meet the Category One antidegradation standards. For point sources, the antidegradation requirements associated with the Category One designation will be imposed on applicants seeking to expand or increase the permitted flow of an existing municipal or industrial treatment works or proposing a new discharge to the Shark River Brook. An applicant will be required to determine existing water quality as part of their application and demonstrate that the new or expanded discharge would not result in a measurable change to water quality.

For non-point sources, the Department requires the implementation of Best Management Practices to address water quality/water quantity impacts associated with nonpoint source pollution. The Stormwater rules, N.J.A.C. 7:8, adopted on February 2, 2004, establish a hierarchy of Best Management Practices for projects. The Stormwater rules also provide special protections, known as the special water resource protection area requirements, for Category One waterbodies at N.J.A.C. 7:8-5.5(h).

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The Stormwater rules contain a grandfathering provision at N.J.A.C. 7:8-1.6, and whether a project must comply with the Stormwater rules in effect after February 2, 2004 and/or the special water resource protection area requirements at N.J.A.C. 7:8-5.5(h), will depend upon the specific project and whether and when the project obtained local approvals and appropriate Department permits. For example, if a project has not obtained local approvals or Department permits prior to the effective date of the Shark River Brook redesignation, the project will need to be designed to comply with the Stormwater requirements, including the 300 foot buffer requirements at N.J.A.C. 7:8-5.5(h). In contrast, if a project meets all the grandfather provisions at N.J.A.C. 7:8-1.6 prior to February 2, 2004, the project will be exempt from the stormwater requirements in effect after February 2, 2004 and the project will not have to be redesigned to meet the special water resource protection area requirements unless either of the following occurs: (1) one of the underlying qualifying approval expires; or (2) a revision to the qualifying approval is made and it does not result in a de minimis impact to water resources. The suggestion that the Department should revise the applicability requirements in the Stormwater Rule at N.J.A.C. 7:8-1.6 is beyond the scope of this rulemaking.

52. COMMENT: The commenter supports the Department's proposal to reclassify the Shark River Brook to Category One, to the extent that such reclassification facilitates the proposed cleanup of the Shrewsbury Disposal site. (21)

53. COMMENT: The commenters request an exemption for the proposed Monmouth County Reclamation Center (MCRC) Phase IV landfill in the event that the proposal is adopted. (19, 32)

54. COMMENT: There are two "landfills" at the headwaters of the Shark River-has anybody determined the economic impact on the area if landfills were closed? (10, 12, 20, 23, 25, 28)

RESPONSE TO COMMENTS 52 through 54: The Surface Water Quality Standards do not contemplate exemptions for particular projects. However, Department regulatory programs issue permits for development projects that enable permittees to conduct a variety of activities on properties containing waterbodies with the Category One antidegradation designation. Since

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Department regulatory programs implement the Surface Water Quality Standards and several of these programs are involved in the permitting for any landfill, each program must determine how the Surface Water Quality Standards will be implemented with respect to any individual project.

The Department is unable to determine from the comment the type of permit(s) that could be required for the "Phase IV" landfill or whether or for what type of exemption the contemplated project would qualify. For example, if the contamination from the Shrewsbury Landfill can be documented as having an adverse impact on either groundwater or surface water quality, the Department would allow encroachment into the Special Water Resources Protection Areas as necessary to remediate that impact. The impact on the proposed expansion for Phase IV may depend on the scope of remediation activities at the Shrewsbury Landfill. To the extent that the regulated entity meets the criteria for such an exemption, or any other exemption under the Department's rules, one will be provided. The appropriate mechanism for seeking an exemption would be through the permit application process.

Additionally, the Stormwater Management rules at N.J.A.C. 7:8-2.5 do allow a municipality or other entity conducting stormwater management planning to petition the Department for an exemption to the requirements of that chapter by submitting documentation to demonstrate that, if granted, the exemption will not result in an increase in flood damage, water pollution, including threats to the biological integrity, or constitute a threat to the public safety.

Existing water quality includes nonpoint source pollution from the closed Shrewsbury Landfill and the landfill operated by Monmouth County Reclamation Center. The upgrade to Category One for Shark River Brook will not result in additional economic impact to the landfill unless the landfill is expanded. The Shrewsbury Landfill is already closed and therefore the upgrade would not result in additional economic impact. Expanding the Monmouth County Reclamation Center would be subject to additional requirements due to the designation as Category One.

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55. COMMENT: Protection against degradation of water quality should be implemented at the pollution source, rather than attempting the removal of pollutants through a buffer. Efficient removal of pollutants in stormwater can generally be more successful via use of structural and non-structural BMPs with buffers that are significantly less than 300 feet. (5)

56. COMMENT: Paving roads, driveways and parking areas in developments with an open-graded asphalt mix known as "popcorn mix" would reduce the amount of runoff by allowing a substantial amount of stormwater to permeate the asphalt and recharge the aquifer. (6)

RESPONSE TO COMMENTS 55 through 56: The Department agrees that the use of open-graded asphalt mix, and various soil erosion and sediment control measures within a watershed have a positive impact on water quality. However, the commenters' proposed alternatives deal with Best Management Practices (BMPs) for Stormwater Management. These alternatives do not address the "exceptional" classification for water supplies, and as such, they are beyond the scope of this rulemaking.

57. COMMENT: Proper enforcement of existing requirements, such as N.J.S.A. 4:24-39 et seq., and soil conservation regulations requiring that disturbed areas be re-seeded within 30 days, would control silt. Proper filtration and treatment would probably eliminate the current problems faced by Shark River. (6, 14)

58. COMMENT: A new regulatory framework is not necessary to achieve the Department's goals. The proposed wetland delineation specifically applicable to the Avalon Bay Communities, Inc. site and the preexisting soil erosion and sediment control requirements will provide adequate antidegradation protection without the necessity to reclassify the entire Shark River Brook as a Category One waterbody. (14)

RESPONSE TO COMMENTS 57 through 58: The Stormwater Management rules, N.J.A.C. 7:8, establish best management practices to be applied to new major development. The commenters suggest best management practices that may minimize the impact of nonpoint sources. However,

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the Department has concluded that special water resource protection areas provide the best available and most reliable method to prevent degradation of Category One waters from nonpoint source pollution. Special water resource protection areas provide additional water quality benefits to in-stream aquatic life, provide streambank stabilization and flood attenuation, and protect and provide wildlife habitat.

59. COMMENT: The municipalities' resolutions in support of the Shark River Cleanup Coalition contain the same inaccurate and misleading information about the Shark River and its relation to the regional water supply as presented in the Shark River Cleanup Coalition document. (4)

60. COMMENT: The Department should have the New Jersey American Water Company verify the information in Shark River Cleanup Coalition document, because in many instances, it appears that Shark River Cleanup Coalition information is inaccurate and misleading. (4, 22, 24)

RESPONSE TO COMMENTS 59 through 60: The proposed upgrade for Shark River Brook was based on the Department's determination that the waterbody qualifies as a Category One waterbody. While the Department received information regarding the Shark River Brook from the Shark River Cleanup Coalition, this information was merely a factor, and not the sole basis for the Department's proposal. The Department solicited public comment on the proposal to upgrade the antidegradation designation. Comments were not received from any of the municipalities within the watershed or New Jersey American Water Company indicating that the Department had relied on inaccurate information.

61. COMMENT: The Department does not provide any salinity monitoring data in the proposal to substantiate reclassification of portions of the Shark River Brook. (4, 22, 24)

62. COMMENT: Has there been a professional study on the Shark River to determine the salinity? (10, 12, 14, 20, 23, 25, 28)

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63. COMMENT: The Department's proposal to change the Use Classifications of the Shark River Brook, Shark River, Reevy Brook, Sara Green Brook, Webley's Brook, Robins Swamp Brook, and South Brook as well as other unnamed tributaries in the HUC 14 as outlined in the rule proposal is consistent with field observations and salinity monitoring data collected by the Shark River Cleanup Coalition Inc. (11)

RESPONSE TO COMMENTS 61 through 63: The Department utilized salinity data collected by Shark River Cleanup Coalition to delineate the freshwater segment from the saline segment because only the freshwater segment is used as a water supply. The Shark River Cleanup Coalition, Inc. collected salinity data using a YSI 6300 multi-parameter hydroprobe. The results indicate that above the concrete weir at Remsen Mill Road where NJAWC operates a water intake, the salinity is less than 1ppt. Below Remsen Mill Road, the salinity fluctuates from 3 to 22 ppt. This indicates that the saltwater/freshwater break point of the Shark River Brook is the Remsen Mill Road Bridge.

The Department is classifying Shark River Brook from Remsen Mill Road upstream as either FW2-NT or FW2-TM. Downstream of the weir at Remsen Mill Road, Shark River Brook is classified as SE. The Category One designation only applies to the portion of the Shark River Brook classified as FW2-NT or FW2-TM. Shark River Brook downstream of the Remsen Mill Road intake where salinity exceeds 3.5 parts per thousand changes with the tide and now classified as SE1 and has not received the designation of Category One.

64. COMMENT: The DEP Landscape project lists several areas of wetlands in the Shark River Brook HUC 14 as "suitable habitat for Threatened and Endangered Species." The presence of documented suitable habitat (either in the stream corridor or in stream waters for aquatic/ aquatic-dependent species) supports a finding of "exceptional ecological significance" which is one of the criteria for Category One designation at N.J.A.C. 7:9B-1.4. (11)

65. COMMENT: The commenter believes that suitable habitat or the presence of a rare, threatened or endangered species in a stream corridor for a single plant or animal species is a

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sufficient basis for Category One based on the Category One definition at N.J.A.C. 7:9B-1.4. (29, 31)

66. COMMENT: In the event that any publicly owned, preserved lands or “other special holdings” border the stream or its tributaries, the Department should consider upgrading the designation to Category One. (29, 31)

RESPONSE TO COMMENTS 64 through 66: As provided in the definition at N.J.A.C. 7:9B-1.4, a Category One water can be designated because of various attributes. In the case of the Shark River and tributaries, the basis for the Category One upgrade was "exceptional water supply significance." While there may be habitat for endangered and threatened species which may support a finding of "exceptional ecological significance", or publicly owned or preserved land or “other special holding”, the Department determined that "water supply significance" was sufficient for the upgraded antidegradation.

67. COMMENT: Does the Department intend to propose wildlife criteria or water quality standards for wetlands? (29, 31)

68. COMMENT: The commenters oppose the Department’s response to comments on an earlier rulemaking at 35 N.J.R. 2264 (b). (29, 31)

69. COMMENT: Commenters strongly urge the Department to move forward in proposing additional waterbodies for Category One designation based on the Department’s candidate list and publicly nominated waters. (29, 31)

RESPONSE TO COMMENTS 67 through 69: The commenters’ concerns regarding wildlife criteria, wetland standards, antidegradation implementation policies and future upgrades are beyond the scope of this proposal.

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Federal Standards Statement

Executive Order 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c.65) require that State agencies which adopt, readopt, or amend State regulations that exceed any Federal standards or requirements include in the rulemaking document a Federal standards analysis.

The Federal Clean Water Act (CWA), 33 U.S.C. 1251 et seq., as amended by the Water Quality Act of 1987 (PL 100-4) requires the establishment of water quality standards for all surface waters of the United States. Individual states are given the primary responsibility for developing and adopting surface water quality standards applicable to their waters. The USEPA is given responsibility to oversee and approve state water quality standards, provide guidance on the content of the standards and develop water quality criteria guidance documents. Key elements of the surface water quality standards program required under the CWA are: a classification system establishing designated beneficial uses of the waters; ambient water quality criteria necessary to protect those uses; minimum uses to be attained, which reflect the fishable and swimmable goals of the CWA; and antidegradation policies, and implementation procedures to prevent water quality from deteriorating. Furthermore, the CWA includes provisions requiring the USEPA to promulgate superseding Federal standards where the USEPA concludes that a State's standards are not consistent with the requirements of the CWA or where Federal requirements are necessary to meet the requirements of the CWA.

N.J.A.C. 7:9B-1.15 contains specific waterbody classification listings and antidegradation designations, arranged by major drainage basin, and instructions for the use of the classification tables. The Federal water quality regulations at 40 CFR § 131.10 require that states specify appropriate water uses to be achieved and protected. The Department's SWQS waterbody classification listing is a tool to identify designated uses such as protection and propagation of fish, shellfish, and wildlife, recreation in and on water, public water supplies, agricultural, industrial, etc. Therefore, these waterbody classifications are consistent with the Federal regulations.

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In addition, 40 CFR § 131.12 establishes requirements for the states to develop and adopt antidegradation policies and implementation procedures. The policies and procedures ensure that the level of water quality needed to protect existing uses is maintained, and that water quality better than necessary to protect existing uses is maintained and protected unless demonstrations are made in support of lowering the water quality. The changes in antidegradation designation for Shark River Brook and its tributaries identify the level of protection and implementation procedures that must be followed. The antidegradation designations are consistent with and do not exceed Federal standards, and therefore, no further analysis is required.

Full text of the adoption follows (additions indicated in boldface **thus**; deletions indicated in brackets **[thus]**):

(No Change from Proposal.)

Based on consultation with staff, I hereby certify that the above statements, including the Federal standards analysis addressing the requirements of Executive Order 27 (1994), permit the public to understand accurately and plainly the purposes and expected consequences of these amendments. I hereby authorize this adoption.

Date:

Bradley M. Campbell, Commissioner
Department of Environmental Protection