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DEPARTMENT OF ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

WATER MONITORING AND STANDARDS

Surface Water Quality Standards

Proposed Amendments: N.J.A.C. 7:9B-1.4, 1.5(g) and 1.14(d)

Authorized By: Mark N. Mauriello, Acting Commissioner
Department of Environmental Protection

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

Calendar Reference: See Summary below for explanation of exception to
calendar requirement.

DEP Docket Number: 21-09-11/754

Proposal Number: PRN 2009-385

Public hearing concerning this proposal will be held on Wednesday, **January 27, 2010** from
3:30 PM to 5:00 PM or close of testimony, whichever occurs first, at:

Department of Environmental Protection
401 East State Street
Public Hearing Room
Trenton, NJ 08625

Submit written comments by February 19, 2010 to:

Gary J. Brower, Esq.
Attn. DEP Docket Number 21-09-11/754
Office of Legal Affairs
New Jersey Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, NJ 08625-0402

The New Jersey Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as paper. Submittals on disk or CD must not be access-restricted (locked or read-only) in order to facilitate use by the Department of the

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electronically submitted comments. Submission of a disk or CD is not a requirement. The Department prefers Microsoft Word 6.0 or above. MacIntosh formats should not be used. Each comment should be identified by the applicable N.J.A.C. citation, the commenter's name and affiliation following the comment.

Courtesy copies of this rule proposal can be downloaded electronically from the Department's web page at <http://www.state.nj.us/dep/rules>.

The agency proposal follows:

SUMMARY

As the Department has provided a 60-day comment period on this notice of proposal, this notice is exempted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Department administers the SWQS for the protection of high quality water and to restore impaired waters. The Department develops and administers the SWQS pursuant to the Water Quality Planning Act (WQPA), N.J.S.A. 58:11A-1 *et seq.* and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.* The SWQS are further developed and administered in conformance with requirements of the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, commonly known as the Clean Water Act (CWA), and the Federal regulatory program established by the United States Environmental Protection Agency (USEPA) at 40 C.F.R. 131. The SWQS include general requirements, use designations, classifications, antidegradation categories, and water quality criteria applicable to the surface waters of the State. The SWQS are established to address the Department's responsibilities to conduct a continuous planning process pursuant to Section 303 of the CWA, 33 U.S.C. §1313, and the WQPA, N.J.S.A. 58:11A-1 *et seq.* The SWQS establish the designated uses to be achieved for individual waterbodies and specify the water quality criteria necessary to achieve those uses. The criteria contained in the SWQS are expressed as constituent concentrations, levels, or narrative statements that represent a quality of water that supports a particular use. Designated uses include drinking water, propagation of fish and wildlife, recreation, agricultural and industrial

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supplies, and navigation. As part of this process, the Department establishes stream classifications and an antidegradation designation for each waterbody. Changes to the stream classification, designated uses, water quality criteria, and antidegradation designation are accomplished through rulemaking.

The SWQS are utilized by New Jersey Pollutant Discharge Elimination System (NJPDES) (N.J.A.C. 7:14A) surface water discharge permitting program in the development of water quality-based effluent limitations (WQBEL) to protect or improve existing water quality and designated uses. They are also utilized by the Department's Site Remediation Program (N.J.A.C. 7:26E) to ensure discharges flowing to surface water comply with the SWQS. The Land Use Regulation Program, through the Freshwater Wetlands Program (N.J.A.C. 7:7A), the Coastal Permitting Program (N.J.A.C. 7:7 and 7:7E), and the Flood Hazard Area Control Act Program (N.J.A.C. 7:13), also utilizes the SWQS to establish permit requirements.

As part of its proposal to readopt the SWQS, the Department proposed amendments to the nutrient policies, N.J.A.C. 7:9B-1.5(g), and the phosphorus criteria, N.J.A.C. 7:9B-1.14(d)5. (see 41 N.J.R. 1565(a); April 20, 2009). The criteria contained in the SWQS are expressed as constituent concentrations, levels (with concentrations and levels expressed in numbers and referred to as numeric criteria), or narrative statements that represent a quality of water that supports a particular use. The Department proposed to address nutrient concerns through utilization of an assessment method that would evaluate compliance with the existing narrative nutrient criterion, contained in the nutrient policy at N.J.A.C. 7:9B-1.5(g)2, in a specific waterbody in order to determine how the numeric phosphorus criterion should be applied. The assessment method would address situations where the waterbody meets the applicable numeric phosphorus criterion but still has aquatic growth problems (for example, algae), as well as those situations where the waterbody is above the numeric phosphorus criterion, but does not actually exhibit any problems. This approach would allow the Department to perform a case-specific examination of water conditions and impose a numeric phosphorus criterion at N.J.A.C. 7:9B-1.14(d)5, appropriate for the particular waterbody.

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The Department received comments opposing the proposed approach that would evaluate the narrative criterion before determining whether to apply the applicable numeric phosphorus criterion and asserting that this approach would weaken protections for surface waterbodies. The Department also received comments generally supporting the Department's approach to assess the narrative nutrient criterion by evaluating a waterbody's biological response to nutrients and to use that information to determine applicability of the numeric phosphorus criteria. In addition, commenters requested that the Department expand the application of the nutrient policies to coastal waters and adopt a narrative criterion for these waters. These comments and the Department's responses are published as part of the adoption of the April proposal elsewhere in this issue of the New Jersey Register.

After reviewing the comments received on the April 20, 2009 proposal, the Department determined that clarification of certain parts of the previous proposed amendments to the phosphorus criteria at N.J.A.C. 7:9B-1.14(d)5 was necessary, and that other amendments to these criteria not previously proposed would be appropriate. Accordingly, in order to allow for full comment on all changes related to the phosphorus criteria, the amendments to the phosphorus criteria proposed on April 20, 2009 were not adopted and the existing phosphorus criteria at N.J.A.C. 7:9B-1.14(d)5 remain in effect.

Comments received on the April 20, 2009 proposal expressed concern that the Department would not implement a numeric criterion for a waterbody until it determined that the narrative criterion was not met. More specifically, commenters were concerned that the proposal could be interpreted to mean that the applicable numeric criterion would only be applied when it was found that a waterbody did not comply with the narrative criterion. Accordingly, they were concerned that where information or an assessment method was not available to evaluate compliance with the narrative criterion, the applicable numeric criterion would not be imposed. To eliminate this concern and clarify the Department's intention in such situations, the Department is re-proposing phosphorus numeric criteria for both streams and lakes to indicate that the applicable numeric criterion applies until the Department determines that the phosphorus concentration in the waterbody does not cause undesirable conditions described in the narrative

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criterion for nutrients. This will allow the Department to address both situations where a waterbody meets the applicable numeric phosphorus criterion, but still has aquatic growth problems, as well as situations where a waterbody is above the applicable numeric phosphorus criterion, but does not actually exhibit any problems. This change will also clarify that all waterbodies and their uses will be protected by either narrative or numeric criteria, as appropriate.

In addition to considering and addressing the concern that the prior proposal could be interpreted to provide that, where information or an assessment method was not available to evaluate compliance with the narrative criterion, the existing numeric criteria would not be imposed on a discharge to that waterbody, the Department considered the suggestion made by some commenters that the narrative criterion for nutrients should apply to other stream classifications and not just to freshwaters classified under the FW general surface water classification (FW waters). As discussed in further detail below, the Department has evaluated the existing narrative criterion and determined that it could additionally be appropriately applied to all saline estuarine waters (SE waters) and saline coastal waters (SC waters). In consideration of these concerns, the Department is proposing amendments to the definition of “watershed-specific translators” at N.J.A.C. 7:9B-1.4, nutrient policies at N.J.A.C. 7:9B-1.5(g), and proposing new narrative nutrient criterion at N.J.A.C. 7:9B-1.14(d) as described below.

N.J.A.C. 7:9B-1.4

The Department is proposing amendments to the definition of “watershed-specific translators” to correct the reference to the narrative criterion to N.J.A.C. 7:9B-1.14(d)4i to reflect changes proposed as part of this proposal as explained below. In addition, the Department is proposing to correct criteria to criterion because the narrative statement is a criterion and not multiple criteria.

N.J.A.C. 7:9B-1.5(g)

N.J.A.C. 7:9B-1.5(g) specifies the SWQS nutrient policy and provides that it is applicable to all FW waters of the State. As indicated above, the Department has determined that

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the existing nutrient policies at N.J.A.C. 7:9B-1.5(g) could also be appropriately applied to SE and SC waters. Although the primary limiting nutrient may differ between freshwaters and coastal waters (phosphorus and nitrogen, respectively), the biological response due to excessive nutrients is similar in both types of waterbodies. In both fresh and saline waters, nutrients may cause algal blooms, depletion of dissolved oxygen, loss of water clarity, and impacts to aquatic life, such as fish kills, loss of submerged aquatic vegetation and shellfish habitat, loss of aquatic habitat, harmful/toxic algal blooms, and natural flora and fauna replacement. However, the response indicators and thresholds may vary. Therefore, the Department is proposing to delete 'FW' from N.J.A.C. 7:9B-1.5(g)1. As a result, the nutrient polices would apply to all waters of the State.

N.J.A.C. 7:9B-1.5(g)2 currently describes in narrative form the objectionable impacts to surface waters caused by nutrients and provides that it is the Department's policy that nutrients shall not be allowed in concentrations that create these negative conditions. The Department is proposing to recodify this provision to N.J.A.C. 7:9B-1.14(d)4. As a result, the Department is proposing to delete the policy at current N.J.A.C. 7:9B-1.5(g)2. The provisions currently codified at N.J.A.C. 7:9B-1.5(g)3, 4, and 5 are recodified to N.J.A.C. 7:9B-1.5(g)2, 3, and 4. At proposed N.J.A.C. 7:9B-1.5(g)2, the Department is proposing to amend the cross-reference to the numeric phosphorus criteria to reflect that this will now be codified at proposed N.J.A.C. 7:9B-1.14(d)4.

N.J.A.C. 7:9B-1.14(d)

N.J.A.C. 7:9B-1.14(d) establishes narrative and numeric criteria for substances generally considered conventional pollutants, including phosphorus. Numeric criteria for toxic pollutants are established at N.J.A.C. 7:9B-1.14(f). The Department is proposing to include "nutrients" as a separately listed substance at N.J.A.C. 7:9B-1.14(d)4. The proposed nutrient criteria consist of a narrative criterion applicable to all nutrients, including phosphorus, in all waters as well as the existing numeric criteria for one nutrient, phosphorus, in particular waterbodies, currently codified at N.J.A.C. 7:9B-1.14(d)5. The Department is proposing to include the narrative criterion applicable to all waters at N.J.A.C. 7:9B-1.14(d)4i and the numeric phosphorus criteria

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applicable to streams and lakes at proposed N.J.A.C. 7:9B-1.14(d)4ii(1) and (2). The establishment of nutrients as a “substance” with a general narrative criterion followed by numeric criteria applicable to particular types of nutrients in particular waterbodies will enable the Department to consolidate numeric criteria for additional nutrients and nutrient-related pollutants for rivers and lakes as well as numeric criteria for other waterbody types including waters classified as SE and SC under the nutrients category. The numeric phosphorus criterion applicable to freshwater rivers and streams is currently codified at N.J.A.C. 7:9B-1.14(d)5. The proposed amendments would consolidate the narrative nutrient criterion and the applicable numeric phosphorus criteria at N.J.A.C. 7:9B-1.14(d)4. When criteria for other parameters are developed, amendments to the nutrient criteria will be proposed to incorporate these criteria within the nutrients category at N.J.A.C. 7:9B-1.14(d)4. This could include criteria for nitrate, nitrogen, and chlorophyll *a*, among others. As a result of this change, the pH criteria are recodified from existing N.J.A.C. 7:9B-1.14(d)4 to proposed N.J.A.C. 7:9B-1.14(d)5 to maintain the alphabetical listing of parameters at N.J.A.C. 7:9B-1.14(d).

The proposed narrative criterion for nutrients at N.J.A.C. 7:9B-1.14(d)4i is identical to the nutrient policy currently codified at N.J.A.C. 7:9B-1.5(g)2. Both as existing and as proposed, this provision specifies that, except as due to natural conditions, nutrients shall not be allowed in concentrations that render the waters unsuitable for the existing or designated uses due to objectionable algal densities, nuisance aquatic vegetation, abnormal diurnal fluctuations in dissolved oxygen or pH, changes to the composition of aquatic ecosystems, or other indicators of use impairment caused by nutrients. The proposed narrative criterion for nutrients would apply to all classifications of State waters, including estuaries and near-shore ocean waters.

The Department is also proposing to recodify the numeric phosphorus criteria for lakes and streams from N.J.A.C. 7:9B-1.14(d)5i and ii to proposed N.J.A.C. 7:9B-1.14(d)4ii(2) and (1) respectively. Plant growth in freshwaters (streams, rivers, lakes, ponds, and reservoirs) is expected to be limited by the amount of phosphorus available. The nutrient assessment method used to evaluate the narrative nutrient criteria will now be the means to evaluate whether nutrients render the waters unsuitable for their designated uses. The narrative criterion analysis

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will determine whether the phosphorus concentration in the water is causing a problem (and is, thus, the limiting nutrient). Where nutrients cause undesirable conditions in freshwaters, the Department will require actions to reduce phosphorus by implementing the numeric phosphorus criteria at proposed N.J.A.C. 7:9B-1.14(d)4ii. The Department is proposing to restrict the application of the numeric phosphorus criterion of 0.1 mg/L to non-tidal streams because the USEPA recommendation for this numeric criteria was developed for flowing freshwater streams and not waters that are tidally influenced. For lakes, the reference to “site-specific criteria” applying, where developed, is not carried forward in the criterion as recodified because site-specific criteria supersede statewide criteria by operation of N.J.A.C. 7:9B-1.5(g)3.

The criterion of 0.05 mg/L phosphorus criterion for lakes, ponds and reservoirs, is continued. This criterion will apply to all lakes, ponds, and reservoirs, as well as tributaries at the point where they enter such bodies of water, unless watershed-specific translators are established pursuant to N.J.A.C. 7:9B-1.5(g)3, or if the Department determines that the narrative criterion for nutrients at N.J.A.C. 7:9B-1.14(d)4i is met. Specifically, as already mentioned above, the numeric phosphorus criteria apply unless watershed-specific translators are established or until it is demonstrated that the narrative criterion for nutrients is met.

The Department is also revising the numeric phosphorus criteria to replace the reference to watershed specific criteria with the newly adopted term “watershed specific translators” in proposed N.J.A.C. 7:9B-1.14(d)4ii(1) and (2). As explained in the April 20, 2009 proposal (see 41 N.J.R. 1565(a)), watershed-specific translators are established to demonstrate compliance with the narrative criterion to protect existing or designated uses for a specified watershed. Watershed-specific translators may only be established as part of a TMDL evaluation pursuant to N.J.A.C. 7:15-6.3 to demonstrate compliance with the narrative criterion. Watershed-specific translators may be an alternative criterion or a combination of criteria. For example, a watershed-specific translator could be a variation of the existing phosphorus criteria, criteria established for a new parameter such as Chlorophyll *a*, or a combination of criteria for different parameters (for example, Chlorophyll *a* and dissolved oxygen).

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Assessment Methods and Implementation:

Since 2001, USEPA has recommended that states integrate Section 305(b) reporting requirements with Section 303(d) reporting requirements by generating an Integrated Water Quality Monitoring and Assessment Report (Integrated Report). The biennial Statewide Water Quality Inventory Report or "305(b) Report" includes an evaluation of the overall water quality and support of designated uses, as well as an evaluation of strategies to maintain and improve water quality. The biennial List of Water Quality Limited Waters, or "303(d) List," identifies waters that are not attaining designated uses because they do not meet surface water quality standards despite the implementation of technology-based effluent limits.

New Jersey has developed the Integrated Water Quality Monitoring and Assessment Methods (Methods Document) as required by USEPA. The Methods Document provides an objective and scientifically sound assessment methodology, including a description of the data the Department will use to assess attainment of the designated uses; the quality assurance aspects of the data; a detailed description of the methods used to evaluate designated use attainment; and the rationale for identifying a waterbody as impaired. Pursuant to N.J.A.C. 7:9B-1.5(c)9, the Department uses the Integrated Water Quality Monitoring and Assessment Methods (Methods Document) developed pursuant to N.J.A.C. 7:15-6.2 to evaluate water quality data and identify waters where water quality does not meet the Surface Water Quality Standards at N.J.A.C. 7:9B as required by Section 303(d) and 305(b) of the Federal Clean Water Act.

The Methods Document is revised, as needed, and released for public comment, as required pursuant to N.J.A.C. 7:15-6.2, prior to developing the Draft List of Water Quality Limited Waters. This provides the public and the USEPA with an opportunity to evaluate the methods used to collect, analyze, and interpret data before the Department proposes the List of Water Quality Limited Waters. The Department reviews the comments received and revises the Methods Document as appropriate before proposing the Draft List of Water Quality Limited Waters as an amendment to the Statewide Water Quality Management Plan pursuant to N.J.A.C. 7:15-6.2. The Department will publish a summary of the public comments and its responses in the notice of the proposed amendment to the Statewide Water Quality Management Plan for the

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List of Water Quality Limited Waters. The final Methods Document and the final List of Water Quality Limited Waters are published as appendices to the final Integrated Report at <http://www.state.nj.us/dep/wms/bwqsa/generalinfo.htm> and adopted as an amendment to the Statewide Water Quality Management Plan.

The Department has developed an assessment method to evaluate the narrative nutrient criterion using response indicators with numeric thresholds for freshwater Wadeable Streams, defined as non-tidal streams small and shallow enough so that they can be sampled without the use of a boat. This new assessment method will be used to evaluate whether phosphorus causes aquatic life use impairment. This new assessment method addresses situations where a waterbody meets the applicable numeric phosphorus criterion but still has aquatic growth problems (for example, algae), as well as those situations where a waterbody is above the applicable numeric phosphorus criterion, but does not actually exhibit any problems. The new assessment method uses a weight of evidence approach and evaluates physical/chemical and biological responses. This assessment can only be completed with continuous dissolved oxygen monitoring and biological monitoring using benthic macroinvertebrates. Benthic macroinvertebrates are primarily benthic (bottom-dwelling) fauna easily viewed with the naked eye. These fauna are generally ubiquitous in freshwater and estuarine environments, and play an integral role in the aquatic food web. Insects (largely immature forms) are especially characteristic of freshwaters; other major groups include worms, mollusks (snails, clams) and crustaceans (scuds, shrimp, water fleas, etc.). Species comprising the in-stream community occupy various niches, based on functional adaptation or feeding mode (for example, predators, filter or detritus feeders, scavengers, etc.). Their presence and relative abundance is governed by environmental conditions (which may determine available food supply), and by pollution tolerance levels of the respective species. Benthic macroinvertebrate communities integrate the effects of short-term environmental variations and provide an ecological measure of fluctuating environmental conditions. Since benthic macroinvertebrates have limited migration patterns, or a sessile mode of life, they are particularly well-suited for assessing site-specific ecosystem health. Benthic macroinvertebrate assemblages are made up of species that constitute a broad range of trophic levels and pollution tolerances, thus providing strong information for

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interpreting cumulative effects. Sampling is relatively easy, requires few people and inexpensive gear, and has minimal detrimental effect on the resident biota. This makes benthic macroinvertebrate assemblages good indicators of localized conditions. In some situations, additional biological monitoring for periphyton (microscopic flora and fauna that grow on submerged surfaces such as rocks, tree branches, plants, or artificial substrates) may be needed. Phosphorus measurements are not required as the new nutrient assessment method is designed to identify waters where phosphorus causes impairment not where phosphorus exceeds the applicable numeric criterion.

The details of this new nutrient assessment method for freshwater Wadeable Streams are explained in the draft 2010 Integrated Water Quality Monitoring and Assessment Methods (Methods Document). The Department has revised the Methods Document based on public comments received on the draft Methods Document and on the proposed amendments to the SWQS published on April 20, 2009. (See 41 N.J.R. 2055(a), May 4, 2009). A separate notice is being published in this issue of the New Jersey Register providing the public with another opportunity to review and comment on the new nutrient assessment method for freshwater Wadeable Streams contained in the revised draft Methods Document. A copy of the revised draft Methods Document is available at http://www.state.nj.us/dep/wms/bwqsa/2010_integrated_report.htm. Assessment methods for other waterbody types, including non-wadeable rivers, lakes, estuaries and the ocean are being developed as explained in the Department's Nutrient Criteria Enhancement Plan. (See http://www.state.nj.us/dep/wms/bwqsa/nutrient_criteria.htm.)

The Department plans to reevaluate all waterbodies listed as impaired for phosphorus on the 2008 List of Water Quality Limited Waters (303(d) List) and delist waterbodies listed as impaired for phosphorus if data are available to evaluate the narrative nutrient criterion and that data indicate that the narrative nutrient criterion is met. The Department will still list waterbodies as impaired for phosphorus on the 2010 303(d) List if the applicable numeric phosphorus criterion is exceeded and the Department does not have the data needed to evaluate the narrative nutrient criterion. Waterbodies listed as impaired for phosphorus will not be

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delisted from the 303(d) List until the Department has data to demonstrate that the narrative criterion is met. The assessment methods to evaluate waterbodies for phosphorus compliance are described in the revised 2010 Methods Document (http://www.state.nj.us/dep/wms/bwqsa/2010_integrated_report.htm).

In accordance with the proposed changes to nutrient policies, narrative nutrient criterion, and numeric phosphorus criteria, the Department would continue issuing NJPDES permits with water quality based effluent limits based on the numeric phosphorus criteria unless the Department has made a determination that the narrative criterion for nutrients at proposed N.J.A.C. 7:9B-1.14(d)4i is met. The Department expects that data provided by NJPDES dischargers who conducted water quality studies as described in the *Technical Manual for Phosphorus Evaluations, N.J.A.C. 7:9B-1.14(c), for NJPDES Discharge to Surface Water Permit* will be sufficient to evaluate compliance with the narrative criterion for nutrients in freshwater Wadeable streams. The proposed numeric phosphorus criteria at N.J.A.C. 7:9B-1.14(d)4ii will apply if the Department determines that the narrative nutrient criterion is not met or where insufficient information is available to determine compliance with the narrative nutrient criterion.

As indicated in the New Jersey Nutrient Criteria Enhancement Plan, the Department intends to develop appropriate criteria for all waters, including the State's estuaries and near-shore ocean waters. As a first step, the Department is developing a benthic indicator for near-shore ocean waters, which is expected to be finalized in 2010. This indicator will enhance and improve the Department's aquatic life use assessment in near-shore ocean waters. In addition, the Department is working with the USEPA and Rutgers University to develop a benthic indicator for estuarine waters, similar to the benthic macroinvertebrate indicator used for freshwater Wadeable streams, by 2012 and is also developing other metrics for submerged aquatic vegetation, phytoplankton and macroalgae to allow for a more comprehensive evaluation in near-shore ocean waters.

The Department will develop appropriate methods to assess compliance with the narrative nutrient criterion for the near-shore ocean and estuarine waters. Before a new

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assessment method is used in the development of the Integrated Report, the Department will incorporate the assessment method and associated thresholds into the Methods Document. Pursuant to N.J.A.C. 7:15-6.2, the Department provides the public and the USEPA with an opportunity to evaluate the methods used to collect, analyze, and interpret data, and the rationale for placing a waterbody on the List of Water Quality Limited Waters. The Department also expects that, once the additional assessment methods are available to evaluate whether nutrients impair the aquatic life use, efforts will be initiated to develop numeric criteria for appropriate parameters. These criteria will be incorporated into the Surface Water Quality Standards at N.J.A.C. 7:9B-1.14(d)4 for the appropriate stream classification through formal rulemaking.

Social Impact

The proposed amendments to nutrient policies at N.J.A.C. 7:9B-1.5(g) and phosphorus criteria at N.J.A.C. 7:9B-1.14(d)4 will allow the Department to continue to protect the surface waters of the State and will, therefore, result in a positive social impact. The proposed amendments to the phosphorus criteria at N.J.A.C. 7:9B-1.14(d)4 will enable the Department to issue NJPDES permits with water quality based effluent limits for phosphorus where appropriate. These amendments will have a positive social impact by appropriately protecting the existing and designated uses.

Economic Impact

The Department will impose water quality based effluent limitations for phosphorus in NJPDES permits issued to facilities that discharge to waters where the Department has determined that the narrative nutrient criterion is not met or has not been assessed based upon the proposed criteria at N.J.A.C. 7:9B-1.14(d)4ii. NJPDES permittees may incur additional monitoring costs to provide the information necessary for the Department to evaluate compliance with the narrative nutrient criterion. However, the evaluation of the narrative nutrient criterion in freshwaters will ensure that effluent limits are imposed in NJPDES permits issued to facilities discharging to a waterbody where nutrients cause unacceptable biological responses, regardless of the instream concentration of phosphorus. The evaluation of the narrative nutrient criterion will ensure that effluent limits for phosphorus are imposed only in NJPDES permits where

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unacceptable conditions are present. This could result in some NJPDES dischargers not being subject to effluent limitations for phosphorus where waters are not exhibiting conditions such as algal growth and a negative impact to other dischargers where phosphorus concentrations in the waterbody are not in violation of the standards, but problem conditions are present. Evaluating the narrative criterion may require the facility to install additional treatment to reduce the quantity of phosphorus discharged. NJPDES facilities that discharge to waterbodies where the Department determines that the narrative nutrient criterion has been met may not require a water quality based effluent limitation for phosphorus. However, the Department must still evaluate new and expanding NJPDES wastewater discharges to waterbodies that meet the narrative nutrient criterion to ensure compliance with the antidegradation policies at N.J.A.C. 7:9B-1.5(d). In addition, before removing a water quality based effluent limitation for phosphorus from an existing NJPDES permit, the Department must determine that the antibacksliding provisions at N.J.A.C. 7:14A-13.19 are met. Compliance with these provisions could also require the Department to impose or retain a water quality based effluent limitation for phosphorus for existing discharges. Therefore, the economic impact on facilities will vary depending on the individual WQBEL imposed through the NJPDES permit.

The expansion of the applicability of the narrative nutrient criterion from FW to all stream classifications will not cause any additional economic impact at this time. As indicated in the summary, until the Department develops a method to evaluate the narrative nutrient criterion for classifications other than freshwater wadeable streams, no action will be required. The Department cannot develop and impose water quality based effluent limitations for nutrients in NJPDES permits unless the facility is subject to the proposed criteria at N.J.A.C. 7:9B-1.14(d)4ii. For all other stream classifications, no new economic impacts are expected until the Department publishes a nutrient assessment method. In addition, any obligation to comply with narrative numeric criterion in other than FW would be subject to further rulemaking and the economic impact would be addressed at that time.

Environmental Impact

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The proposed amendments to nutrient policies at N.J.A.C. 7:9B-1.5(g) and phosphorus criteria at N.J.A.C. 7:9B-1.14(d)4 will have a positive environmental impact by continuing to restore, maintain, and enhance the chemical, physical, and biological integrity of New Jersey's waters. These amendments are intended to efficiently and predictably provide appropriate levels of protection for aquatic biota and ecological systems associated with the State's waters. The proposed numeric criteria for phosphorus at N.J.A.C. 7:9B-1.14(d)4ii are more appropriate for water quality protection because of the combined approach of both the narrative nutrient criterion and the numeric phosphorus criteria. In freshwaters this approach would allow the Department to assess site-specific effects and address nutrient impacts when the phosphorus concentrations meet the applicable numeric criterion. NJPDES permits based on these revised criteria will ensure that the existing and designated uses are appropriately protected and will additionally provide improved environmental protection.

Expanding the application of the narrative nutrient criterion to all stream classifications will eventually enable the Department to evaluate and identify waters that are impacted by nutrients and develop actions to restore water quality should the Department determine that the narrative nutrient criterion is not met.

Federal Standards Analysis

Executive Order 27 (1994) and N.J.S.A. 52:14B-1 *et seq.* 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. The Water Quality Act of 1987 amended the CWA to require the adoption of criteria for toxic pollutants identified as causing or contributing to an impairment of a waterbody's designated use(s). Individual states are given primary responsibility for developing and adopting surface water quality standards applicable to their waters. The USEPA is responsible for overseeing and approving state water quality standards, providing

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guidance on the content of the standards, and developing 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.

The SWQS proposed amendments are required by and consistent with the Federal statutes, regulations and guidance. The Department has prepared the following analysis with the applicable Federal law, regulations and guidance, as required by Executive Order 27 (1994) and P.L. 1995, c. 65.

N.J.A.C. 7:9B-1.14 contains the surface water aquatic life and human health protection criteria (both narrative statements and numerical values) for waters classified as PL, FW2, SE and SC. New Jersey has adopted criteria for pollutants to protect the aquatic biota and humans from detrimental effects from exposure to these pollutants in surface waters of the State. N.J.A.C. 7:9B-1.14 also states that the surface water criteria for the Delaware River and Bay are as contained in the Delaware River Basin Commission regulations. Federal regulations require that states must adopt water quality criteria that protect the designated uses (40 CFR 131.11(a)(1)). The numeric criteria should be based on CWA Section 304(a) guidance or 304(a) guidance modified to reflect site-specific conditions, or other scientifically defensible methods (40 C.F.R. 131.11(b)(1)(i.-iii.)). The proposed amendments to nutrient policies and criteria, including revisions to phosphorus criteria, are based on the USEPA “*National Nutrient Policy*”. Therefore, no further analysis is required.

Jobs Impact

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Pursuant to N.J.S.A. 52:14B-1 *et seq.* (P.L. 1995, c. 166), all rule proposals must contain a jobs impact statement assessing the number of jobs to be generated or lost if the proposed rule takes effect.

The implementation of the narrative nutrient criterion and the numeric phosphorus criteria for freshwaters will continue the types of job impacts resulting from the implementation of the NJPDES permit program including studies required pursuant to the Technical Manual for Phosphorus Evaluations for NJPDES Discharge to Surface Water Permits. The types of job opportunities include analytical and environmental consulting services to evaluate and design the most cost-effective abatement measures to achieve compliance. Should such abatement measures involve new capital improvements, job opportunities related to construction, contracting services, operation, and maintenance of these improvements would be created. Failure to implement the SWQS amendments could result in lost employment opportunities in businesses and industries that are water quality dependent, such as tourism and fishing.

Agriculture Industry Impact

Pursuant to P.L. 1998, c.48, adopted on July 2, 1998, the Department has evaluated this rulemaking to determine the nature and extent of the impacts of the proposed amendments on the agricultural industry. The agricultural industry is not subject to the SWQS unless the operation is required to obtain an NJPDES permit pursuant to N.J.A.C. 7:14A. While farms that operate a food processing operation or operate a “concentrated animal feeding operation” (CAFO), as described in N.J.A.C. 7:14A-2.13, are required to obtain a NJPDES permit if they discharge to surface water, it is unlikely that these permits would include water quality based effluent limitations for phosphorus as these types of agricultural operations are subject to best management practices. Therefore, these proposed amendments are not expected to impact agriculture.

Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 *et seq.*, the Department has determined that the proposed amendments are not likely to impact “small

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businesses” as defined in that Act unless the business operates a wastewater treatment facility that discharges phosphorus to freshwaters. If the Department determines that the narrative nutrient criterion is not met, the Department may impose water quality based effluent limitations which may require the small business to hire professional services to design treatment facilities or other measures necessary to comply with the NJPDES permit. This may increase costs for water quality sampling, analysis and reporting for small businesses to comply with their NJPDES permits. The cost to comply will depend on site-specific factors, such as type of activity, classification of the waterbody affected, existing abatement methods, and required levels of pollutant reduction. In proposing these amendments, the Department has balanced the expected economic impacts of the rules upon small businesses against the need to protect the environment and public health while complying with Federal law. The Department has determined that any attempt to relax the requirements for small businesses would endanger safety, public health and the environment. Therefore, no exemption from the rule is specifically provided for small businesses.

Smart Growth

Executive Order No. 4 (2002) requires State agencies which adopt, amend or repeal any rule adopted pursuant to N.J.S.A. 52:14B-4(a) of the Administrative Procedure Act to describe the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan), N.J.S.A. 52:18A-196 et seq. The Department has evaluated this rulemaking to determine the nature and extent of the proposed amendments’ impact on smart growth and implementation of the State Plan. Smart growth discourages development where it may impair or destroy natural resources or environmental qualities that are vital to the health and well being of the present and future citizens of New Jersey.

The proposed amendments are intended to conserve the State’s natural resources, namely, its surface waters and associated biota, which implements State Planning Goal 2: Conserve The State’s Natural Resources and Goal 4: Protect The Environment. Goal 2 provides that the State’s natural resources (including rivers, fresh and saltwater wetlands, habitats of unique flora and

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fauna) have significant intrinsic value as critical elements of the State's quality of life. The implementing strategy calls for conserving the State's natural resources. Goal 4 provides that "A clean, safe and attractive environment is essential to assuring the health of our citizens. Sustainable supplies of clean water, clean air and an abundance of open space and recreational opportunities also will 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 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 proposed amendments are consistent with the goals of the State Plan and will better protect water quality by evaluating the impacts of nutrients on a site-specific basis. This approach will continue to require actions to improve water quality and protect aquatic life.

Affordable housing impact analysis

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments to N.J.A.C. 7:9B for purposes of determining their impact, if any, on the affordability of housing. The numeric phosphorus criteria are used by the New Jersey Pollutant Discharge Elimination System (NJPDES) (N.J.A.C. 7:14A) to develop water quality based effluent limitations for facilities that discharge to freshwaters. The SWQS allow for flexibility in the methods utilized to achieve water quality goals to allow the regulated community to choose compliance measures that reduce economic impacts while assuring that the State's waters are protected. Therefore, the Department believes there is an extreme unlikelihood that the proposed amendments would affect the average costs associated with housing.

Smart Growth Development Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments to N.J.A.C. 7:9B for purposes of determining their impact, if any, on smart growth development. 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)

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requires states to establish water quality standards for all surface waters. These Standards are the Federal standards for the purposes of implementing the Clean Water Act programs. In the absence of State adopted water quality standards, the USEPA would propose and adopt standards applicable to New Jersey. As indicated in the Federal standards analysis, New Jersey's SWQS are consistent with the recommended Federal requirements. The SWQS are implemented by the New Jersey Pollutant Discharge Elimination System (NJPDES) (N.J.A.C. 7:14A) surface water discharge permitting program in the development of water quality-based effluent limitations (WQBEL) for phosphorus to protect or improve existing water quality and designated uses. The SWQS allow for flexibility in the methods utilized to achieve water quality goals to allow the regulated community to choose compliance measures that reduce economic impacts while assuring that the State's waters are protected. Therefore, the Department believes there is an extreme unlikelihood that the proposed amendments would evoke a change in housing production within Planning Areas 1, 2, or within Designated Centers.

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

CHAPTER 9B SURFACE WATER QUALITY STANDARDS

SUBCHAPTER 1. SURFACE WATER QUALITY STANDARDS

7:9B-1.4 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

"Watershed-specific translators" means numeric translators developed, as part of a total maximum daily load (TMDL) in accordance with N.J.A.C. 7:15-6, to demonstrate compliance with **the** narrative [criteria] **criterion** pursuant to N.J.A.C. 7:9B-1.14(d)[5]**4i** to protect existing or designated uses for specified watershed(s).

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...

7:9B-1.5 Statements of policy

(a) – (f) (No change.)

(g) Nutrient policies are as follows:

1. These policies apply to all [FW] waters of the State.

[2. Except as due to natural conditions, nutrients shall not be allowed in concentrations that render the waters unsuitable for the existing or designated uses due to objectionable algal densities, nuisance aquatic vegetation, abnormal diurnal fluctuations in dissolved oxygen or pH, changes to the composition of aquatic ecosystems, or other indicators of use impairment caused by nutrients]

[3.]**2.** (No change in text.)

[4.]**3** The Department shall establish water quality based effluent limits for nutrients, in addition to or more stringent than the effluent standard in N.J.A.C. 7:14A-12.7, as necessary to meet a wasteload allocation established through a TMDL, or to meet the criteria at N.J.A.C. 7:9B-1.14(d)[5]**4.**

[5]**4.** (No change in text.)

(h) (No change.)

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7:9B-1.14 Surface water quality criteria

(a) - (c) (No change.)

(d) Surface Water Quality Criteria for FW2, SE, and SC Waters:

| Substance | Criteria | Classifications |
|----------------------|---|---|
| 1. – 3. (No change.) | | |
| 4. Nutrients | <ul style="list-style-type: none"> i. Except as due to natural conditions, nutrients shall not be allowed in concentrations that render the waters unsuitable for the existing or designated uses due to objectionable algal densities, nuisance aquatic vegetation, abnormal diurnal fluctuations in dissolved oxygen or pH, changes to the composition of aquatic ecosystems, or other indicators of use impairment caused by nutrients. ii. Phosphorus (mg/L) <ul style="list-style-type: none"> (1) Non Tidal Streams: Concentrations of total P shall not exceed 0.1 in any stream, unless watershed-specific translators are established pursuant to N.J.A.C. 7:9B-1.5(g)3 or if the Department determines that concentrations do not render the waters unsuitable in accordance with i. above. (2) Lakes: Concentrations of total P shall not exceed 0.05 in any lake, pond or reservoir, or in a tributary at the point where it enters such bodies of water, unless watershed-specific translators are developed pursuant to N.J.A.C. 7:9B-1.5(g)3 or if the Department determines that concentrations do not render the waters unsuitable in accordance with i. above. | <p>All Classifications</p> <p>FW2</p> <p>FW2</p> |

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[4.] 5. pH (Standard Units)

i. - iii (No change in text.)

[5. Phosphorus, Total (mg/L)

i. Lakes: Phosphorus as total P shall not exceed 0.05 in any lake, pond or reservoir, or in a tributary at the point where it enters such bodies of water, except where watershed or site-specific criteria are developed pursuant to N.J.A.C. 7:9B-1.5(g)3. FW2

ii. Streams: Except as necessary to satisfy the more stringent criteria in paragraph i above or where watershed or site-specific criteria are developed pursuant to N.J.A.C 7:9B-1.5(g)3, phosphorus as total P shall not exceed 0.1 in any stream, unless it can be demonstrated that total P is not a limiting nutrient and will not otherwise render the waters unsuitable for the designated uses. FW2]

6. – 13. (No change.)

(e) – (g) (No change.)

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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 proposed amendments and new rules. I hereby authorize this proposal.

Date: _____

Mark N. Mauriello, Acting Commissioner
Department of Environmental Protection