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DEPARTMENT OF ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

WATER MONITORING AND STANDARDS

Surface Water Quality Standards N.J.A.C. 7:9B

Surface Water Classifications

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

Proposed: January 6, 2003 at 35 N.J.R. 158(a)
Adopted: October 10, 2003 by Bradley M. Campbell,
Commissioner, Department of Environmental Protection
Filed: **October 10, 2003 with portions of N.J.A.C. 7:9B-1.15
not adopted**
Authority: N.J.S.A. 58:10A-1 et seq., 58:11A-1 et seq., and
13:1D-1 et. seq.
DEP Docket Number: 35-02-12/351
Effective Date: On publication
Expiration Date: April 17, 2005

The Department of Environmental Protection (Department) is adopting amendments to the Surface Water Quality Standards proposed on January 6, 2003 at 35 N.J.R. 158(a). The adopted amendments include reclassification of eight (8) stream segments and confirming the current stream classification of three (3) stream segments on the basis of fish assemblage information.

In addition, the upgrade of the antidegradation designation for a stream segment of the Paulins Kill from a Category Two to Category One on the basis of "exceptional ecological significance" is being adopted.

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The Department proposed amendments to the Surface Water Quality Standards (SWQS) at N.J.A.C. 7:9B, to reclassify nine (9) stream segments and to confirm the current stream classification of three (3) stream segments on the basis of fish assemblage information. Additionally, the Department proposed to upgrade the antidegradation designation for a stream segment of Paulins Kill from Category Two to Category One on the basis of "exceptional ecological significance," including the need to protect the dwarf wedgemussel, a Federal and State endangered species.

With exception of the proposed reclassification of the Peckman River from FW2-NT to FW2-TM, the Department is adopting the amendments proposed on January 6, 2003 at 35 N.J.R. 158(a).

Summary of Hearing Officer's Recommendation and Agency Response:

A public hearing regarding this proposal was held on January 29, 2003 at Morris County Park Commission's Frelinghuysen Arboretum in Morris Township, New Jersey. Debra Hammond, Chief of Bureau of Water Quality Standards and Assessment, served as the hearing officer and 24 people presented oral comments at the hearing. The comment period for this proposal closed on March 7, 2003.

Ms. Hammond, Chief of the Bureau of Water Quality Standards and Assessment, recommended that the proposed amendments to N.J.A.C. 7:9B-1.15 be adopted with the exception of the proposed reclassification of the Peckman River.

The records of the public hearing is available for inspection in accordance with applicable law by contacting:

New Jersey Department of Environmental Protection
Office of Legal Affairs
Attn. DEP Docket Number 35-02-12/351
P.O. Box 402

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Trenton, NJ 08625-0402

Summary of Public Comments and Agency Responses:

The following people submitted written and/or oral comments on the proposed amendments on Surface Water Quality Standards, N.J.A.C. 7:9B. The numbers in parentheses after each comment correspond to the number identifying commenters below:

Number	Last Name	First Name	Affiliation
1	Alexander	Diane	Maraziti, Falcon & Healey
2	Appel	Genevieve & Oscar	
3	Barker	Rick	Coalition to Save Randolph Mountain
4	Bilotti	Irene	
5	Borden	Thomas	Rutgers Environmental Law Clinic on behalf of NJ Public Interest Research Group
6	Brees	Alice	Sussex County Water Quality Policy Advisory Committee
7	Brindisi	Nicholas	Township of Cedar Grove
8	Brown	Paula	Friends of Peckman River
9	Buechel	John P.	
10	Cafarella	Jerry & Mario	
11	Caprio	Gerald T.	Friends of Peckman River
12	Carlson	Carl	
13	Cerenzio/Enright	Peter F./Edward J.	Cerenzio & Panaro, P.C. on behalf of Township of Cedar Grove
14	Connell	Robert J.	
15	Cuillerier	Michel	Sierra Club
16	D'Addozio	Anthony & Sylvia	
17	Dougherty	D.J.	
18	Duda	Caroline	
19	Emrich	Reinhold	
20	Erickson	Carl	
21	Esser	Clare	
22	Farley	Bernadette	
23	Fetherston	Martin F. & Catherine M.	
24	Freschi	David	Verona Environmental Commission

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25	Frey	Wilma	Highlands Coalition
26	Fryer	Arthur E.	
27	Furgiuele	Camille	Town of Newton
28	Guddmundsson	August	New Jersey State Council of Trout Unlimited
29	Hatzelis/Varro	John/Thomas	Sussex County Municipal Utilities Authority
30	Hill	Evelyn J.	Township of Verona
31	Hutter	Nancy	
32	Kushner	Ross	Pequannock River Coalition
33	Matarazzo	Pat	Township of Verona
34	McEnroe	Jean	Township of Verona
35	Mega	Thomas R. & Ann C.	
36	Mills	Chris	Sierra Club
37	Oehm	Jerry	
38	O'Keefe	Patrick J.	New Jersey Builders Association
39	O'Keefe	Paul	
40	Olsen	Paul R.	
41	O'Malley	Doug	New Jersey Public Interest Research Group
42	O'Toole	Robert J.	
43	Polchinski	Philip R.	
44	Pringle	Dave	New Jersey Environmental Federation
45	Richmond	Beverly B. & Winslow T.	
46	Rosza	Andrew	
47	Rossomano	Joseph Mr. & Mrs.	
48	Sachar	Barb	
49	Scott	George	Mayor, Stillwater Township
50	Siebert	Lynn	Burnham Park Association
51	Silgailis	Mara	
52	Sobel	Seymour	
53	Somers	Julia	Great Swamp Watershed Association
54	Sprung	Matt	
55	Stutz	Kathleen R.	Township of Cedar Grove (petition signed by 375 individuals)
56	Szabo	Ed	Stillwater Township Environmental Commission
57	Tittel	Jeff	Sierra Club
58	Torlucci	Joseph	Township of Cedar Grove
59	Varacalli	Fran	South Branch Watershed Association
60	Von Aulock	Sabine	
61	Walsh	Inez C.	

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The New Jersey Builders Association (Commenter 38) requested that the Department consider their comments submitted as part of the proposed amendments to the Surface Water Quality Standards to upgrade certain waterbodies to Category One antidegradation protection (see 34 N.J.R. 3889(a), November 18, 2002) as comments on this proposal. The Department's response to the Builders Association comments are included in the rule adoption published in the New Jersey Register on May 19, 2003, 35 N.J.R. 2264(b). The Department has provided responses below to the comments previously submitted that were not specifically related to waterbodies included in the earlier proposal.

COMMENT 1: The public comment period should be extended. The commenters note that six current NJDPES permit holders were listed as affected parties within the proposed rule. The commenters submit that three additional permit holders are affected by the proposed rule and were not specifically included by the Department (Kittatinny High School in Hampton Twp.-NJPDES #NJ0028894; McKeown Elementary School in Hampton Twp.-NJPDES #NJ0083402; Sussex County Complex in Frankford Twp.- NJPDES #NJ0022063). The Department should re-publish the proposed rule with all affected NJPDES permit holders listed and allow adequate time for full public comment.

Additionally, the commenters requested the Department attend a Sussex County Water Quality Policy Advisory Committee (PAC) meeting to explain the proposed rule and its impact on existing NJPDES facilities that discharge into the Paulins Kill. The Department has, to date, failed to attend a meeting of the PAC or to commit to attend a future meeting of the PAC. The commenters believe the Department, as a public agency, has an obligation and a responsibility to educate and assist other public agencies. The commenters submit that their ability to adequately comment on the proposed rule is hindered by the Department's lack of cooperation. The commenters, therefore, request that the existing comment period be extended indefinitely until such time as the

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Department attends a PAC meeting and answers questions regarding the proposed rule.
(6, 27)

RESPONSE: The Department believes that the sixty-day comment period on this proposal provided sufficient time to review the technical justification for the proposed upgrades.

The Department included the Sussex County MUA service center, NJPDES NJ0022063, as a potentially affected NJPDES discharger (see 35 N.J.R. 161). The Department did not list the Kittatinny High School, NJDPES NJ0028894, as one of the potentially affected NJPDES dischargers because its discharge location is downstream of the segment of Paulins Kill upgraded to Category One designation by this rulemaking and thus is not impacted. The Department did not list the McKeown Elementary School as an affected discharger because it does not utilize a surface water discharge.

The Department agrees that it is necessary and important for it to educate the public, including public agencies, regarding rules, policies and programs of the Department. The Department believes that the summary of the rule proposal provided an adequate explanation of the basis for the anticipated impact of the rule for all interested parties. The Department provided a 60-day comment period for interested parties to review the summary and comment on the rule. The Department accepted public comments during the public hearing in Morris County on January 29, 2003 and accepted written comments during the public comment period, which closed on March 7, 2003. The Department has responded to the specific comments made by Sussex County PAC in the responses that follow. To the extent that Sussex County PAC seeks responses to specific issues regarding individual permittees, Sussex County PAC, or the individual permittee, may address questions directly to the Department's permitting program.

COMMENT 2: The Department should extend the comment period on the proposed amendments to the Surface Water Quality Standards. The proposed rules are technically

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complex, have the potential for far-reaching impacts on development throughout the State of New Jersey, and are closely related to the Department's Stormwater Management rules, which were proposed on January 6, 2003. The commenter requests a 180-day extension. (38)

COMMENT 3: The reclassifications alone do not provide a realistic picture of the impact of the proposal. The Department has already made public its intent to change the Stormwater Rules to require buffers on Category One streams. To properly evaluate the proposal to reclassify these waterbodies, the Department has an obligation to make public all plans for additional regulatory restrictions. Without this information, one cannot provide adequate comment on the proposal. (38)

COMMENT 4: In combination with the proposed Stormwater Management Rules, this rule will increase the number of 300' buffers required in Sussex County around Category One streams and their upstream tributaries. This impact is not explicitly stated in these rules, but must be considered because it will affect future development. The Department should also provide a map that shows the Category One stream segments and the extent of the proposed 300' buffers within the HUC-14 watersheds. The rules are using new geographic areas and watershed boundaries that are only mapped on GIS, and the public needs to know where these buffers would be required. It is difficult at this time to fully assess the economic impact of this rule. (6, 27)

COMMENT 5: The Department failed to provide sufficient information to property owners on the physical impacts to the properties from upgrading stream segments to an antidegradation designation of Category One. The Department should have more of an obligation to inform people of the implication of the proposed rule. (54)

RESPONSE TO COMMENTS 2 THROUGH 5: The Department proposed to reclassify nine (9) stream segments and to confirm the current stream classification of three (3) stream segments on the basis of fish assemblage information. Additionally, the

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Department proposed to upgrade the antidegradation designation for a stream segment of Paulins Kill based on exceptional ecological significance. This rulemaking identified seven waterbodies that qualify for a Category One designation (six based on trout production and one based on exceptional ecological significance). The Department provided the available information for the public to review as part of the proposal. The Department posted the proposal on its website in early December 2002 and provided sixty days from publication of the proposal in the January 6, 2003 New Jersey Register for review and comment. The Department believes sufficient opportunity to review and comment on the proposal was provided. Through this rulemaking, the Department has identified waterbodies that qualify for Category One protections. The Stormwater Management proposal, which was published in the January 6, 2003 New Jersey Register (35 N.J.R. 119(a)), included provisions to protect waterbodies identified as Category One from the impacts of nonpoint source pollution. The Department notes that the comment period for the Stormwater Management proposal was extended to April 7, 2003 to allow additional time for comment on the potential impacts of that rulemaking. Comments concerning the implementation of stormwater management requirements for Category One waterbodies will be addressed in the context of that rulemaking.

General Support:

COMMENT 6: The commenter completely supports the State's proposed amendments to New Jersey's Surface Water Quality Standards and the proposed upgrades to Category One designation, as they would greatly protect our surface water from any degradation in water quality. The Department should move ahead quickly to adopt the amendments and all of the upgrades currently proposed by the Department.

Since New Jersey is the most densely populated state in the country, we should be setting a strong example and sending a clear message to the rest of the country that we have a responsibility to take care of and protect our land as well as our citizens. It's time to stop the procrastination and excuses and make a concerted effort to protect what's left of our precious natural resources and restore damages already inflicted. (43)

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COMMENT 7: The commenter expresses full agreement with the upgrade of these 12 waterbodies. The commenter is particularly supportive of changes to Category One status proposed for segments of the Macopin River and Pequannock River. The Pequannock River Coalition was involved with the Department sampling that led to the recommendations for the Macopin River and Pequannock River and is well aware of the unique and sensitive biota these waterways support. The Category One designation of these waters is necessary and deserved. (32)

COMMENT 8: Governor McGreevey upgraded 28 streams and reservoirs in the State of New Jersey for Category One protection. By designating the Category One protection to streams, the State of New Jersey is enforcing the Clean Water Act more appropriately. (57)

COMMENT 9: The commenter supports Category One upgrades for the proposed streams. (53)

COMMENT 10: The commenter would like to thank Governor McGreevey, Commissioner Campbell and the Department for leading the initiative to increase protection of New Jersey's surface water.

The surface water quality standards and the proposed upgrades to Category One designation, which would protect surface water from degradation in water quality, are supported. The Department of Environmental Protection should move ahead quickly to adopt these amendments. (15, 25, 28, 36, 41, 44, 50)

COMMENT 11: The commenter urges prompt adoption and enforcement of the new Category One designation. (49)

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RESPONSE TO COMMENTS 6 THROUGH 11: The Department acknowledges the commenters' support. With reference to enforcement of the Category One designations, the Category One designations are utilized by the NJPDES wastewater discharge permitting program. The Category One standard is taken into account in the establishment of effluent limitations that meet the antidegradation requirements. Failure to comply with those effluent limitations may result in enforcement actions including monetary penalties.

COMMENT 12: The commenter is in support of the proposed upgrades in the South Branch Raritan River. These include: Budd Lake tributaries, east of Budd Lake, west of Budd Lake, and the South Branch Raritan River tributary at High Bridge. (59)

COMMENT 13: The proposed trout maintenance reclassification of Lopatcong Creek is supported. (28)

COMMENT 14: The proposed trout reclassifications are supported especially the Category One protection afforded to Mill Brook. (3)

COMMENT 15: The commenter supports the Department's use of Category One classification for species protection because viable turtle, trout and mussel populations are indicative of superb habitat requiring Category One antidegradation protection. The primary goal of the Clean Water Act, and the Water Pollution Control Act, is to restore and maintain waters. One safeguard is the requirement to adopt antidegradation policies. As the Supreme Court of New Jersey explained, "[i]t is self-evident that the purpose of the antidegradation policy is to protect existing water uses and to maintain present water quality. No irreversible changes may be made to existing water quality that would impair or preclude attainment of the designated uses of a waterway." IMO the Issuance of a Permit by the Department to Ciba-Geigy Corp., 120 N.J. 164, 177 (1990). Moreover, "[t]he most telling indicator of water quality is the health of the plants and animals that inhabit an aquatic ecosystem." Andrew C. Hanson, "Note: Moving Beyond Jeopardy: Water Quality Standards and the Conservation and Recovery of Endangered Aquatic Species," 20 Va.

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Envtl. L.J. 431,432 (2001). Given the well-documented presence of various Federally and State listed threatened and endangered species, the Department's proposed amendments to N.J.A.C. 7:9B-1.1 et seq. provide the necessary next step in the continuing process of achieving and maintaining a healthy freshwater environment. (5)

RESPONSE TO COMMENTS 12 THROUGH 15: The Department acknowledges the commenters' support for the proposed reclassifications.

COMMENT 16: The Department should implement the Category One upgrades for the 23 waterways before approving any new sewage treatment permits that would be discharging into them. (18)

RESPONSE: The Department adopted 15 Category One waterbodies on May 19, 2003 (see 35 N.J.R. 2264(b)). An additional seven waterbodies are being adopted as Category One at this time. The Department is also adopting the reclassification of two stream segments from FW2-NT to FW2-TM and confirming the stream classification for three more stream segments as part of this rulemaking.

Comments regarding issuance of permits are beyond the scope of this rulemaking. However, permits are issued in accordance with the regulations in effect at the time of issuance. The Category One designation takes effect upon publication and permits issued after adoption will have to meet the Category One standards.

COMMENT 17: All streams and rivers in New Jersey should be upgraded to trout maintenance classification. (51)

RESPONSE: The Department assesses fish assemblage data and evaluates the ability of a stream to support trout and fish species that are associated with trout (see 35 N.J.R. 158(a)). Streams that are found to support trout are assigned the appropriate stream classification of trout production or trout maintenance. The Department assigns the

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Category One antidegradation designation to stream segments that are classified as FW2-Trout Production.

COMMENT 18: The Department has an obligation to provide justification for any rule change. This is particularly relevant in this instance as the Department is proposing a clear departure from past practice in a manner that will have significant socio-economic costs. Such changes should not be made without compelling reason or convincing science. (38)

COMMENT 19: The Department has not provided clarification on how the water bodies in the proposal were chosen, including the criteria or provided its overall plan for reclassifying waters statewide. Since the Department has not provided this information, the proposal should be withdrawn. (38)

COMMENT 20: To evaluate this proposal, an understanding of the Department's overall plan for reclassifying waters statewide is needed. The proposal makes clear that additional reclassifications are in the works but does not indicate what they are or why they were not included with this proposal. The Department must make clear how water bodies are chosen including the specific criteria being used. (38)

COMMENT 21: The Department must provide clear and compelling justification to expand the waters included as Category One. The current definition indicates that this category is intended to be very limited. The rule proposal does not provide such justification. The most important piece is an overall plan, which would make transparent how these waters were chosen. Without an explanation, the process is akin to a guessing game and precludes any predictability for future planning. (38)

COMMENT 22: The proposal has been put together without input from the regulated community. As such, there are numerous fundamental questions that need be addressed in order for meaningful comments to be prepared. The open questions are many. Why

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were these specific water bodies chosen at this time? What were the parameters evaluated to select these water bodies? When will additional water bodies be proposed for reclassification? (38)

COMMENT 23: The State should look upon these steps as a foundation for a more comprehensive environmental protection plan. The commenter requests to expand protections based on broad ecological criteria especially the presence of Federal or State threatened or endangered species. Isolated stream segments are a good beginning, but protection should expand to entire waterways. Also, the entire watershed should be evaluated and protection expanded to feeder streams and headwaters of rivers, reservoirs, or other water bodies proposed for upgrade. (43)

RESPONSE TO COMMENTS 18 THROUGH 23: The Department has embarked on an initiative to comprehensively review available data and information for the waters of the State to determine what waters qualify for additional water quality protection as Category One. All waters may not qualify under the definition of Category One at N.J.A.C. 7:9B-1.4. However, the Department believes that many waterbodies exhibit the characteristics necessary to meet this definition. The Department recently adopted amendments to the Surface Water Quality Standards upgrading six stream segments to Category One antidegradation designations based upon "exceptional ecological significance" and nine reservoirs based on "exceptional water supply significance" (see 35 N.J.R. 2264(b), May 19, 2003).

In this rulemaking, the Department has determined that seven stream segments meet the definition of Category One at N.J.A.C. 7:9B-1.4. Six of the seven total upgraded stream segments were based on their ability to support trout production. The Department utilizes a "Young of the Year" methodology to determine whether a waterbody supports trout production. An explanation of this methodology and the results for the sampled waterbodies was presented in the proposal at 35 N.J.R. 158-159. Trout production waters qualify for Category One protection. In the case of the Paulins Kill upgrade to Category

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One, the Department determined that, based on an integrated ecological assessment, the Paulins Kill qualifies as a waterbody of exceptional ecological significance. The stream segment impacted by this upgrade is home to one of only three known populations in New Jersey of the endangered dwarf wedgemussel as well as the State-threatened wood turtle and the Federally-threatened and State-endangered bog turtle. The Department has provided sufficient justification for each upgraded waterbody.

The Department also published a Notice of Opportunity for Public Comment on both the Blueprint for Intelligent Growth (BIG) Map and potential candidate waterbodies for Category One Antidegradation classification (see 35 N.J.R. 1308(b), March 3, 2003). The public comment period closed on April 25, 2003. The Department received hundreds of nominations. The Department intends to review all waterbodies statewide beginning with the waterbodies nominated by the various programs within the Department and the public. This review will require time and resources to complete. However, the Department does not believe that it is necessary to delay proposing Category One upgrades where the assessment is complete and the determination has been made that the waterbody qualifies for Category One protections, while the assessment is pending for other waterbodies. At this time, the Department envisions series of proposals as groups of waterbodies complete the assessment process. It has been and continues to be the Department's intention to identify all appropriate waters for Category One protection and to assure that the State's water resources are protected.

COMMENT 24: The proposal cannot be supported or opposed because it lacks important data. The Department should provide the public with the location of real scientific valid data used in these determinations. If this is just purely a political move then let's just call it that. (60)

RESPONSE: The Department reviewed all readily available environmental data and determined that the proposed stream segments qualified for the appropriate trout status and Category One designation based on their fish assemblage sampling data and

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“exceptional ecological significance”. The Department evaluated the various data sets available for each stream segment to determine whether the data supported the classification and/or Category One antidegradation designation. The Department provided a summary of the factors considered for each stream segment in the Summary of the proposal (see 35 N.J.R. 161 January 6, 2003).

COMMENT 25: The proposal does not provide any discussion of how the Category One designation will provide increased protections for the waters proposed. (38)

RESPONSE: The Water Pollution Control Act (WPCA), N.J.S.A 58:10A-1 et seq., authorizes the Commissioner to adopt rules to “prevent, control or abate water pollution.” N.J.S.A. 58:10A-4. The antidegradation policies applicable to Category One waterbodies are intended to prevent any negative impacts to water quality. The same surface water quality criteria apply in Category One and Category Two streams. The additional protection provided by the Category One designation is to prevent degradation of existing water quality. While Category Two does provide water quality protection, the Category One designation prevents water quality degradation. Category Two provides a level of water quality protection, although it also allows for water quality to be degraded in certain circumstances. Preventing degradation of water quality is a clear environmental benefit. The Department has determined that waterbodies that meet the definition of Category One at N.J.A.C. 7:9B-1.4 warrant additional protection, namely prevention of water quality degradation. See response to comments 29 through 30 for explanation on how these protections are implemented.

Paulins Kill

COMMENT 26: The change in designation for the Paulins Kill is strongly supported. (49, 56)

COMMENT 27: The U.S. Fish and Wildlife Service (FWS), in its February 6, 2003 and January 31, 2003 letters to Department, strongly supported the use of rulemaking to

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upgrade from a Category Two to a Category One for species protection. The FWS clearly advocated for Category One water quality classification because it will "provide the highest assurance" of protecting the various species.

The use of the Category One antidegradation classification is an appropriate mechanism to provide protection for threatened and endangered species. Deleterious habitat modification can be violative of the Endangered Species Act (ESA). As discussed by Elizabeth Rosan in "Comment: EPA's Approach to Endangered Species Protection in State CWA Programs," 30 Envtl. L. 447, 460 (2000) "[w]ith limited means to apply ESA consultation procedures to state CWA programs and growing concern about ESA liability for states and individual permittees," nearly a decade was "spent developing an interagency" agreement to tackle the dilemma. *Id.* at 464. In 2001, a final Memorandum of Agreement (MOA) between the EPA, FWS and NMF under the CWA and the ESA was published. A review of the MOA "clearly indicates a concerted and innovative effort to integrate species protection into state administrated water quality programs. In essence, the ESA is driving water quality standards to play a key role in protecting the needs of endangered and threatened species under the CWA." *Id.* at 475.

The FWS, as an advisory agency, has recently provided limited §7 consultation to the Department. In its January 31, 2003 technical comments on the permit proceedings for the proposed Milligan Farm wastewater discharges into Sidney Brook, the FWS clearly expressed its stance that the Department should adopt Category One classification for streams in order to protect threatened and endangered species. This reasoning applies equally to the other waterbodies since they provide similarly critical habitat for threatened and endangered species. (5)

COMMENT 28: Sussex County officials were quoted as stating "Unless you have specific data about the endangered species, it's presumed that the water quality criteria is going to keep that endangered species protected." This position is not supported by the legal requirements of the Clean Water Act and the Water Pollution Control Act which require

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that existing uses of a stream be maintained and protected. There is no presumption that criteria will be protective of the existing uses of a stream. In fact, the lack of data regarding the impact of pollutants on species requires the use of Category One designation to protect waterbodies that support threatened and endangered species. (5)

RESPONSE TO COMMENTS 26 THROUGH 28: The Department acknowledges the commenter's support.

The additional protection provided by the Category One designation is to prevent degradation of existing water quality. The same surface water quality criteria apply in Category One and Category Two streams. While Category Two designation does provide water quality protection, the Department has made a determination that waterbodies that present characteristics of exceptional ecological significance deserve a higher level of protection. Applying Category One to waterbodies that display these characteristics ensures that the water quality and ecological integrity of the waterbody is maintained.

COMMENT 29: The commenter seeks to clarify and confirm that under the proposed amendment the following actions would not necessarily become subject to antidegradation requirements for Category One waters:

- When a sewage treatment plant increases flow up to its currently permitted capacity,
- Renewal of a NJPDES permit without increasing the flow beyond currently permitted capacity, or
- Expansion of a sewage treatment plant's service area without increasing flow beyond currently permitted capacity. (27)

COMMENT 30: What is the impact of the Category One designation upon the existing NJPDES dischargers. The rule proposal states: "...existing dischargers, upon renewal of their permit, would be subject to any new water quality criteria, such as when reclassifying waters from FW2-NT to FW2-TP, which may or may not require an upgrade of wastewater treatment."

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The regulatory impacts analysis is not clear with respect to the impacts on existing dischargers. In particular, the analysis failed to address whether or not existing permitted conditions and design flows will be adversely impacted by this change in designation. Based upon a January 22, 2003 letter from Commissioner Campbell to Association of Environmental Authorities (AEA) the commenters understand that if a facility is not expanding, the FW2-NT (C1) designation for the Paulins Kill will not result in any impacts on the existing permitted facilities, as long as current narrative and numeric water quality standards are achieved. In particular, new antidegradation reviews will not be triggered as long as an expansion is not sought. The Department needs to specifically clarify this point so that current permit holders are fully informed regarding the ramifications of the Category One designation. The County of Sussex facility in Frankford is located in the proposed Category One stream segment, and the rule may affect the future plans of the County in this area. (6, 27, 29)

RESPONSE TO COMMENTS 29 THROUGH 30: Existing, operational facilities discharging to a Category 1 waterbody, are subject to the same regulations that govern all NJPDES surface water discharge permits. These facilities are authorized to operate up to the approved/authorized flow specified in their NJPDES permit. Existing dischargers would not be subject to antidegradation, unless the existing discharger is proposing an expansion. Modification of a sewer service area, which does not result in an increase in the permitted flow, does not trigger an antidegradation analysis for the wastewater treatment plant. The dischargers to a Category One segment will be affected as follows:

Expansion/Rerating Subsequent to Upgrade to Category One: For pollutants with concentration and loading limitations, the new permit will retain the existing loading limits. For pollutants with concentration limits only, the new permit will establish loading limits based upon the current concentration limits and the previously permitted flow. For all pollutants for which a permit limit has not been previously included in a NJPDES permit, which are known to be present in the effluent when the permit is drafted, the new permit

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will establish effluent limitations for concentration and loading based upon "existing effluent quality" (N.J.A.C. 7:14A- 13.8), and the previously permitted flow.

Renewal of an Existing Discharge Permit: Unless additional flow or loading is requested as part of the renewal, an antidegradation analysis is not required.

Under each of these scenarios, the Department will also evaluate the available information for compliance with regulatory requirements such as water quality based effluent limitations, adopted Total Maximum Daily Loads, Effluent Limitation Guidelines, and Clean Water Enforcement Act provisions.

For existing NJPDES dischargers that are not proposing an expansion, the proposed Category One antidegradation designation amendments will not automatically require the existing facility to upgrade its treatment capabilities. However, existing dischargers, upon renewal of their permit, would be subject to new water quality criteria. Different water quality criteria apply when reclassifying waters from FW2-NT to FW2-TM or from FW2-NT to FW2-TP. The change in criteria may or may not require an upgrade of wastewater treatment.

COMMENT 31: The (former) CEMEX Corporation limestone quarrying and process facility located in Sparta Township currently holds a NJPDES permit from the Department (NJ0002791 – Southdown, Inc.). The facility currently discharges more than 6 million gallons per day of groundwater into the Paulins Kill upstream of the proposed Category One segment. The commenter is concerned that cessation of discharge by CEMEX could adversely impact water quality in the Paulins Kill. The commenter is also concerned that any reduction in water quality attributed to the cessation of discharge by CEMEX could result in more stringent requirements on the remaining permit holders in the area. The Department should state affirmatively that cessation of discharge by CEMEX will not negatively impact other permit holders in the region. (6, 27)

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RESPONSE: Water quality changes may occur due to the cessation of another discharge. For the remaining dischargers, the Department will evaluate the available information for compliance with regulatory requirements such as water quality based effluent limitations, adopted Total Maximum Daily Loads, Effluent Limitation Guidelines, and Clean Water Enforcement Act provisions. This evaluation would occur in all waterbodies regardless of the antidegradation designation. This evaluation may result in more stringent effluent limitations for the remaining dischargers. Additionally, such changes could cause the stream segment to be identified as impaired on Sublist 5 of the State's Integrated List and therefore subject to further regulatory actions. (For information on the State's Integrated List, see <http://www.state.nj.us/dep/wmm/sgwqt/wat/integratedlist/integratedlist.htm>).

COMMENT 32: The proposed rule states that for the Paulins Kill the assessment also demonstrated that the stream segment is not attaining standards for the fecal coliform, temperature and arsenic criteria. Would the proposed Category One designation require any additional regulations for these criteria? (6, 27)

RESPONSE: Category One is designed to protect waterbodies from degradation in water quality. Where the existing water quality is better than the established water quality criteria, effluent limits for new or expanded discharges must ensure that existing water quality is maintained. Where existing water quality does not meet the established water quality criteria for a particular parameter, the Department must establish effluent limitations that will ensure that the water quality criteria are met. As indicated in the summary, the Paulins Kill does not meet all water quality criteria. The Paulins Kill is listed as impaired for fecal coliform, temperature and arsenic and included on Sublist 5 of the Department's 2002 Integrated List. The Department is required to establish a Total Maximum Daily Load (TMDL) for these pollutants or show that the waterbody meets water quality standards. A TMDL establishes a plan for returning the waterbody to compliance with the surface water quality standards. TMDLs are required where water quality does not meet water quality standards, while the Category One antidegradation is intended to prevent additional degradation by protecting against changes in water quality.

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COMMENT 33: The Department has identified the Sussex County MUA solid waste 1E stormwater basin as a potentially affected discharge in Table B of the proposed amendments. Site stormwater is discharged to an unnamed tributary of the Paulins Kill in accordance with an approved Stormwater Pollution Prevention Plan (SPPP). Current antidegradation policies are vague relative to impacts upon this type of discharge. The commenters need assurances that this regulated discharge activity (NJPDES #NJ0066184) would not be impacted by a Category One designation change, as proposed by the Department, and respectfully requests clarification in this regard. (29)

RESPONSE: All NJPDES facilities located in the HUC 14 of stream segments proposed for upgrades to Category One were identified in the proposal as potentially impacted. Based upon the commenter's submission, the Department recognizes that the Sussex County MUA - Site IE is subject to a permit for stormwater discharges. The Department utilizes a "best management practices" or "BMP" approach to protect water quality from the impacts of nonpoint sources. Existing permitted stormwater discharges, would not be impacted by the Category One designation. However, increases in stormwater may subject a permitted facility to additional stormwater management measures and BMPs. The Department reviews BMPs to assure the most appropriate, current methodologies are employed. For example, on January 6, 2003 (see 35 N.J.R. 119(a)), the Department proposed new Stormwater Management rules which include additional BMPs applicable to Category One streams.

COMMENT 34: The Department has determined that it will reclassify a number of waters as Category One due to the presence of endangered species. The Department claims that these species are sensitive to changes in water quality, thereby justifying the more stringent antidegradation classification. The Sussex County Water Quality Policy Advisory Committee (PAC) requests additional information from the Department regarding the scientific data used as the basis for the Department's conclusion that Category One designation is required to protect the listed endangered species and that water quality is a

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primary determinant in the listed species becoming endangered. When was the testing or stream assessment conducted? Implementation of the Category One designation should be delayed until such time as the Department has fully disclosed this data and until such time as the public has had the opportunity to fully review and comment on the same.

The commenter questions the Department's legislative authority to re-classify a stream to Category One based solely on the presence of an endangered species. The commenter requests information from the Department regarding the statutory/regulatory basis for Category One designation based solely on the presence of an endangered species including specific legislative and regulatory citations. (6, 27, 29)

COMMENT 35: The commenters agree that water quality should protect endangered species, as it is required to protect other species. The mere presence of endangered species is not a basis for imposing more restrictive water quality requirements or for claiming that a water body is "of exceptional ecological significance" (35 N.J.R. 160). The existing rules do not specify that endangered species should be provided a higher level of water quality than other aquatic organisms. Both the U.S. Fish & Wildlife Service (FWS) and USEPA agree that water quality criteria are presumed to be protective of endangered species, absent specific information indicating that a water quality standard will not be protective. (See Memorandum of Agreement between USEPA, FWS, and the National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 et seq., February 22, 2001). The Department's statement that endangered species are part of the existing use that must be protected does not provide a sufficient rationale for concluding that the current water quality program is insufficient to protect that use. Thus there is no legal, scientific, or factual basis for the Department to utilize the presence of endangered species as "a significant factor in the selection of the proposed stream segments....". Therefore, the commenters respectfully request that the proposed amendment regarding Category One reclassifications due to endangered species protection be rescinded and held in abeyance until the legal, scientific and factual basis for such amendment is provided. (29)

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COMMENT 36: Factual information does not support the need for Category One designation to protect wedgemussels. The information presented by the Department indicates that water quality has not played a significant role in loss of these species. For example, as stated by the Department, loss of freshwater mussels is attributed to "destruction of habitat and degraded water quality due to dredging, channelization and erosion; introduction of exotic mollusks and dam construction...". Thus, it is apparent that destruction of habitat by gross activities has resulted in reductions in species prevalence, not slight changes in water quality that otherwise is deemed protective of even highly sensitive aquatic life.

With respect to the dwarf wedgemussel, the Department asserts that the species requires "silt free, stable stream beds and well oxygenated, pollutant free water." This statement does not mean that a Category One designation is needed. First, the primary needs of the dwarf wedgemussel are habitat based regarding stream characteristics (non silty stream bottom). Second, meeting applicable standards will ensure "highly oxygenated water and pollution free conditions." That is the basic purpose of the water quality standards. Thus, it is neither conclusive nor apparent that any special protection is needed for this species.

Finally, the Department's claims that mussels "may suffer lethal or sub lethal effects from pollutants discharged into waters" and "the free floating larval stage is especially vulnerable to environmental toxins" are pure speculation, unrelated to any specific information presented in the record or relative to the level of water quality that must be met in State waters. Similarly, no information is presented showing that the bog turtle or wood turtle would suffer any adverse impacts if the current regulatory regime were maintained. The Department may not abandon the current adopted regulatory regime and regulate based upon speculation, inference and innuendo. The need for a more restrictive regulatory approach must be based upon hard evidence and technical analysis confirming that the current regulatory program is not protective. Therefore, the commenters

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respectfully request that the proposed Category One amendment be withdrawn by the Department until the necessary and appropriate justification, including scientific data and technical analyses, are provided. (29)

COMMENT 37: The Department states that a significant factor in selecting waters for upgraded antidegradation designation was their ability to support threatened and endangered species. Does this mean that an area could justify an upgrade in antidegradation designation, if the area is suitable habitat but not actual habitat? (38)

RESPONSE TO COMMENTS 34 THROUGH 37: While a significant factor, the presence of the Federally and State endangered dwarf wedgemussel was not the only factor considered in the case of Paulins Kill. The Department evaluated the condition of Paulins Kill using an integrated ecological assessment. The Department assessed the condition of the aquatic community using macroinvertebrates, fish and threatened and endangered (T&E) species. The Department also evaluated the instream habitat and the riparian habitat and confirmed a non-impaired aquatic community with an optimal habitat quality. As indicated in the proposal, the Paulins Kill is one of three documented locations in the State that support viable populations of dwarf wedgemussels. The other two locations were upgraded to Category One on May 19, 2003. (35 N.J.R. 2264(b)). The Paulins Kill also supports the State-threatened wood turtle and the Federally-threatened and State-endangered bog turtle. While the Department considered factors in addition to the presence of T&E species in case of Paulins Kill, the Department believes that there may be circumstances where the presence of a T&E species alone warrants Category One protection.

Other regulatory programs are designed to protect certain aspects of the T&E species habitat. In addition to habitat alteration, dwarf wedgemussels are especially sensitive to changes in water quality and are unable to avoid contaminants introduced in the water column. Therefore, existing water quality in dwarf wedgemussel areas needs to be maintained and protected. The upgraded antidegradation designation compliments the

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species and habitat protections provided by other Department programs by ensuring that water quality will not be degraded. Water quality may also indirectly impact bog and wood turtles by altering habitat and food availability. Bog turtles favor low sedge communities. Degraded water, rich in nitrates, phosphates and chlorides, facilitates the establishment of invasive vegetation (for example, Phragmites, cattail, purple loosestrife, red maple) which eventually supplants the low sedge communities ultimately causing a decline in reproductive success. It is also well established that wood turtles derive a substantial portion of their nutrition from aquatic organisms (for example, gastropods, benthic invertebrates, mollusks, and amphibians) which, are well known to be adversely affected by water quality degradation. Furthermore, the largest and most viable wood turtle populations in the State occur primarily on non-impaired streams that are not subject to sewage effluent.

The same surface water quality criteria apply in Category One and Category Two streams. The additional protection provided by the Category One designation is to prevent degradation of existing water quality. While Category Two designation does provide water quality protection, the Department has made a determination that waterbodies that present characteristics of exceptional ecological significance deserve a higher level of protection. Applying Category One to waterbodies that display these characteristics ensures that the water quality and ecological integrity of the waterbody is maintained.

COMMENT 38: The adoption of the Category One amendment, as currently proposed by the Department, may conflict with other Department water quality policies, strategies and/or initiatives. The absence of justification for Category One antidegradation necessary to the protection of endangered species beyond that level afforded by applicable water quality standards is questionable. If the Department adopts the Category One classification based solely upon the "presence" of endangered species, then the Department must apply this change in accordance with N.J.A.C. 7:9B-1.5(d)6.iii. However, absent supporting scientific information, the Department cannot provide assurance that the improvement of water quality characteristics within the Category One designation could be

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accomplished "without adverse impacts on organisms, communities or ecosystems of concern". Hence, Category One implementation, in this instance, must be strictly limited to no "measurable change" per N.J.A.C. 7:9B-1.4. Such a position would directly conflict with the Department's phosphorus initiatives in the Paulins Kill, whereby NJPDES discharges into a phosphorus impaired waterbody would be subject to a discharge concentration limit of 0.1 mg/L. Imposition of the Department initiative would therefore, produce a "measurable change" in water quality and also produce an unknown and potentially adverse impact on the dwarf wedgemussel, in conflict with N.J.A.C. 7:9B-1.5(d)6.iii. The only fact known at this point is that the dwarf wedgemussel is tolerant of and may be thriving at the present levels of instream phosphorus. The commenter respectfully requests that the Department address this apparent conflict between its existing policy and proposed regulation. Specifically, the Department should indicate whether it intends to make phosphorus effluent limitations more stringent for the "potentially Impacted NJPDES Discharges" (Table B), and should provide technical documentation that such an action would not adversely impact upon the endangered species. (29)

RESPONSE: As indicated in response to comments 29 through 30, the antidegradation provisions are triggered by a new or expanded discharge. The Department's phosphorus initiative is targeted at point sources of phosphorus that discharge into impaired stream segments. The goal of the phosphorus initiative is to meet the water quality criteria by reducing instream phosphorus concentrations to levels that do not result in use impairment.

The existing phosphorus concentrations at the three locations where dwarf wedgemussels have been identified in New Jersey are almost always in compliance with the surface water quality standards. Based on 1995 through 1997 sampling, the Pequest River segment is the only impaired segment of the three stream segments with known populations of dwarf wedgemussels. The 0.1 mg/L phosphorus criterion for streams was exceeded in 2 out of 15 samples. The highest phosphorus concentration measured was 0.2 mg/L. There is no evidence to support the hypothesis that lowering of phosphorus

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levels could have an adverse impact on dwarf wedgemussels. The available evidence from the three locations in the State that support dwarf wedgemussels demonstrates that compliance with the phosphorus criteria would not have any unexpected negative impact on dwarf wedgemussel. Therefore, reducing phosphorus concentrations in the Paulins Kill through the Department's phosphorus initiative will improve water quality conditions in accordance with N.J.A.C. 7:9B-1.5(d)6.iii which states "Water quality characteristics that are generally worse than the water quality criteria, except as due to natural conditions, shall be improved to maintain or provide for the designated uses where this can be accomplished without adverse impacts on organisms, communities or ecosystems of concern."

COMMENT 39: The Summary of the proposal includes a discussion of "species of special concern". The commenter questions how these species are included as criteria in the evaluation of streams being considered for reclassification. "Species of special concern" is not a regulatory or statutory term. The Department has no authority to impose restrictions based on such species. Further, there is no information as to how this list of species was generated. Were the criteria used by the Department to evaluate species to determine if they are in fact "species of special concern" subject to peer and public review? If not, this list should not be used in any context, certainly not to make regulatory decisions. The language regarding "species of special concern" should be eliminated and any decision made based on this information must be reconsidered in a new rulemaking. Therefore, this proposal should be withdrawn. (38)

RESPONSE: The Department evaluated the Paulins Kill for Category One upgrade using an integrated ecological assessment. The Department considered water quality, instream habitat, riparian habitat, the aquatic community using macroinvertebrates and fish, and Threatened and Endangered Species. Occurrence information for species described as "Special Concern" was considered supplemental to the other factors listed above. The "Special Concern" status applies to species that are not listed as threatened or endangered but may warrant special attention because of evidence of decline, inherent

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vulnerability to environmental deterioration, or habitat modification that would result in the species becoming threatened. This status can also be applied to species that meet the above criteria and for which there is little understanding of their current population status in the State. Identifying a species as a “special concern” is usually the first step in the process which, may ultimately result in listing a species as “threatened or endangered”.

Peckman River:

COMMENT 40: The commenter wants the Peckman River to have this upgrade in status before it reaches Verona and after it leaves Cedar Grove (Little Falls), so that all sections of the river will be trout maintenance. (51)

RESPONSE: The available stream sampling data does not support the trout maintenance reclassification of the Peckman River either upstream or downstream of the proposed stream segment.

COMMENT 41: The proposed trout maintenance upgrade of Peckman River should be adopted to maintain the existing uses. (57)

COMMENT 42: The proposed trout maintenance reclassification of Peckman River is supported. The upgraded trout maintenance reclassification of Peckman River should be adopted regardless of disapproving comments and ensuing political pressure to not adopt. (28)

COMMENT 43: All streams and rivers in New Jersey including the Peckman River should be upgraded to trout maintenance status.

Cedar Grove is a small community of about 12,000 people in a very urban Essex County. Historical records show that a hundred years ago there were trout in this stretch of the Peckman River, but due to pollution there were not any trout for most of the 20th century.

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The Verona-Cedar Grove stretch of the Peckman River is as clean as it is today and should be applauded and rewarded. This is the Department's chance to commend Cedar Grove and to show-off the progress that can be made in cleaning up rivers in urban areas of the State. Cedar Grove should be rewarded for having cleaned up its water as much as it has. The Cedar Grove-Verona portion of the Peckman River should truly be a showcase for the Department, a success story for the Department of what can be achieved in an urban area. This part of the Peckman River should be held up as a model to other towns of what can and should be done. Cedar Grove should be rewarded with grants for any needed upgrades, and not penalized for achieving current levels of water quality. (51)

COMMENT 44: The Department has reports from the Bureau of Freshwater Fisheries, since 1999, showing conclusive data on the capability of Peckman River and the Lopatcong Creek to support trout maintenance classification. The June 10, 1999 and September 15, 1999 memorandum from the Bureau of Freshwater Fisheries to the Division of Watershed Management clearly identified the need for the upgrading of these streams. The Department failed to propose changes to these streams during their spring 2001 rulemaking. Accordingly, it is imperative that the Department adopts the rule as proposed. (5)

COMMENT 45: The economic impact to existing dischargers to the Peckman River will be limited to the extent that trout maintenance requirements only impose more stringent effluent limitations for four pollutants: dissolved oxygen, temperature, ammonia, and suspended solids. However, it is not the case that existing dischargers are exempt from the new classification. Existing dischargers to the Peckman River must comply with the upgraded criteria for these pollutants in the same fashion a new discharger must comply with the criteria. The Department is required to impose water quality based permit limitations, where a discharge has the reasonable potential to cause or contribute to violation of the standards, regardless of whether you are an existing or new discharger. (5)

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COMMENT 46: The reclassification of the Peckman River will have a devastating effect on Cedar Grove in human and economic terms. The people of this township voluntarily improved the Peckman River by restocking it with trout sometimes twice a year as well as holding annual river clean-ups. Now the Department threatens to punish for exemplary care of a natural resource. The message bureaucrats are sending is that municipalities should let dead rivers remain lifeless or pay a horrendous penalty. That is what the proposed river reclassification to "trout management" will tell State residents when they see how Cedar Grove and Verona were bureaucratically burned. That is the opposite of the Department's feigned mission to encourage environmental protection. (38)

COMMENT 47: There is a significant opposition to the reclassification of Peckman River because of the negative cost impacts that the reclassification will have upon the residents of Cedar Grove and Verona, and in fact all of Essex County.

The commenter is in favor of "clean water." The Peckman River water quality was degraded for so long because of the post World War II development impacts, unchecked or poorly treated discharges into the river, decreased base flow into the river, and lack of concern among many residents.

The communities of Cedar Grove and Verona do care but the cost implication from the proposed reclassification is turning that care into despair. The commenter is certain that the river quality would continue to improve without the onus of the reclassification. In Cedar Grove, on-going improvements to the treatment and filtration system in the wastewater plant would help with the river's recovery. State stormwater regulations would force the Township and the NJDOT to take steps to improve the quality of storm water that is discharged to the river. The proposed stormwater ordinance would provide additional protection. The outreach and educational programs have raised awareness of many issues, including non point source pollution and integrated pest management, that relate to river quality.

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The Army Corps of Engineers in cooperation with the Department is studying flooding along the Peckman. The residents are hopeful that any proposed changes to the river would preserve its natural ecology.

The Peckman River is on an upswing. The water quality has improved dramatically and would continue to improve due to local efforts. The commenter requests that these efforts should be continued in unison with the Department. Reclassification of Peckman River to "trout maintenance" would be counter to the efforts of the past decade. (58)

COMMENT 48: By imposing this upgrade the Department is sending a clear message to other towns to leave their waterways as they are and not try to make any improvements, lest they wind up in a similar situation as that which is being forced on Cedar Grove and Verona. The residents are in effect being punished for having tried to make things a little better by being told, "thanks for what you have done so far, now you have to do more and pay for it yourselves".

The Peckman River is the only waterway on the list of proposed upgrades that flows through such a built-up area. Considering that a large percentage of what flows in this river is effluent from two sewage treatment plants, the proposed upgrade is unrealistic and unreasonable. (31)

COMMENT 49: The Townships of Cedar Grove and Verona strongly oppose the reclassification of the Peckman River as FW2-TM, as the decision to reclassify will unnecessarily, and without proper scientific justification, subject the citizens and taxpayers of the Township of Cedar Grove and the Township of Verona to costs of upwards of 11 million and 17 million dollars, respectively. Therefore, the Township of Cedar Grove and Verona petitions the Department to withdraw its proposal to reclassify the Peckman River. (30, 34, 55)

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COMMENT 50: The commenter is extremely disappointed to find out that the Department wants Verona and Cedar Grove taxpayers to pay for another upgrade to their wastewater treatment facility to benefit fish that seemingly are not suffering in the Peckman River. (4)

COMMENT 51: The reclassification of the Peckman River to a trout maintenance stream is opposed due to the potential increases in property tax. (9-12, 14, 16, 17, 20, 21, 23, 35, 37, 39, 40, 61, 62)

COMMENT 52: The possible reclassification of the Peckman River to trout maintenance is of great concern.

Residents of Verona and Cedar Grove have maintained and improved their wastewater treatment plant. The change to trout maintenance would cost the taxpayers more millions of dollars for a little brook running about a mile through the towns before emptying into the Passaic River. Most of the water in the brook comes from the two treatment plants about two miles apart in Verona and Cedar Grove. (9, 19, 22, 42, 47, 51)

COMMENT 53: The reclassification of the Peckman River in Verona to an upgraded status is strongly objected. This action would force residents to spend millions of dollars to further upgrade the wastewater treatment plant when the plant is already a model of effective, state of the art technology.

The commenter respects the views of the citizens of the other municipalities where the remaining six waterways upgrades are located. Each river or water area should be considered for an upgrade on an individual basis. The Township of Verona should be allowed to "grandfather" its wastewater treatment plant on a permanent basis, not just for the life of the current DEP permit to operate. (11)

COMMENT 54: The reclassification of the Peckman River is completely opposed. For the past 100 years or so the Peckman has not been what one would call a pristine habitat for

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native trout. In fact it has really been no more than a storm drain for the four towns through which it flows. As it is not spring fed, in most years there is not sufficient cold water in the summer to sustain native trout. In recent years the Verona and Cedar Grove sewer treatment plants have increased the volume of water flowing in the river north of the two plants and apparently a few trout have been able to survive summer hot spells.

While the commenters are in favor of reclassifying certain streams in natural and rural areas, it boggles the mind that anyone with any intelligence would consider such a reclassification in the urban setting of Verona and Cedar Grove.

Native trout (brown trout are not native) require water temperatures of less than 65 degrees Fahrenheit to survive and thrive. This is absolutely impossible in a stream such as the Peckman, except by artificial and very costly means.

The commenters hope that the Department would not subject the residents of these two towns with this kind of financial burden particularly in today's economic environment and particularly when there is such small benefit to the environment. (45)

COMMENT 55: The Department should reconsider its plan to reclassify the Peckman River. Inasmuch as no need exists for two miles of trout maintenance quality of this river, such upgrading would seem to be an inordinate expenditure of State and local funds. Verona and Cedar Grove are not wildlife sites inviting fishermen to visit their little stream so there is no apparent reason for creating such an environmental luxury.

If some trout are presently able to live in the Peckman, so be it. No one needs or denies them their existence there, but to reclassify the river to improve their conditions is extravagant, to say the very least.

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There must be other more critical areas needing environmental action, such as (State funded) standardization of wastewater discharge throughout the State. Let us not lose sight of the overall mission of environmental protection. (2)

COMMENT 56: The proposed new water regulations for the Peckman River in Verona and Cedar Grove are opposed. This measure is counter productive. Verona and Cedar Grove should be congratulated for previous upgrade to their sewage treatment plants, which have resulted in the Peckman River being able to sustain trout rather than being punished with huge additional charges to further upgrade their plants.

More efforts should be exerted towards cleaning up waterways that are still unable to sustain any sort of aquatic life rather than penalizing those communities who have evidently done such a superb job. Please let common sense and reasons prevail and commend these towns, do not punish their taxpayers. (26)

COMMENT 57: The commenter supports environmental protection and is proud of the fact that the town of Cedar Grove has gone through the expense of bringing its sewage effluent above the required standards. The "Friends of the Peckman River" have gone through the trouble and expense to see that trout live in the Peckman.

The commenter condemns the senseless forcing of the expensive upgrading of the Cedar Grove sewage treatment plant to produce an effluent that will have little, if any, effect on the waters already supporting trout. The Department most certainly is aware of the fact that waters coming into and out of Verona Lake are already classified as "impaired".

It is poor judgement to subject Cedar Grove to punishment for having gone beyond what most towns do to preserve the waters. Do not reclassify the Peckman unless the State can pay for it by changing the law. (52)

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COMMENT 58: The Department and the Governor's office should take the Peckman River off the list of reclassified streams. It is doing fine as nontrout classification and nontrout should stay.

The proposal to reclassify segments of Peckman River and the resulting impacts on two waste water treatment plants will create hardship on both the towns. To meet the new requirements, it costs millions to upgrade the systems. Currently, the estimate is over 20 million dollars to upgrade both plants. The fish are thriving and swimming in nontrout water, and they're happy. Therefore, this change to trout maintenance is unnecessary and unwarranted, not to mention a spectacular waste of money. (8)

COMMENT 59: To meet the temperature criteria if the Peckman River is upgraded to trout maintenance, it would cost between 5 and 11 million dollars. An additional \$10 million would be the cost in dealing with the phosphorus 0.1 milligrams per meter. The new storm water regulations indicate that storm water to a trout associated stream has to meet a higher degree of treatment. The proposed upgrade would result in a potential cost in excess of \$17 million dollars to upgrade the treatment plant of the Township of Verona. (33)

COMMENT 60: In the 1990s, the Township of Verona upgraded the treatment plant at a cost of 20 million dollars. At that time, the EPA did an analysis of the Peckman River to determine that the Peckman River was mildly impaired, as well as a warm water river. However, now the Department is classifying Peckman River for cold water game fish. However, based on the data that's available, the stream itself can not support that use. (1)

COMMENT 61: The Town of Cedar Grove opposes the reclassification of Peckman River from nontrout to trout maintenance. The citizens of Cedar Grove are very proud of the sewage treatment plant and the levels of contaminants that come out of the sewage treatment plant are below the maximums that are permitted. However, upgrading the sewage treatment plant will have a devastating impact upon the citizens of Cedar Grove.

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The cost estimates in order to maintain or meet the new classification standards at the end of our permit life with Cedar Grove would be 10.8 million dollars in plant improvements.

The Department should recognize its responsibility and evaluate a statewide plan to provide funding to bring all wastewater treatment plants to a state of the art technology that maintains overall water quality. (7)

COMMENT 62: The Department did not provide sufficient notice to the Towns of Verona and Cedar Grove regarding the proposed upgrade of the Peckman River from FW2-NT to FW2-TM. The notice provided in the proposed rule is hardly adequate to demonstrate to the towns what the true extent of the impact is. The Department should withdraw this rule until an explanation is provided regarding what the significance and impact will be to the towns under this rule. (1)

COMMENT 63: The commenter opposes the reclassification of the Peckman River to trout friendly at the tune of 17 million dollars. The Peckman River is and always will be a drainage ditch for waste storm drainage sewers for various towns.

Governor McGreevey is cutting aid to towns, which in turn drives up the municipal property owners' taxes even higher still. Many people are unemployed or on fixed income and cannot afford any more taxes, or this nonsense of a 17 million dollar attempt to make Peckman River trout friendly, which is untimely and ridiculous. (46)

COMMENT 64: The commenters strongly oppose the current effort by the Department to upgrade any part of Peckman River to Category One status. Further, the commenters completely oppose any attempt to designate the Peckman River as a trout maintenance stream. The commenters are in favor of efforts to produce a better environment, but in this instance the Department's recommendation goes far beyond what is necessary, prudent and fiscally responsible. Following are the reasons for the commenters' opposition:

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The Peckman River is currently the cleanest of any tributary flowing into the lower Passaic River, particularly in the sections of Verona and Cedar Grove. There is simply no need to require further upgrades, when there are many other streams that need to be brought up to the same standard as the Peckman. Further, there are active groups in both towns that are working to improve the condition of the river.

For the little benefit that would be achieved, the cost to the taxpayers of Verona in terms of modifications to our sewage treatment plant would be exorbitant. Indeed, such costs are estimated to reach some \$5 million in Verona and \$10 million in Cedar Grove simply to cool water (which is a huge waste of energy) in a stream. Peckman River would not have any water at all in most summers were it not for the discharges of these treatment plants. With no water, there would be no fish and this whole discussion would be moot. Verona and Cedar Grove are actually providing a service by putting clean water into a stream that would otherwise have very little.

The reason that the Peckman is so clean can be traced to the efforts of the taxpayers of Verona and Cedar Grove in spending millions of dollars to upgrade their treatment plants. Currently in Verona the average homeowner pays \$400 annually to pay off the debt that we have incurred for such upgrades. Such efforts should be rewarded and praised. Instead, the Department is threatening with the heavy hand of State regulation and the prospect of paying even more money for a benefit of minute proportions.

There is no historic evidence in the past two hundred years that the Peckman River has supported a trout population. This river has historically had mill dams and other activity that has militated against trout as a natural species in the river. The only reason there are trout present today is due to a volunteer effort to stock the river by the Friends of the Peckman River. The fact that the fish has survived is a testimony to the clean water that exists. If the Department persists in forcing us to upgrade the river, the residents will

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support efforts to remove the fish that have been placed there by the organization, in which case there will be no reason to upgrade the river.

The commenters are actively engaged in efforts to improve conditions on the Peckman River, particularly in view of the recently proposed stormwater regulations. Run-off, erosion, storm sewer marking, pollution from geese in Verona Park, and other issues are constantly in focus. These are far more serious threats to the river and are being addressed in an ongoing manner.

Peckman River is not the type of stream best suited to Category One designation. It is a stream that flows through a fully developed area with all the attendant problems of urbanization. It is not a stream used for the supply of drinking water, nor does it flow into such waters. In short, given the water supply problems in New Jersey, upgrading the Peckman River will simply do nothing to improve the situation.

The commenters would like to explore the possibility of building a pipeline from the Verona treatment plant to a nearby golf course in order to recycle the effluent. Unfortunately, at the height of the drought, the Department apparently prohibited such recycling. The commenters would like to see this ban overturned and believe that rather than upgrading the Peckman River as proposed, it would be wiser to explore opportunities to recycle treated effluent in order to save water and increase aquifer recharge.

If the Department decides to go ahead with the proposed recommendations, the commenters would actively oppose the Department's efforts. Further, the commenters insist that any State-mandated upgrades be fully paid for by the State of New Jersey. This would include upgrades to treatment plants as well as operation costs in terms of labor and electricity. In these troubling fiscal times, the commenters believe that the Department would be wise to leave the Peckman River as it is and concentrate on efforts elsewhere.

(24)

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COMMENT 65: The minute the Peckman River leaves Cedar Grove and enters Little Falls the water quality gets much worse, and it keeps getting worse until it shortly enters the very polluted Passaic River. These areas should be made to achieve better water quality levels that Cedar Grove achieved.

It is disturbing that the Department itself allows many of the pesticides, fertilizers, and contaminants which are now polluting the streams and rivers of New Jersey (nonpoint source pollution). The Department also allows building to occur in buffer zones and watershed areas which further degrades the quality of water. All these things are occurring in the Peckman River watershed in Cedar Grove and Verona. These problems need to be addressed rather than just focusing on wastewater treatment plants.

The commenter would like clean water and water protection in Cedar Grove and Verona and also in neighboring towns. The Department should be giving incentives to towns to encourage them to strive for the cleanest water possible. This is an issue that is causing conflicts throughout Cedar Grove and also within the Cedar Grove Environmental Commission. (51)

COMMENT 66: The Township of Cedar Grove opposes the upgrade of the Peckman River. The Township's opposition to the proposed reclassification of Peckman River is based on the following:

- The reclassification is not justified as the trout in the stream were placed via stocking, and are able to survive only because an external food source is supplied by local residents,
- The reclassification is not supported by the natural temperature of the stream, which has been documented to exceed the 20° C water quality standard for FW2-TM at low flow and in the summer,

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- The reclassification will result in more stringent permit limitations for BOD, TSS, ammonia-nitrogen, dissolved oxygen and temperature, which will in turn require a major plant upgrade to meet these requirements,
 - The potential cost of the plant upgrade, which is estimated at \$10 to \$11 million, would be an unacceptable burden on the taxpayers of the Township. This would result in only a marginal improvement over existing water quality, considering other sources of pollutants such as nonpoint sources, which will continue to impact the river. (13)

RESPONSE TO COMMENTS 41 THROUGH 66: The Department has decided not to adopt the proposed upgrade of the segment of the Peckman River.

While the fisheries sampling indicates that this segment of the Peckman River may be capable of supporting adult trout and trout associated species, other types of sampling indicate that the water quality conditions are not supportive of the FW2-TM classification. The stream temperature in this section of the Peckman River frequently exceeds the criteria established for maintaining trout populations. This inherent conflict with the documented ability to support trout associated species and stream temperature warrants the development of site-specific criteria for temperature, dissolved oxygen, suspended solids and ammonia to protect the existing use. The communities of Verona and Cedar Grove have done a tremendous job restoring the water quality of this section of the Peckman River. The upgrades completed at the two wastewater plants provide high quality effluent into the stream. Therefore, prior to requiring additional wastewater treatment, the Department believes that it is appropriate to develop site-specific criteria for the Peckman River, which will ensure the protection of trout and trout associated species. This approach will ensure that the water quality conditions necessary to support trout associated species are used to determine whether additional upgrades in wastewater treatment are necessary while avoiding unnecessary upgrades to the already upgraded, “state of the art” sewage treatment plants. By maintaining the status quo until site-specific criteria are adopted for the Peckman River, the existing uses are not expected to be adversely impacted.

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Smart Growth Impact

COMMENT 67: The proposed rule potentially conflicts with the policies of the New Jersey State Development and Redevelopment Plan (State Plan). The State Planning Commission has approved one regional center (Town of Newton) and has pending two other centers (Branchville/Frankford and Hampton Township) within the area affected by the proposed rule. The Sussex County Water Quality Public Advisory Committee is concerned that the Category One designation may impede the ability of designated growth areas to accommodate future growth. The Department should not impose restrictions on future sewer plant expansions or impose overly restrictive discharge permit parameters in areas designated for growth based solely on the Category One classification. (6, 27)

COMMENT 68: Under the State Plan for smart growth, Newton is designated as a regional center where growth is encouraged. This State Plan designation for Newton would appear to be in direct conflict with the growth restrictions that would be attendant to the proposed Category One designation for the Paulins Kill. The Department should explain how it intends to reconcile this conflict between the State Plan and the proposed C-1 designation so that the Town is not placed between the proverbial “rock and a hard place” with respect to responding to any future development proposed within (or adjacent to) the sewage treatment plant service area. (27)

COMMENT 69: To provide comment, one needs to understand the overall rationale for reclassifying waters in the State; and how this process responds to policy directives such as those in Executive Order 2002-04. (38)

COMMENT 70: The existing SWQS provide that Category Two waters with water quality characteristics better than or equal to the standard shall be maintained to protect existing and designated uses and where the water quality is worse than criteria it shall be improved. These provisions serve to provide the protection necessary for all waters included in this proposal. The change to Category One will provide the same protections

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but will severely reduce housing availability and affordability. The proposal will limit much-needed housing without any added water quality benefit. (38)

RESPONSE TO COMMENTS 67 THROUGH 70: Smart Growth is the term used 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 residents in New Jersey.

The Department included a Smart Growth Impact Statement that outlines how this rulemaking is consistent with smart growth principles. The Department's action is consistent with and supports the State Development and Redevelopment Plan (SDRP). The Category One designations implement State Planning Goal 2 by conserving the State's natural resources, including rivers, fresh and saltwater wetlands, habitats of unique flora and fauna that have significant intrinsic value as critical elements of the State's quality of life. The actions also implement State Planning Goal 4 by providing a clean, safe and attractive environment essential to assuring the health of our citizens. Sustainable supplies of clean water, air, and an abundance of open space and recreational opportunities also assure a sustainable economy. Policy No. 2 of the Statewide Water Resource Policies provides for the integration of State, regional and local land use and water management planning to avoid surface and groundwater degradation due to the cumulative effects of point and nonpoint sources of pollution. Consistent with the SDRP, the Department is designating waters that provide a sustainable supply of water, support unique flora/fauna and other selected water resources for additional protections. Therefore, this rulemaking is consistent with smart growth because it 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.

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The Department has identified Paulins Kill for Category One designation based upon exceptional ecological significance. Smart Growth principles recognize that development must take into account and accommodate these critical environmental resources.

The same surface water quality criteria apply in Category One and Category two streams. The additional protection provided by the Category One designation is to prevent degradation of existing water quality. While Category two does provide water quality protection, the Department has made a determination that waterbodies that meet the definition of Category One deserve greater protection to ensure that the ecological integrity of the waterbody is maintained. 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.

The Category One designation does not preclude a wastewater discharge to surface water. New and expanded dischargers will be required to comply with effluent limitations that will maintain existing water quality. The factors that affect the calculation of effluent limitations include the size of the receiving stream, the volume of wastewater, current levels of pollutants in the receiving stream, and effluent characteristics. The applicant must determine treatment technologies to meet these effluent limitations if a discharge to surface water is proposed. However, a surface water discharge is not the only means of wastewater disposal. The applicant will need to evaluate the technology and costs associated with a variety of wastewater disposal options such as community on-site wastewater treatment with a discharge to groundwater, connection to a regional wastewater treatment plant, wastewater reuse, and individual on-site septic systems.

The Department believes that this action will discourage development where it would impair or destroy natural resources and the environmental qualities vital to the health and well-being of the citizens of New Jersey consistent with Executive Order No. 114(1994), Executive Order No. 4(2002), and Executive Order No. 38(2002).

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Additional Nominations:

COMMENT 71: Category One waterways should have protection immediately within the HUC-14 watershed and especially in areas that affect drinking water and areas of feeder streams above the HUC-14. (41)

COMMENT 72: The Department should expand the protections to include not only outstanding water supply resources but also extend the criteria to include broad ecological criteria, especially the presence of threatened and endangered species and habitat shown on the New Jersey DEP project maps. The Department should expand regulation to feeder streams and head waters to rivers, reservoirs, and other water bodies. The head waters protection policy and program compliment the Category One protections as these head waters hold the key to water recourse protection. Lastly, the Department should provide expansion of protection to entire waterways, not just isolated stream segments.

The Department should adopt these proposals and in addition, establish a more comprehensive inventory and designate more of the Highland waters as Category One. (25)

COMMENT 73: The Department should consider upgrading Canoe Brook and Rahway River in West Orange, Essex County to stop further degradation of these waterbodies. (15)

COMMENT 74: Four years of water quality data and testing undertaken by the Ten Towns Committee and the Great Swamp Watershed administration indicates that the water flowing into the Category One waters of the Great Swamp refuge is having a negative effect. The data suggests that the refuge acts as a nutrient sink that may be near its carrying capacity in a healthy ecosystem. We must insure that the waters that flow into the Great Swamp Refuge deserve a Category One protection in order to maintain a healthy ecosystem within the Refuge. (53)

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RESPONSE TO COMMENTS 71 THROUGH 74: The Department intends to review all waterbodies statewide beginning with the waterbodies nominated by the various programs within the Department and the public. This review will require time and resources to complete. Not all waters may qualify under the definition of Category 1 at N.J.A.C. 7:9B-1.4. However, the Department believes that many waterbodies exhibit the characteristics necessary to meet this definition. At this time, the Department envisions series of proposals as groups of waterbodies complete the assessment process. It has been and continues to be the Department's intention to identify all appropriate waters for Category One protection and to assure that the State's water resources are protected. The Department is required to propose these upgrades through rulemaking. Therefore, no action is being taken on these additional nominations at this time.

Other Comments:

COMMENT 75: The stormwater rules not only acknowledge Category One protections but they have a 300 foot buffer zone built in to protect Category One waters. These buffer zones should stay in those rules and not be taken out. (41)

COMMENT 76: All of the measures proposed protecting water quality may be wiped out by continued use of fertilizers. The Department does not restrict home owners and farmers from pesticide use in any way. The Department should keep our water really and truly clean. (48)

COMMENT 77: The proposed storm water rules require no net increase in storm water volume and pollution, thus assisting in the protection of all water bodies statewide. This is an essential part of protecting Category One streams. These requirements and the 300 foot buffer in the proposed storm water rules are supported. (53)

RESPONSE TO COMMENTS 75 THROUGH 77: The Department acknowledges the commenters' support of the proposed Stormwater rules. Comments concerning the

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implementation of stormwater management requirements for Category One waterbodies will be addressed in the context of that rulemaking.

Federal Standards Analysis

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. (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 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 to 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 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 amendments being adopted are required by and consistent with the Federal statutes, regulations and guidance.

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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 these 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.

In addition, 40 CFR 131.12 establishes requirements for the states to develop and adopt antidegradation policies and implementation procedures to 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 adopted changes in antidegradation designation identify the level of protection and implementation procedures that must be followed. The antidegradation designations are consistent with and do not exceed Federal standards, therefore, no further analysis is required.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

7:9B-1.15 Surface water classifications for the waters of the State of New Jersey

(a) - (c) (No Change.)

(d) (No change from proposal.)

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(e) The surface water classifications in Table 3 are for waters of the Passaic, Hackensack and New York Harbor Complex Basin:

TABLE 3

Waterbody	Classification
...	
MACOPIN RIVER (No change from proposal.)	
...	
MILL BROOK (No change from proposal.)	
...	
PECKMAN RIVER	
(Verona) - *Entire length* *[Source to a point 1,300 feet (straight line distance) upstream of Ozone Avenue bridge]*	FW2-NT
*[(Cedar Grove) - From a point 1,300 feet (straight line distance) upstream of Ozone Avenue bridge to Main Street bridge	FW2-TM
(Little Falls) - Main Street bridge to Passaic River	FW2-NT]*
PEQUANNOCK RIVER (No change from proposal.)	
...	
WALLACE BROOK (No change from proposal.)	
(f) (No change from proposal.)	
(g) - (i) (No change.)	

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_____ Based on the 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 the adoption of these amendments. I hereby authorize this adoption.

Date: _____

Bradley M. Campbell, Commissioner
Department of Environmental Protection