

Participating Organizations

■ Alliance for a Living Ocean

American Littoral Society

Arthur Kill Coalition

Asbury Park Fishing Club

Bayberry Garden Club

Bayshore Saltwater Flyrodders

Bellford Seafood Co-op

Belmar Fishing Club

Beneath The Sea

Bergen Save the Watershed Action Network

Berkeley Shores Homeowners Civic Association

Cape May Environmental Commission

Central Jersey Anglers

Citizens Conservation Council of Ocean County

Clean Air Campaign

Coalition Against Toxics

Coalition for Peace & Justice

Coastal Jersey Parrot Head Club

Coast Alliance

Communication Workers of America, Local 1034

Concerned Businesses of COA

Concerned Citizens of Bensonhurst

Concerned Citizens of COA

Concerned Citizens of Montauk

Dossil's Sea Roamers

Eastern Monmouth Chamber of Commerce

Environmental Response Network

Explorers Dive Club

Fisheries Defense Fund

Fishermen's Dock Cooperative

Fisher's Island Conservancy

Friends of Island Beach State Park

Friends of Liberty State Park

Friends of Long Island Sound

Friends of the Boardwalk

Garden Club of Englewood

Garden Club of Fair Haven

Garden Club of Long Beach Island

Garden Club of Morristown

Garden Club of Navesink

Garden Club of New Jersey

Garden Club of New Vernon

Garden Club of Oceanport

Garden Club of Princeton

Garden Club of Ridgewood

Garden Club of Rumson

Garden Club of Short Hills

Garden Club of Shrewsbury

Garden Club of Spring Lake

Garden Club of Washington Valley

Great Egg Harbor Watershed Association

Highlands Business Partnership

Highlands Chamber of Commerce

Hudson River Fishermen's Association/NJ

Interact Clubs of Rotary International

Jersey Coast Shark Anglers

Jersey Shore Audubon Society

Jersey Shore Captains Association

Jersey Shore Running Club

Junior League of Monmouth County

Junior League of Summit

Kiwanis Club of Manasquan

Kiwanis Club of Shadow Lake Village

Leonardo Party & Pleasure Boat Association

Leonardo Tax Payers Association

Main Street Wildwood

Marine Trades Association of NJ

Monmouth Conservation Foundation

Monmouth County Association of Realtors

Monmouth County Audubon Society

Monmouth County Friends of Clearwater

Montauk Fisherman's Emergency Fund

National Coalition for Marine Conservation

Natural Resources Protective Association

Navesink River Municipalities Committee

Newcomers Club of Monmouth County

NJ Beach Buggy Association

NJ Commercial Fishermen's Association

NJ Council of Dive Clubs

NJ Environmental Federation

NJ Environmental Lobby

NJ Marine Educators Association

NJ PIRG Citizen Lobby

NJ Sierra Club

NJ Windsurfing Association

Nottingham Hunting & Fishing Club

NYC Sea Gypsies

NY/NJ Baykeeper

NY Marine Educators Association

Ocean Advocates

Ocean Conservancy

Ocean County Citizens for Clean Water

Ocean Divas

Ocean Wreck Divers

Outreach/First Presbyterian Church of Rumson

Picatinny Saltwater Sportsmen Club

Raritan Riverkeeper

Riverside Drive Association

Rotary Club of Long Branch

Saint George's by the River Church, Rumson

Saltwater Anglers of Bergen County

Sandy Hook Bay Catamaran Club

Save Barnegat Bay

Save the Bay

SEAS Monmouth

Seaweeders Garden Club

Shark River Cleanup Coalition

Shark River Surf Anglers

Sheepshead Bay Fishing Fleet Association

Shore Adventure Club

Shore Surf Club

Sierra Club, Shore Chapter

Soroptimist Club of Cape May County

South Monmouth Board of Realtors

Staten Island Friends of Clearwater

Strathmere Fishing & Environmental Club

Surfers' Environmental Alliance

Surfrider Foundation, Jersey Shore Chapter

TACK 1

Terra Nova Garden Club

Unitarian Universalist Congregation of Mon. County

United Boatmen of NY/NJ

United Bowhunters of NJ

Volunteer Friends of Boaters

Waterspirit

Women's Club of Brick Township

Women's Club of Keyport

Women's Club of Long Branch

Women's Club of Merchantville

Zen Society

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Attention: DEP Docket Number 10-07-04/527

Office of Legal Affairs

New Jersey Department of Environmental Protection

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P.O. Box 402

Trenton, NJ 08625-0402

August 20, 2007

RE: Surface Water Quality Standards Proposed at 39 N.J.R. 1845(a)

VIA STANDARD MAIL AND EMAIL

Dear Mr. Brower:

Clean Ocean Action is a regional, broad-based coalition of over 125 conservation, environmental, fishing, boating, diving, student, surfing, women's, business, service, and community groups with a mission to improve the degraded water quality of the marine waters of the New Jersey/New York coast.

These comments are in response to the proposed amendments to N.J.A.C. 7:9B-1.4 and 1.15, publicized in the May 21, 2007 New Jersey Register. They are written on behalf of our coalition and the undersigned. We address the proposals in two parts: the changes to the definition of "Category One waters" and the upgrading of 910 river miles to Category One.

Redefining Category One Waters (7:9B-1.4)

Clean Ocean Action ("COA") objects to the new, proposed definition for "Category One waters." This proposed definition does not clarify the current definition. Rather, it significantly narrows the definition and will remove an undeterminable amount of waters from future consideration for Category One designation. Those waters excluded from consideration would include numerous "exceptional" waterbodies. As a result, the proposed definition would defeat the "primary objective of the Clean Water Act[, which] is to *restore* and maintain the chemical, physical, and biological integrity of the nation's waters."¹

¹ 39 N.J.R. 1846 (May 21, 2007) (emphasis added).



Aesthetic Values: Change from Basis to Purpose

To our dismay, the proposed definition strikes “clarity, color, scenic setting, or other characteristics of aesthetic value” as bases for designating waters as Category One. The Department states that it is “reorganizing the definition of ‘category one waters’ because it believes it is necessary to clarify the purpose and bases for designating waters as Category One.”² The proposed rule seeks to make aesthetic values a purpose, or end result, of a Category One designation. However, the current rule unambiguously treats aesthetic values as bases for designation.

The distinction between basis and purpose is extremely important. Under the present rule, clarity, for example, is a sufficient basis for designating a waterbody as Category One. Under the proposed rules, clarity is a purpose and not sufficient to designate a waterbody. Characteristics of aesthetic value would no longer suffice individually, or at all, as standards for qualifying a waterbody for Category One. Instead, the Department proposes to limit the list of qualifiers to requiring either “exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resource(s).” This is a fundamental change in the definition, cutting in half the list that qualifies waters for Category One.

The proposed change does not “clarify” the current definition, it removes bases for designation from the definition. Further, the current definition is already clear that aesthetic values serve as bases. The language of the current rule makes no distinction between the status of “clarity” and “exceptional ecological significance” or “scenic setting” and “exceptional water supply significance.” Instead, all terms are listed as equal qualities and conjoined by an “or” to make each one individually sufficient as a basis for a Category One designation.

The plain language of the current rule clearly treats the aesthetic values standards equally to the “exceptional” standards. The proposed rules shift the balance by making aesthetic values a purpose. This removes an important basis for protecting our waters.

“Exceptional” Definitions

The proposed rules further narrow the definition of “Category One waters” by adopting very specific and limited definitions for “exceptional ecological significance,” “exceptional fisheries resource(s),” and “exceptional water supply significance.” This is troubling because the proposed definition of “Category One waters” limits the standards for listing solely to these three (3) bases and the basis of exceptional recreational significance, which the Department is not considering at this time as a basis.³

The proposed changes result in near total exclusion of saline and brackish waters from the proposed definitions and further demonstrates the definitions’ restrictiveness. Indeed, none of the 910 river miles proposed for Category One include saline or brackish waters.

² 39 N.J.R. 1846.

³ “Until a definition is adopted for waters that qualify for Category One based on exceptional recreational significance, the Department will not upgrade waters based on this basis.” 39 N.J.R. 1850.

Saline and brackish waters cannot be upgraded under the proposed definition of “exceptional ecological significance” because they do not meet conditions (1) or (2). Condition (1) limits waterbodies to those suitable as habitat for specific endangered and threatened species. All of those listed species are freshwater species. The list is inclusive and therefore does not allow for consideration of other threatened and endangered species, including marine species.

Condition (2) requires a “waterbody supporting an exceptional aquatic community as demonstrated by an [sic] nonimpaired benthic macroinvertebrate community as measured by the Department’s Rapid Bioassessment Protocol” and at least two other factors. Saline and brackish waters do not meet the first part of this test and therefore cannot qualify under condition (2). The benthic macroinvertebrate index within the Rapid Bioassessment Protocol is inappropriate to use for brackish or saline waters, therefore making it impossible for these habitats to rank as unimpaired.

Because of the limited nature of Conditions (1) and (2), saline and brackish waters could never be considered exceptionally ecologically significant. Such a result is outrageous.

It would also appear that the proposed rule excludes saline and brackish waters from the proposed definition of “exceptional water supply significance.”

Saline and brackish waters can only obtain Category One status under the proposed rules under the definition of “exceptional fisheries resource(s),” and only in limited circumstances. Trout are freshwater fish and therefore will not allow for listing saline and brackish waters. Such waters can only be considered for Category One designation if they are “waterbodies approved by the Department for unrestricted shellfish harvest pursuant to Shellfish Growing Classification rules at N.J.A.C. 7:12.” This exception for saline and brackish waters is so narrow that it excludes a substantial amount of saline and brackish waters from consideration.

Therefore, under the proposed rules, the only way the Department will designate saline and brackish waters for Category One is if they are approved for unrestricted shellfish harvest. It seems improbable that under any other circumstances saline and brackish waters will be able to move out of the bottom tier of antidegradation protection in New Jersey. These proposed rules determine that significant amounts of saline and brackish waters in the State are not worthy of being protected from measurable changes in water quality. Instead, they will remain in the bottom tier where “some level of lowering of existing quality” can occur.⁴

The proposed rule is also myopic in that it views exceptional waters as those with minimal degradation. For example, the proposed rule defines “exceptional ecological significance” to require either one of a few specifically listed endangered or threatened species or it must support an “exceptional aquatic community.” The Department uses “exceptional aquatic community” because it believes a “waterbody’s ability to support a wide variety of aquatic species is a good indication of a healthy aquatic ecosystem.”⁵ Focusing on healthy aquatic ecosystems defeats the purpose of the Surface Water Quality Standards, which the Department administers “for the

⁴ 39 N.J.R. 1846.

⁵ 39 N.J.R. 1847.

protection of high quality water and to *restore impaired waters*.”⁶ While the protection of healthier waters is a crucial goal, the Department must also work towards improving other waters as well. Further, some level of impairment does not mean a waterbody is not exceptional. Many waterbodies still perform important functions despite being degraded.

Moreover, the Department inadequately explains the restrictive nature of the proposed definitions. “[T]he Department has determined that it is appropriate to consider waterbodies which support an endangered or threatened species as a waterbody of exceptional ecological significance.”⁷ Yet there is no rational basis for the Department’s stunted list of endangered and threatened species that make a waterbody have “exceptional ecological significance.” Why are the listed species the only ones considered in the definition? Why aren’t all endangered and threatened species included? Why aren’t Kemp’s Ridley turtles, loggerhead turtles, or short-nosed sturgeons listed in this section?

Current Listings

The restrictiveness of the proposed definition is also demonstrated by looking at current Category One waters. Numerous current listings do not meet the limited standards the Department is proposing. This outcome shows that the proposed definition is not clarifying “Category One waters” but rather minimizing its applicability.

Again, saline and brackish waters serve as a good example of the limitations, not clarification, of the proposed definition. The following list is of saline waters, and waterways in which there may be a saltwater/freshwater interface, that are currently Category One but do not meet the proposed definition for such a designation. This list is not to imply that these waters never had, or no longer maintain, exceptional and/or important aesthetic values. After rigorous scrutiny they qualified for such designation. No justifications exist to now hold otherwise. Yet, the proposed rule does just that. Therefore, this list is meant to demonstrate that the proposed rule is unreasonably restrictive.

- BALLANGER CREEK: (New Gretna) - Pollys Ditch to Bay (SE1)
- BASS RIVER: (New Gretna) - Boundary of shellfish waters to Mullica River (SE1)
- MOTT CREEK (Brigantine) - Entire length (SE1)
- MULLICA RIVER: (New Gretna) - River and tributaries from the Pinelands Protection and Preservation Area boundary to Great Bay (SE1)
- TUCKAHOE RIVER:
 - (Head of River) - McNeals Branch and the River within the boundaries of the Peaselee Wildlife Management Area, except tributaries within the boundaries of the Pinelands Protection and Preservation Area (FW2-NT/SE1)
 - (Tuckahoe) - Edge of Fish and Wildlife Management Area at confluence with Warners Mill Stream to Great Egg Harbor, except segment described separately below (FW2-NT/SE1)
 - (Tuckahoe) - River, tributaries and all other waters within boundaries of the MacNamara Wildlife Management Area (FW2-NT/SE1)

⁶ 39 N.J.R. 1845 (emphasis added).

⁷ 39 N.J.R. 1847.

- MAURICE RIVER, TRIBUTARIES: (Vineland) - All tributaries within the boundaries of the Union Lake Wildlife Management Area and within the Wildlife Management Area that borders Delaware Bay (FW2-NT/SE1)
- BLACKBERRY CREEK: (Oceanport) - Creek below the line beginning on the easternmost extent of Gooseneck Point and bearing approximately 162 degrees True North to its terminus on the westernmost extent of an unnamed point of land in the vicinity of the western extent of Cayuga Ave. in Oceanport (SE1)
- BRANCHPORT CREEK: (Monmouth Beach) - Creek below line beginning on the northernmost extent of an unnamed point of land lying north of Pocano Ave. in Oceanport and bearing approximately 055 degrees True North to its terminus on the westernmost extent of the northern bulkhead at the lagoon located between France Rd. and Lori Rd. in Monmouth Beach (SE1)
- CLAYPIT CREEK: (Navesink) - Widening of Creek to Navesink River (SE1)
- LITTLE SILVER CREEK: (Rumson) - Creek below line beginning on the eastern bank of that unnamed lagoon located between Wardell Ave. and Oakes Rd. in Rumson and bearing approximately 171 degrees T (True North) to its terminus on the south shore of Little Silver Creek (SE1)
- NAVESINK RIVER: (Rumson) - River southeast of the line starting at a point at the northeast end of Blossom Cove, bearing approximately 142 degrees T (True North), through navigational aid C23 to the south bank near Riverview Hospital, except: (Monmouth Beach) - All water south and east of a line beginning on the northwesternmost point of land on Raccoon Island (in the vicinity of the western extent of Highland Ave.) in Monmouth Beach, and bearing approximately 056 degrees T (True North) to the southernmost point of a small unnamed island, and then bearing approximately 091 degrees T (True North) to its terminus on the northernmost point of land located at the northern extent of Monmouth Parkway in Monmouth Beach and all waters south of a line beginning on the western shoreline (just east of Monmouth Parkway in Monmouth Beach) and bearing approximately 081 degrees T (True North), intersecting Channel Marker Flashing Red 4 and Channel Marker Flashing Red 2 and terminating on the eastern shoreline of the Galilee section of Monmouth Beach (SE1)
- OCEANPORT CREEK: (Oceanport) - Creek downstream of line beginning on the easternmost extent of Horseneck Point and bearing approximately 140 degrees T (True North) to its terminus on the westernmost extent of an unnamed point of land located at the westernmost extent of Monmouth Boulevard in Oceanport (SE1)
- PARKERS CREEK: (Fort Monmouth) - Creek downstream of line beginning on the easternmost extent of Horseneck Point and bearing approximately 000 degrees T (True North) to its terminus on Breezy Point on the Little Silver side (north) side of the creek (SE1)
- SHREWSBURY RIVER: (Little Silver) - Source to Rt. 36 highway bridge (SE1)
- TOWN NECK CREEK: (Little Silver) - Creek below the line beginning on the easternmost extent of the unnamed point of land located just east of Paag Circle on the south bank of Town Neck Creek and bearing approximately 095 degrees True North and terminating on Silver Point (SE1).

This list is not at all comprehensive. There are many other waterbodies that can be used as examples of the restrictiveness of the proposed definition. Again, all of these waters are

exceptional and/or have important aesthetic values. They all rightfully earned their Category One designation. The Department consciously evaluated each waterbody in the list and applied the current definition. By doing so, the Department has already provided guidance on the applicability of the Category One definition. In providing this guidance, the Department did so with thoughtful deliberation and process. Therefore, we know the above list does accurately reflect some of examples of the types of waters that meet the Category One definition.

The amount of listed waters that do not fit within the proposed definition demonstrates the narrowness of the proposed rule. The proposed rule excludes by definition many exceptional waters and all waters with important aesthetic values. The proposed changes do not serve as clarification but rather an arbitrary limitation that contradicts the current rule.

“Exceptional Recreational Significance”

The Department states that “[u]ntil a definition is adopted for waters that qualify for Category One based on exceptional recreational significance, the Department will not upgrade waters based on this basis.”⁸ Clean Ocean Action finds this inaction unacceptable. Category One waters have been defined for over two decades. “Exceptional recreational significance” is a part of that definition and has remained undefined. The other “exceptional” bases are also undefined. A lack of definitions for the “exceptional” bases has not limited the Department in the past from using them. For example, the Department has used both “exceptional ecological significance” and “exceptional water supply significance” to upgrade waters to Category One.

Waters are to be upgraded under the definition of “Category One waters,” which is defined. The “exceptional” bases are “characteristics delineated in the definition.”⁹ The bases do not need to be defined for the Department to take action. It is inappropriate for the Department to no longer consider a part of the definition for “Category One waters.” To do so is an abdication of the Department’s duty to consider recreational use and value in adopting and revising water quality standards, as required by the federal Clean Water Act, 33 U.S.C. 1313(c).

No Catchall Provision

Clean Ocean Action is also troubled by the closed nature of the proposed rule. Under the current rule, any waterbody is eligible for Category One designation for any factor that makes the waterbody truly exceptional or importantly aesthetic. The proposed rule is so selective that it arbitrarily removes from consideration many other factors that make the subject waters exceptional and aesthetically valuable. We are even more troubled by the lack of a catchall provision to remedy this problem. For example, it is illogical to assume that no water supply will ever be exceptionally significant unless it serves a population greater than 100,000. It is inappropriate to make a rule that all water supplies serving a population of 100,000 or less cannot be upgraded from the bottom tier of antidegradation protection to Category One.

⁸ 39 N.J.R. 1850.

⁹ 39 N.J.R. 1846.

Upgrade of 910 River Miles (7:9B-1.15)

Clean Ocean Action does support the proposed upgrades of approximately 910 river miles. However, we do not support the coupling of these upgrades with the proposed revisions to the definition of “Category One waters.” While it appears the upgrades were based on the proposed definition, COA believes the Department can adopt the upgrades without adopting the proposed definition. This is because, as explained above, the proposed definition is a limitation on, not a clarification of, the current definition. Therefore, since the upgrades qualify under the proposed definition, they unquestionably qualify under the current definition.

If the upgrade cannot be separated from the proposed definition (which is objectionable for the reasons set forth above), then COA recommends the Department immediately re-propose and upgrade 910 river miles. However, such an exercise seems academic and superfluous since the 910 miles clearly meet the current definition for a Category One designation.

We also note that it appears that some of these river miles were adopted at the exclusion of others. Since the 910 river miles are proposed for an upgrade under the proposed standards, the Department has not determined whether the excluded miles meet the current definition of Category One. Therefore, while the 910 miles can be deemed recommended for upgrade, any excluded miles cannot be deemed denied.

Conclusion

For the above stated reasons, COA strenuously objects to the proposed definition for “Category One waters.” We believe this will unreasonably limit the inclusion of waterways and thus not meet the Clean Water Act goals to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”¹⁰

We thank you in advance and look forward to your written reply.

Sincerely,



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¹⁰ 39 N.J.R. 1846 (May 21, 2007).

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