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# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

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In Reply Refer to

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Attn. DEP Docket Number 11-07-04/557  
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New Jersey Department of Environmental Protection  
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FWS - OFFICE OF  
LEGAL AFFAIRS

Dear Mr. Brower:

This letter provides partial comments of the U.S. Fish and Wildlife Service (Service) on the New Jersey Department of Environmental Protection's (NJDEP) Round 5 Category One Proposal dated May 21, 2007, Proposed Amendments to N.J.A.C. 7:9B-1.4 and 1.15, Docket Number 11-07-04/557. The letter supplements our comments related to effects to federally listed species as a result of the proposed changes to the New Jersey Surface Water Quality Standards (SWQS) pursuant to Section 7 of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*). This letter also addresses proposed additions to Category One waters within the Wallkill River Basin which support Wallkill River National Wildlife Refuge. We are also providing an updated review of real property within Cape May and Supawna Meadows National Wildlife Refuges which do not have apparent Category One protections based on review of the existing SWQS. The Service appreciates the opportunity to provide these comments.

### AUTHORITY

The following comments have been prepared under the authority of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 *et seq.*), the Migratory Bird Treaty Act of 1918 (40 Stat. 755, as amended; 16 U.S.C. 703-712), the Endangered Species Act of 1973, and the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd *et seq.*).

## WATER QUALITY STANDARDS

In separate correspondence addressing this rule, the Service indicated that “The proposed change to the definition of Category One Waters, and the proposed upgrade of certain waters to Category One status, is not likely to adversely affect any federally listed species under Service jurisdiction, notwithstanding the binding provisions of the Service’s 1996 *Biological Opinion on the Effects of the U.S. Environmental Protection Agency’s Approval of the State of New Jersey’s Surface Water Quality Standards on the Bald Eagle, Peregrine Falcon, and Dwarf Wedgemussel*, which will be addressed under separate cover.” Since our Biological Opinion was conducted with the Environmental Protection Agency (USEPA), we needed to clarify the remark made under **N.J.A.C. 7:9B-1.4, Exceptional Ecological Significance - Endangered or Threatened Species (E&T)**, which stated:

“The use of a waterbody by E&T species is an existing use that must be protected. The United States Fish and Wildlife Service (USFWS), in cooperation with the United States Environmental Protection Agency (USEPA), are evaluating existing aquatic life criteria to ensure the protection of federally listed E&T species. Until a determination is made that the existing criteria do not adequately protect a federally listed species, the Department and the USEPA believe that the existing water quality criteria are adequate.”

It is our interpretation that these statements were not directly addressing the Wildlife Criteria, which were the subject of the above-mentioned Biological Opinion. The ongoing national criteria consultation referred to above pertains to all listed species, both wildlife as well as aquatic life and additionally includes the National Marine Fisheries Service as a federal participant. However, our agencies jointly developed protective Wildlife Criteria for DDT, PCBs, and mercury that were to be implemented as part of the Biological Opinion’s Terms and Conditions. Staff from the Service, USEPA, and NJDEP worked together closely in the derivation of the wildlife criteria and agreed that the end product, a set of three protective and defensible criteria based on the best and most appropriate science available, should be adopted by the State.

These criteria, derived in Buchanan et al., (2001) have not been implemented by the State of New Jersey and have not been promulgated by the USEPA. The NJDEP should address this protection deficiency, since existing numeric State of New Jersey Water Quality Standards remain unprotective for mercury and DDT. Total PCB criteria adopted in 2006 have closed the gap from previously unprotective criteria and while this new human health-based criterion (64 pg/l) is less a concern today than previously, regarding wildlife protection, attainment of New Jersey’s numeric PCB standard is stalled due to implementation issues that need clear and decisive resolution, regardless of the actual numeric criterion.

For clarity, the Service recognizes that every federally listed and de-listed wildlife species may or may not be afforded Category One protections outside of currently designated or proposed water bodies. That remains a State prerogative that we support. However, numeric criteria associated with the above derivation document was a requirement of a legally binding and preexisting section 7 consultation, which is not preempted by the ongoing National Water Quality Criteria Consultation. The USEPA and the State continue to be in non-compliance with the Service's Biological Opinion and may be vulnerable to legal challenges. The federal delisting of the bald eagle (effective August 8, 2007), and similarly the past delisting of the peregrine falcon, does not mean species are no longer susceptible to historic and current pollution and hazardous substance releases, including sediment contamination of major ecosystems within New Jersey (e.g., Hackensack Meadowlands, New York / New Jersey Harbor, Delaware River and Bay). We recommend NJDEP and USEPA coordinate with the Service to resolve the outstanding issues addressed above. The Service is most willing to work in partnership to resolve resource management challenges that crosscut our respective authorities and programs.

**N.J.A.C. 7:9B-1.15 Surface water classifications for the waters of the State of New Jersey** specifically addresses the waters of the Wallkill River: Beaver Run, Blue Heron Lake, Clove Book, Franklin Pond, Franklin Pond Creek, Hamburg Creek, Mohawk Lake, Mud Pond, Papakating Creek, Silver Lake, Saginaw Lake, Wantage Brook, Wildwood Lake, and Willow Brook that are proposed for Category One designation. The Service supports the inclusion of these Wallkill River Basin waters not only for the purpose of listed species that are present but also because these waters overlap with real property of the Wallkill River National Wildlife Refuge. The Category One designation allows refuge managers to more fully address and achieve management objectives much as the State of New Jersey does with its Wildlife Management Areas.

In review of these Category One waters additions, the Service re-evaluated the real property of other National Wildlife Refuges within New Jersey whose waters are covered by previous Category One designation. The following surface waters of the Delaware River Basin pass through or form boundaries of the Supawna Meadows National Wildlife Refuge, Salem County, and accordingly should be designated as Category One.

- Miles Creek
- Mill Creek
- Mud Creek.

Surface waters of the Delaware River Basin that pass through or form boundaries of the Delaware River Division of the Cape May National Wildlife Refuge, Cape May County,

and accordingly should be designated as Category One are listed below, from north to south.

- Dennis Creek
- Bidwell's Creek
- Dias Creek,
- Fishing Creek
- Green Creek

Cedar Swamp Creek, within the Atlantic Coastal Basin, passes through and partially originates within the Cedar Swamp Division of the Cape May National Wildlife Refuge, Cape May County. Moreover, this stream length is within the Pinelands Management Area boundary, and meets the definition of Outstanding National Resource Waters, but has not been designated as Category One or Pinelands Waters.

## CONCLUSION

The proposed change to the definition of Category One Waters, and the proposed upgrade of certain waters to Category One status, is not likely to adversely affect any federally listed species under Service jurisdiction, notwithstanding the binding provisions of the Service's 1996 Biological Opinion as amended. The Service looks forward to working cooperatively with the NJDEP to ensure that all waters are protected for wildlife designated uses as well as listed State and federal species and that efforts be made to include additional National Wildlife Refuge property parcels in the Category One designations as stated herein, and as may occasionally be needed in the future.

Please contact Assistant Supervisor Timothy Kubiak of my staff at (609) 646-9310, extension 26, if you have any questions or require further assistance regarding these comments.

Sincerely,



Diane Lynch  
Acting Supervisor

## LITERATURE CITED

Buchanan, G.A., D.R. Russell, and D.A. Thomas. 2001. Derivation of New Jersey specific wildlife values as surface water quality criteria for: PCBs, DDT, and mercury. New Jersey Department of Environmental Protection, Trenton, New Jersey. 36 pp.