

November 20, 2006

Dear Commissioner Jackson,

As you know, the water quality management planning rules (WQMP) were extended by Governor Corzine and will expire January 31, 2007. We understand that the Department is now finalizing rules to meet the new expiration date. The WQMP rules have far reaching ramifications for our state's surface and ground waters. Through them, we can establish new policy that would improve the quality of our state's waterways, by reducing the most prevalent and increasingly threatening sources of water pollution. With this in mind, we are writing to share with you an outline of policy changes that we'd like to see adopted through this upcoming rule change, and we request a meeting to discuss these key policy changes right away, and before you and your agency makes key policy decisions.

As we are sure you and your staff are aware, our groups have long advocated the policies outlined below, as part of a series of proposed water quality management planning rule changes. On the public record, as far back as the 1996 Whitman Administration's "Mega Rule" proposal, you will find comment from all our groups on these very same policy points, multiple times over. Thus, while we look forward to sitting down with you very soon to discuss them, we also encourage you and your staff to go back to the public record we have established in support of these important policy changes.

Below is an overview of the key changes and policy decisions we believe would strengthen the state's ability to protect and improve water quality. We look forward to the opportunity to discuss them with you soon.

1) Sewer service areas

Assure that designated sewer service areas are modified to eliminate environmentally sensitive areas where sewers are not in the ground. Extinguish the corresponding wastewater flows that would have been generated by planned development of these lands via amendment of the applicable WQMP and modification of the NJPDES permits for the assigned receiving facility. Until such plan amendments and NJPDES permit modifications are made, prohibit site specific extension of sewer service to projects that would disturb environmentally sensitive areas. Amend the current definition of "environmentally sensitive areas" to include threatened and endangered species habitat; lands that drain to water supply reservoirs; lands that drain and have the potential to directly impact water supply intakes; prime aquifer recharge areas; designated well head protection areas; wetlands; steep slopes; contiguous forest cover; riparian buffers; and the headwaters of less than 50 acre drainages.

2) Review existing planned and permitted flows/loads

In 1990, a NJ Supreme Court case directed the Department to implement the antidegradation requirements. In conflict with that decision, several recent proposed revisions of surface water quality standards, NJPDES, and WQMP rules have attempted to grandfather existing approved planned and/or permitted wastewater flows and pollutant loads, regardless of whether these approved flows/load were ever justified by legally required antidegradation or water quality reviews. To remedy this longstanding flaw which has over-allocated the assimilative capacity and led directly to lowering of water quality and impairment of state waterways, the WQMP rules should require justification of need for planned/NJPDES permitted flows/loads via conduct of antidegradation review or water quality studies for pollutant loadings that are NJPDES permitted but not currently being discharged. For discharges into impaired waterways, WQMP rules should cap loads at current discharge levels until a TMDL is fully implemented, water quality standards are attained, and the waterbody is de-listed as “impaired”.

3) Strengthen implementation of the TMDL program.

The WQMP rules should

- establish explicit and mandatory 10% minimum margin of safety and 10% minimum reserve factors, as previously proposed but never adopted by the Department.
- require that ambient flow and water quality concentrations for a TMDL model shall be determined based on actual data and/or the water quality standards, not the NJPDES rules as now allowed.
- Require that TMDL attain critical conditions, including a specific numeric “not to exceed and any time” enforcement policy, not seasonal or monthly averaging. This is a critical issue in the pending Wanaque TMDL – we support the prior position of the Department to base the compliance with the target criteria on a “not to exceed at any time” basis.
- Eliminate the pollutant trading option as it has proven unworkable. Assure that stormwater discharges are regulated and assigned allocations.
- Establish a mandatory timeframe between the completion of the TMDL and revisions of NJPDES permit effluent limitations to enforce allocations.
- Under the “reasonable assurance” requirements for implementation of non-point loadings, mandate that BMPs shall include specific changes to local land use and development ordinances, including restriction of new generation of additional point and non-pollutant loadings until the TMDL is fully implemented, and adoption of mandatory ordinances to implement the allocations and BMPs.
- Mandate that towns in the TMDL drainage adopt stream buffer, pesticide application, and water conservation ordinances to implement the allocations.
- Mandate that TMDL load allocations shall apply to agricultural practices and shall supersede “Agricultural Management Practices” (AMPs) and technical requirements of the Soil Conservation Districts.
- Revise the TMDL ranking criteria, set real priorities, and enforce them.

- Set and enforce mandatory maximum timeframes for completion of each discrete component of the TMDL process.
- Expand current public comment requirements for impairment listing (in Subchapter 6) to public hearings in the affected watershed.
- Establish conflict of interest standards for any consultants such that no consultant (or academic institution) may provide TMDL or NJPDEES related services to both dischargers and the Department in the same watershed.

4) Codify standards for EO 109 reviews

The current EO 109 review requirements will expire upon adoption of new WQMP rules. Therefore the Department must adopt enforceable standards in the WQMP rules to implement Executive Order 109 review requirements.

5) Septic requirements

Revisions to the WQMP should

- Lower the threshold for planning and NJPDES permit review of septic systems and require that all WQMPs include a septic service area component.
- Require towns to design a septic management plan that establishes scientifically based land use densities, in consideration of cumulative impacts of existing conditions, as part of their water quality management plan.
- Establish target groundwater concentrations for the septic based densities based upon protection of existing natural groundwater quality, or a 2 mg/L default value in the absence of site specific data.
- regulate DEP mapped well head protection in septic management plans.

6) Enforcement of planning requirements

The prior October 2005 WQMP proposals identified widespread non-compliance with WQMP requirements. To remedy this situation, the new WQMP rules must require that all towns update wastewater management plans on a phased mandatory schedule. If within one year of the scheduled update date, if towns do not, DEP shall not issue any permits for land use, water allocation and water pollution control.

7) Implement mandatory WQMP consistency

The Water Quality Planning Act prohibits the Commissioner from issuing any permit or approval that is not consistent with the approved area-wide plan. Enforcement of this statutory provision arose in the St. Mary's Abby case. New WQMP rules must include stronger provisions to ensure that all permits granted by NJDEP are consistent with and conform to updated water quality management plans. The current rules merely require that approvals not be inconsistent with the area-wide plan, a lower and more confusing standard.

8) Delegation of Wastewater Management Planning powers

Only entities that are capable of developing and implementing wastewater management plans should become designated planning entities, for example: towns and regional planning entities such as the Highlands Council. We oppose delegation of wastewater management planning powers to counties and wastewater authorities, or any entity that has a conflict of interest or lacks land use powers. Wastewater management plans must be based upon and implement land use decisions.

9) Strengthen beneficial reuse policies

In establishing incentives for beneficial re-use of wastewater, the Department must assure that the re-use does not offset permitted flows and loads, or planning flows and loads. For example, if the WQMP and NJPDES permit provides for a 10 MGD flow, and 2 MGD of this existing flow were beneficially reused, then the 2 MGD may not “free up” treatment capacity and planned wastewater flows.

10) Role of the State Plan

We remain concerned and strongly opposed to any reliance of the WQMP rules on the State Plan. The WQMP rules are proposed pursuant to the Water Quality Planning Act (WQPA) and NJ Water Pollution Control Act (WPCA), not the State Planning Act. Enactment of the WQPA and WPCA were legal conditions of NJ receiving formal delegation by EPA of federal Clean Water Act water quality standards, planning and permitting programs. The NJ WQPA and NJ WPCA are applicable and more protective of state waters than the State Plan. Institutionally, the State Planning Commission, the governing body for the State Plan, is not required in adopting the State Plan to comply with the procedural and substantive protections of state and federal clean water laws

Aside from and in addition to this legal framework, the State Plan has serious flaws in policies and mapping that make the SDRP an inappropriate technical basis for the WQMP rules.

Sincerely,

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